

PUBLIC LAW BOARD 6071

AWARD NO. 1
CASE NO. 1

PARTIES TO DISPUTE

CARRIER

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS

AND

ORGANIZATION

UNITED TRANSPORTATION UNION
(YARDMASTERS' DIVISION)

CARRIER'S FILE NO.

PF/Discpl

ORGANIZATION'S FILE NO.

(N/A)

STATEMENT OF CLAIM

Claim on behalf of Mr. R.H. Russell for reinstatement to service with pay for all lost time account of dismissal issued July 31, 1997, as a result of alleged violation of Carrier's Rule "G" following investigation held July 30, 1997.

STATEMENT OF BACKGROUND

Richard H. Russell, Claimant herein, commenced employment in the service of Carrier June 22, 1973, his Trainman-Seniority date. On October 25, 1996, after 23 years and 4 months of service with Carrier, Claimant tested positive for alcohol and, in a letter dated November 4, 1996, Claimant pled guilty to violating Carrier's Rule "G" and requested leniency from Carrier. Rule "G" of Carrier's Operating Rules reads in pertinent part as follows:

Employees must not report for duty or be on Company property under the influence of, or use while on duty, or have in their possession while on Company property, any alcohol beverage or illegally obtained drug, narcotic or other controlled substance.

Carrier dismissed Claimant from its service effective November 4, 1996 and thereafter, Claimant entered Carrier's Employee Assistance Program (EAP) for substance abuse. In honoring Claimant's request for leniency and, based upon a favorable report from the EAP Counselor, Carrier returned Claimant to service effective March 6, 1997 pursuant to the terms pertaining to Conditional Reinstatement as set forth in its Substance Abuse Policy (Revised, Effective September 15, 1996). In pertinent part, Claimant was subject to the following conditions in being reinstated to employment on a leniency basis:

1. The employee is returned to service with seniority unimpaired, but without compensation for lost time.
2. The employee must pass a Carrier-directed medical examination demonstrating the ability to meet the physical and emotional demands of the job assignment to which the employee is returned.
3. The employee must successfully pass the applicable rules and safety examinations if required.
4. The employee will be conditionally returned to service on a probationary basis for a period of five (5) years. If the employee violates the TRRA Rule G Policy, or violates other terms of the conditional reinstatement, this will be considered a violation of his/her probation and he/she will be removed from service and returned to dismissed status.
5. The employee will submit to unannounced alcohol and/or drug follow-up tests, for a five (5) year period from date of conditional return. A refusal to test will be considered an automatic positive test.
6. The employee must protect his/her employment and, if requested to do so, furnish substantiation of an acceptable reason for any absence.
7. At the end of the two (2) year period, the TRRA EAP Substance Abuse Professional will make a recommendation to continue or terminate the conditional reinstatement.

In accordance with point 5 above, Carrier's Substance Abuse Policy sets forth the following Guidelines for Follow-Up Testing and the following Alcohol Testing Procedure respectively:

GUIDELINES FOR FOLLOW-UP TESTING

Follow-up testing is an effort on the part of the Company to let employees demonstrate that they are following through on their commitment to stay clean and sober, and are following both recommendations of the TRRA EAP Substance Abuse Professional and the requirements of any conditional reinstatement program. The Company regards this step as paramount in guaranteeing the safety of the employee, other crew members, other rail workers, and the general public.

Employees on a conditional reinstatement are subject to unannounced follow-up testing at any time while on duty to perform service.

TESTING PROCEDURES

1. ALCOHOL TESTING

The rules require breath testing using evidential breath testing devices (EBT) approved by the National Highway Traffic Safety Administration (NHTSA). Two breath tests are required to determine if a person has a prohibited alcohol concentration. A screening test is conducted first. Any result less than 0.02 alcohol concentration is considered a "negative" test. If the alcohol concentration is 0.02 or greater, a second or confirmation test must be conducted. The employee and the individual conducting the breath test, called a breath alcohol technician (BAT), complete the alcohol testing form to ensure that the results are properly recorded. The confirmation test, if required, must be conducted using an EBT that prints out the results, date and time, a sequential test number, and the name and serial number of the EBT to ensure the reliability of the results. The confirmation test result determines any actions taken. Testing procedures that ensure accuracy, reliability and confidentiality of the test results are outlined in Title 49 CFR Part 40 procedures. These procedures include training and proficiency requirements for BAT, quality assurance plans for the EBT's

(including calibration), requirements for suitable test location, and protection of employee test records.

Pursuant to the applicable terms of Conditional Reinstatement, but more particularly point 5, Carrier scheduled Claimant for Follow-Up Testing for both alcohol and controlled substance at the Providence Occupational Health Services Clinic in Granite City, Illinois, associated with St. Elizabeth Hospital. For reasons not disclosed anywhere in the record evidence proffered before this Board, Carrier's Manager of Transportation Services, Joseph T. Ochoa, did not take Claimant to be so tested on July 16, 1997, the date he had been scheduled for but, rather, Ochoa took him to be tested two (2) days later on July 18, 1997. On said date, Claimant arrived at Carrier's NEEB Madison Yard tower at approximately 10:50 p.m. to protect the third shift Yardmaster position he was scheduled to work. At approximately 11:20 p.m., Manager Ochoa arrived at the tower, informed Claimant he was taking him for a scheduled follow-up testing for alcohol and controlled substances and immediately transported Claimant in his (Ochoa's) automobile to Providence Clinic. According to Carrier, Providence Occupational Health Services Clinic is a Federal Railroad Administration (FRA) approved and certified independent contractor for drug and alcohol testing. According to the record evidence, Ochoa and Claimant arrived at the Clinic at 11:35 p.m. The record evidence reflects that at 12:05 a.m., July 19, 1997, Breath Alcohol Technician (BAT), D. Burnett, administered the screening test for alcohol which is the first of two breath tests to be administered under the Alcohol Testing Procedure referenced hereinabove, and Burnett indicated the name of the testing device used was "Alco Sensor IV and indicated that Claimant yielded a test result of 00.02. According to the Alcohol Testing Procedure, if the screening test registers an alcohol concentration of 0.02 or greater, a second test, known as a confirmation test, must be conducted. Since Claimant's screening test registered a result exactly at the very minimum alcohol concentration of 0.02, a confirmation test was administered by Burnett. The record evidence indicates that the confirmation test was taken at 12:23 a.m. on July 19, 1997, eighteen (18) minutes after the screening test occurred, and that Claimant yielded a confirmatory test result of 0.017, a result that was lower than that obtained from the screening test and, according to the Alcohol Testing Procedure, a test result that, had it been recorded as the screening test result, would have been considered a "negative" rather than a "positive" test. The Board takes judicial notice that the Alcohol Testing Procedure is silent with respect to any minimum level of alcohol concentration established for a confirmation test. However, it is noted that Carrier's Rule "G" Policy is a zero tolerance policy.

The record evidence reflects that as a result of testing positive for alcohol, Carrier removed Claimant from Service pending

investigation. By Certified Mail, Return Receipt Requested, dated July 21, 1997, Carrier informed Claimant an investigation would be held on July 23, 1997 to develop the facts, discover the cause and determine his responsibility, if any, in connection with his alleged violation of Rule G of Carrier's Operating and Safety Rules, effective April 5, 1987, while he was performing service as Yardmaster, Madison Yard, on July 18, 1997 into July 19, 1997 and to determine if any Operating Rules, Safety Rules or Special Instructions were violated in connection therewith. At the Organization's request, the initial date of the investigation was postponed and was rescheduled for July 30, 1997 on which date it was conducted. At the investigation Ochoa testified he observed the tests being administered by BAT Burnett to Claimant but did not know whether Burnett used the required evidential type breath testing device. Ochoa related that Burnett used a new mouth piece insert when performing the initial screening test but did not recall whether Burnett used another new mouth piece when performing the confirmation test. Ochoa further related that the screening test was really the second test administered to Claimant as Burnett failed to record a yes response to the question of whether Claimant's social security number recorded on the test sheet was the correct number which prevented the test result from printing out. In order to obtain a screening test result, Burnett had to indicate the necessary yes response which she did and it was this second test that yielded the test result of 0.02. According to Ochoa, Burnett waited fifteen (15) minutes after the first attempted test was nullified before administering the second test which was considered as the screening test.

Claimant testified in corroboration of Ochoa's account that, in fact, Burnett had committed an error in administering the test the first time and, as a result, she had to re-do the screening test. Claimant related he was apprised at the conclusion of the screening test he had tested positive which, he stated, he could not understand how that result could have happened. According to Claimant, during the interim time between taking the screening test and waiting to take the confirmatory test, he yielded and submitted a urine sample. Claimant, like Ochoa, was unable to recall whether Burnett used a new mouth piece for both the screening test and the confirmatory test. At the conclusion of the investigation, Claimant asserted that, in his view, notwithstanding both breathalyzer test results, that he was in compliance with Carrier's Rule "G" on the evening of July 18, 1997, when he reported to work.

By letter dated July 31, 1997, Carrier apprised Claimant it had reviewed the transcript of the investigation and, in its judgment, the charge against him had been proven, that is, he had been found guilty of violating Rule "G". Accordingly, Claimant was informed he was being dismissed from the service of Carrier effective July 31, 1997.

CARRIER'S POSITION

Carrier notes that as a result of Claimant's first violation of Rule "G", he was reinstated on a leniency basis and that among the conditions of reinstatement were, that he was required to submit to unannounced alcohol and/or drug follow-up tests for a period of five (5) years, that during this five (5) year period he was deemed to be on probationary status and, as a result, commission of another violation of Rule "G" anytime during his probationary period would cause his removal from service and a return to dismissed status. Carrier further notes that in accordance with its testing requirements, it properly subjected Claimant to an unannounced follow-up test just about three (3) months after he was reinstated on a leniency basis and he failed the test, that is, he tested positive for alcohol under the minimum 0.02 for alcohol concentration in one's system.

Carrier asserts Claimant was given an investigation, that he was afforded all his due process rights, and that it was determined he had committed a second violation of Rule "G" which is prohibited by its Substance Abuse Policy that, in pertinent part, states:

If an employee has a second proven Rule "G" violation, the employee will be permanently dismissed from service with no opportunity for re-employment.

Carrier submits there is no valid basis, and no persuasive evidence that has been proffered by the Organization to support the position advanced here in the subject claim that Claimant should, once again, be reinstated after having violated Rule "G" for a second time. On the contrary, the record evidence, Carrier asserts, shows that Claimant was very cognizant of his commitment to the leniency conditions he agreed to in order to gain reinstatement from his first Rule "G" violation, that he was well aware of the Substance Abuse Policy, having acknowledged receipt of same on February 23, 1996 and, in addition, on dates of March 8, 1996 and June 27, 1996, he viewed two educational films titled, "Drug Use and Abuse" and "Under the Influence; Alcohol in the Workplace". Carrier notes that notwithstanding the exposure to all this information, it did not deter Claimant from violating Rule "G" twice within one (1) year.

Carrier argues there are numerous Board awards, of which it cited a few, that uphold the long established principle that discipline in the form of dismissal is appropriate for second proven Rule "G" offenses, such as was assessed Claimant in the instant case. Given the gravity of the offense which derives from the possible safety consequences that might occur from poor decision making by an intoxicated employee, the fact that Claimant infringed the rule twice, and that he was afforded all his due process rights, Carrier

submits the subject claim is totally lacking in merit and therefore, should be denied in its entirety.

ORGANIZATION'S POSITION

The Organization raises three (3) procedural challenges as it relates to the fact circumstances of the case at bar and argues that taken in combination, these three (3) procedural defects cause the case against Claimant to be so substantially flawed as to render the dismissal action null and void. These three (3) procedural defects are as follows:

1. PRE-TESTING PERIOD

This involves two (2) procedural defects.

(a) Carrier scheduled Claimant to be tested on date of July 16, 1997 yet, for no apparent reason, it waited until July 18, 1997 to take Claimant to be tested and, the actual testing was not administered until shortly after midnight, making the testing date July 19, 1997.

(b) Carrier failed to establish that the Providence Clinic it took Claimant to be tested is, in fact, a FRA approved and certified testing facility and, in addition, it failed to substantiate, by any probative evidence, that D. Burnett, the person who administered the breathalyzer test, was a qualified Breath Alcohol Technician (BAT).

2. TESTING PERIOD

The Organization submits that because of errors committed by D. Burnett in administering the tests, the tests are not reliable and should be invalidated. The first error committed by Burnett was one of record-keeping in that she failed to indicate all responses to questions prior to administering the initial test, thereby causing the initial test to be nullified as test results were prevented from being printed out. This error caused a delay in the testing procedure specifically, the second test which became the screening test was administered to Claimant after a waiting period of fifteen (15) minutes. A

second record-keeping error committed by Burnett is that she incorrectly identified the testing date as July 18, 1997 when clearly, the screening test was administered after midnight, thus making the testing date July 19, 1997.

But, even more egregious than the record-keeping errors committed by Burnett was her failure to indicate whether the breathalyzer device she used to test Claimant was of the legally required evidential breath testing (EBT) type and whether she followed the required procedure of inserting a new mouth piece into the device with each one of the three (3) tests she administered. Failure by Carrier to produce evidence at the investigation to refute these alleged commissions of errors by Burnett is sufficient to prove that Burnett committed the errors which, in turn, raises doubt as to the accuracy of the results obtained for both the screening test and the confirmatory test.

3. POST-TESTING PERIOD -- THE INVESTIGATION

The investigation provided Claimant was not proper in that Carrier failed to abide by the applicable provisions of Rule 10 pertaining to discipline and grievance procedures. Specifically, Rule 10, Section (a) provides that, "Yardmasters shall not be reduced in rank or dismissed from service without a hearing before the Assistant Superintendent or Trainmaster." The Organization notes that L.R. Hurt, the Carrier official who conducted the investigation, holds the position of Director of Safety Training and Environmental Compliance and therefore, is neither an Assistant Superintendent nor a Trainmaster, thereby rendering the entire investigation as unfair and a violation of Claimant's due process rights.

Based on the foregoing argument cited above, the Organization requests the Board to sustain the claim in its entirety and to make Claimant whole.

FINDINGS

The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Organization within the meaning of the Railroad Labor Act, as amended, that this Board is duly constituted by agreement dated November 12, 1997, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

The various objections raised by the Organization in their Points 1 and 3 above are found by the Board not to be of any material relevance to the case at bar. Taking these objections in order, we find the following:

- 1a) There is no significance as to what date Claimant was initially scheduled to be taken to be tested as opposed to the date he actually was tested because according to Point 5 of Carriers' Substance Abuse Policy, an employee, here Claimant, is required to submit to unannounced alcohol and/or drug follow-up tests. Although Claimant was scheduled to be tested initially on July 16, 1997, it was not announced this would actually occur on July 16th. In fact, unannounced means unannounced and this component of Claimant's conditional reinstatement was adhered to by Carrier when, unexpectedly, a Carrier officer showed up on July 18th and informed Claimant at that time he was being taken for a follow-up test.
- 1b) Unless proven otherwise by substantive evidence submitted by the Organization which was not the case here, the Board accepts on faith that Carrier would not send an employee to be alcohol/drug tested at a facility that was not certified and approved by the Federal Railroad Administration. This reasoning also applies to the credentialing qualifications of D. Burnett.
- 3) The Board finds this objection to be thoroughly without merit. It brings to mind the well known literary expression, "A rose by any other name smells as sweet." The fact is, that the titles set forth in Rule 10(a) are meaningless in, and of themselves, as what is more important is the expertise of the individual conducting the investigation. Titles of positions are transitory and changeable whereas, one's expertise can never

be taken away. The evidence submitted before the Board establishes, without doubt, that Carrier Officer, L.R. Hurt, has conducted numerous investigations over many years and, that, in fact, at some prior time he held the title of Assistant Superintendent when Carrier maintained such positions which it no longer does. Claimant was, in no way prejudiced by the fact that Hurt's title is not that of either Assistant Superintendent or Trainmaster since he is eminently qualified to conduct investigations.

However, we take pause with respect to the objections raised by the Organization in its Point 2. On the surface, the record-keeping errors would appear to be inconsequential except for the fact that, such established errors lend credence to other possible errors Burnett may have committed but for which there is no evidence, one way or the other, to either prove or disprove their occurrence. In this regard, contrary to what Carrier maintains, such alleged commission of errors by BAT Burnett does raise, at least, a modicum of doubt about the validity of the test results, especially in light of their very borderline values. While we strongly suspect Claimant was reckless enough to have violated Carrier's Rule "G" for a second time, we feel constrained to sustain the dismissal action in view of the hint of doubt raised by the arguments advanced by the Organization.

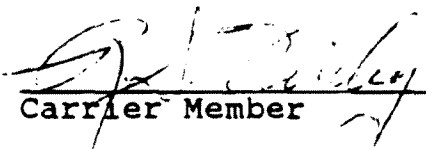
Based on the foregoing findings, Claimant is to be given a third and definitely final chance to retain his employment with Carrier which, before us, he evidenced contrition for having risked his service of 23+ years. But, before Claimant is reinstated for a second time without back pay or other benefits during his hiatus from work, Claimant must comply with the following conditions in addition to all the conditions governing his initial reinstatement.

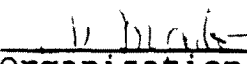
- Claimant must re-enroll in the EAP and continue his participation in EAP for the full time of his probationary period with no exception but, at the Carrier's discretion.
- Claimant shall not be reinstated to employment until September 1, 1998, the total time off from work representing a suspension. During this interim period, Claimant shall establish himself as completely alcohol and drug free and present to Carrier, in the form of acceptable proof, that he has attained this status prior to re-entering the service of Carrier.

The Board wishes to make clear to Claimant that he is an extremely fortunate person in that he is being given something that is extremely rare and almost unheard of in life -- a third chance. We believe Claimant "blew" his second chance but because of the contrition he exhibited in having done so, notwithstanding his reluctance to be forthright in admitting to having consumed alcohol sometime prior to reporting for work on July 18, 1997, we are convinced he will not be so foolish and cavalier as to "blow" this third chance. If that should happen, the Organization should think twice before going to bat for Claimant yet, another time.

A W A R D

CLAIM SUSTAINED IN PART AS PER FINDINGS


Carrier Member


Organization Member


GEORGE EDWARD LARNEY
Neutral Member and Chairman

Chicago, Illinois
March 11, 1998