

Special Board of Adjustment 928

Award no. 499

Parties to the Dispute:

Brotherhood of Locomotive Engineers and Trainmen

and

National Railroad Passenger Corporation (AMTRAK)

(Brody Heilman – Claimant)

Statement of Claim:

Claim presented on behalf of the Brotherhood of Locomotive Engineers and Trainmen on behalf of Passenger Engineer B. Heilman (“Claimant”) for rescinding the imposed discipline of: dismissal as stated in the discipline letter dated June 21, 2007, and with full compensation for time lost, full credit toward vacation entitlement, health and welfare credits during the period held out of work, and clearing of Claimant’s personal record as to any reference relative to the alleged violation.

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Special Board of Adjustment 928 has jurisdiction over the parties and the dispute involved herein.

At the time of the incident that led to the suspension in this matter, Claimant had been employed by the Carrier for over 10 years. A review of the record shows the following facts. Claimant had been employed as an Assistant Superintendent – Road Operations in Sacramento since October 2002. Claimant was working in that capacity on May 19, 2007 when he was notified that the crew on train 701 was randomly selected for drug testing upon release after arrival. Claimant contacted the crew approximately three hours before the scheduled arrival and advised them to stay hydrated.

The Assistant Conductor of Train 701 tested positive for a prohibited substance and advised Claimant on May 24, 2007, of that positive test and her discussions with the Medical Review Officer. The Assistant Conductor asked whether to report for duty and Claimant advised her to report. She worked a portion of her trip and was removed from service. Claimant was

terminated from his management position on June 6, 2007. Claimant tried to mark up as a Passenger Engineer and was withheld from service.

On June 11, 2007, Carrier advised Claimant in a letter that an investigation would be held on June 15, 2007, to develop the facts and determine responsibility in connection with the above incidents. Claimant was notified that four charges would be investigated. The hearing was held on June 15, 2007.

The Carrier notified Claimant in a letter dated June 21, 2007, that the charges were sustained. Claimant was notified in a letter dated June 21, 2007, that he was being assessed the discipline of termination from service.

The Organization argues that the charged violations were not proved. First, the drug testing CFR regulations and Carrier rules should not apply to Claimant because the incidents occurred while he was working in management for the Carrier and not as a locomotive engineer. Claimant was terminated for issues related to his management duties, where he is not represented by the Organization, and should be allowed to return to his position as a passenger engineer. The time limits were not observed in the instant matter because Claimant was notified of the investigation only after he attempted to mark up as a passenger engineer. Further, even if Claimant did advise the train crew to remain hydrated, it was within the reasonable time frame of the FRA regulations for drug testing. Even if the violations were proven, Claimant should not be terminated for such a violation and the discipline of dismissal is excessive.

The Carrier counters that Claimant committed the infractions. Claimant improperly warned a crew of a random drug test and, when one of the crew tested positive, he did not remove that crew member from service. Instead, he advised her to come into work. While he could be terminated as a manager, under the Collective Bargaining Agreement, Claimant cannot be terminated from his position as an engineer without an investigation and discipline being assessed. Claimant was on leave of absence from the craft while he was working in management. The time frame for an investigation began only when Claimant attempted to mark up as a passenger engineer following his termination as a manager.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the record, the Board finds that there were no procedural defects which void the discipline. The notice of investigation was timely filed after Claimant attempted to mark up as a passenger engineer. The Board finds that that the requirements of the applicable Alcohol and Drug Testing Rules are not ambiguous and apply to all Carrier employees.

Claimant warned an inbound crew that a random drug test would be waiting on their arrival. This was a violation of the Carrier's Alcohol and Drug Testing Guidelines. He then did not remove an Assistant Conductor from that crew who tested positive for a prohibited substance. This also violated the Carrier's Alcohol and Drug Testing Guidelines.

Accordingly, this Board finds that there was substantial evidence in the record to sustain the charges. The Organization contends that the discipline was excessive in light of the offense, particularly where the evidence shows that Claimant was an exemplary employee prior to the instant matter. As stated above, the Board's role is limited to an appellate review. Under this limited review, we cannot disturb discipline unless it appears that the imposed discipline was arbitrary or capricious and constituted an abuse of the Carrier's discretion.

After a review of the evidence submitted and the arguments before this Board by the parties, this Board makes the following finding: Claimant should be returned to work and restored to his prior position with the craft as a locomotive engineer with seniority unimpaired. The Organization contends that the discipline was excessive in light of no damage, no injury and Claimant's record. As stated above, the Board's role is limited to an appellate review and, under this limited review; we cannot disturb discipline unless it appears that the imposed discipline was arbitrary or capricious and constituted an abuse of the Carrier's discretion. In the instant matter, the termination was excessive and constituted an abuse of the Carrier's discretion when the facts, circumstances and Claimant's background are considered.

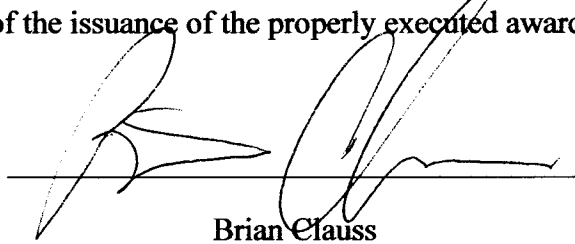
While the facts in the instant matter and the Claimant's background offers mitigation, that mitigation is not absolute – Claimant did notify an inbound crew three hours in advance that they would be receiving a random drug test.. He then did not remove a crew member who tested positive. The Carrier removed Claimant from his position as a manager – citing his performance as a manager. While his removal from management is not an issue for this Board, clearly the decision to remove Claimant from a management position was well-founded.

These are serious offenses that warrant discipline short of termination when the mitigation is considered. While termination is not warranted in the instant matter, neither is a make-whole remedy for this serious offense. Claimant committed the infraction and some discipline is warranted. Accordingly, Claimant is returned to work as a passenger engineer with no backpay and with remedial training.

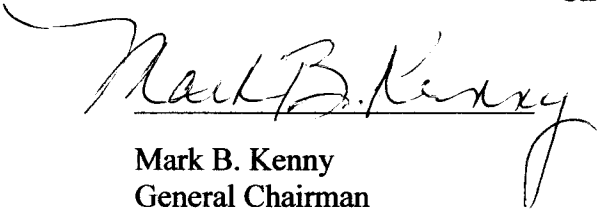
The return to work is effective within thirty days of the issuance of the properly executed award in this matter, subject to Claimant's successful passing of the appropriate remedial training, examinations for rules, drug and alcohol testing and other examinations that are normally required for Passenger Engineers. There is no award of backpay as part of this award.

Award:

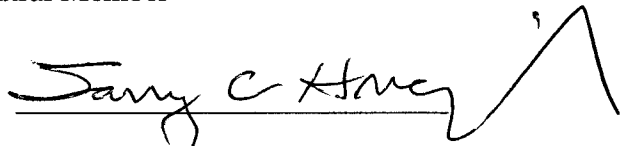
Claim is sustained in part and denied in part pursuant to the above findings and is effective within 30 days of the issuance of the properly executed award in this matter.



Brian Clauss
Chairman and Neutral Member



Mark B. Kenny
General Chairman
BLET
Organization Member



Larry C. Hriczak
Director, Labor Relations
AMTRAK
Carrier Member
I DISSENT.

Dated this 21st day of JULY, 2008