

PUBLIC LAW BOARD NO. 4615

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* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *
* vs. * Award No. 112-
* * Case No. 112
* CONSOLIDATED RAIL CORPORATION *
* * * * *

DOCKET NO.: MW-2666-D

CLAIMANT: J. D. Balicki

APPEARANCES

FOR BMWE:

Jed Dodd	-	General Chairman
Roy Robinson	-	Staff Assistant

FOR CONRAIL:

Frank J. Domzalski	-	Assistant Director
William Knowles	-	Labor Relations Officer

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Mr. J. D. Balicki for alleged '... failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated January 31, 1992 and subsequent letter dated June 8, 1992 from Medical Director, O. Hawryluk, M.D., in that you failed to complete the initial phase of the treatment plan developed in conjunction with the Conrail Employee Counselor and approved by the Medical Director.' was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System Docket MW-2666).
2. As a consequence of the violation referred to in Part 1 above, the Claimant shall be reinstated with seniority and all other rights unimpaired, including overtime and benefits, his record shall be cleared of the charges leveled against him and he shall be paid for all wage loss suffered."

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POSITION OF EMPLOYER

The Employer (a/k/a the "Carrier") claims that it has the right to enforce reasonable rules and policies, and that its dismissal of the Claimant, J. D. Balicki, must be upheld by the Board as this is a proven case of insubordination. The Employer contends that since 1987, it has maintained a drug testing policy which allows it to subject an employee to dismissal if he or she:

- "* refuses to submit to drug testing as part of the physical examination;
- * fails to provide a negative test within the 45-day or 125-day period referred to above, whichever applies; or
- * fails to provide negative drug tests in a 3-year follow-up period arranged and monitored by Health Services."

The Employer asserts that the Claimant was specifically and individually informed of his positive test for cannabinoids and that he may be subject to a dismissal if he failed to rid his system of prohibited drugs as directed.

In a letter dated January 31, 1992 from Dr. O. Hawryluk, M.D., Medical Director/Medical Review Officer, the Claimant was directed to (1) by March 16, 1992 have completed an evaluation conducted by or arranged by the Conrail Employee Counselor and have the Conrail Counselor certify that the evaluation had been completed, (2) by June 4, 1992 have completed the initial phase of the treatment plan developed in conjunction with the Conrail Employee Counselor and approved by Dr. Hawryluk, and (3) by

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June 4, 1992 have submitted a urine sample which tests negative at a medical facility approved by the company. The January 31, 1992 letter also indicated to the Claimant that Conrail medical policy prohibits the active employment of persons who use unauthorized drugs which impair sensory, mental or physical functions.

The Employer maintains that the Claimant had been put on notice of its drug testing policy and of the disciplinary consequences of disobeying that policy, and that the Claimant chose to ignore such policy and its disciplinary consequences. The Employer argues that the Claimant was released from Westmoreland Gateway Drug and Alcohol Rehabilitation Center because of his lack of progress with his initial phase of treatment as indicated in a memorandum dated July 9, 1992 from Employee Counselor T. J. McMahon to Dr. Hawryluk.

The Employer argues that it is an established practice at Conrail and throughout the railroad industry that an employee may not disobey a properly authorized and communicated instruction. The Employer claims that its drug testing policy has been upheld as reasonable and necessary.

The Employer contends that the Union's argument that the Claimant had eighteen years of unblemished service with Conrail is untrue in that the Claimant had received prior discipline during his tenure at Conrail. The Employer asserts that the Union's argument that the Claimant was released from the

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Westmoreland Gateway Drug and Alcohol Rehabilitation Center because his insurance coverage had expired is untrue given Westmoreland's policy which indicates otherwise. The Employer maintains that the Union's argument that the Employee Counselor McMahon failed to appear to clarify Conrail's policy to the Claimant and explain to the Claimant what was required of him fails as Mr. McMahon was prohibited from doing so on the grounds of confidentiality. Therefore, the Employer argues, the Claimant's claim should be denied in its entirety.

POSITION OF UNION

The Union maintains that the Employer has failed to posit any evidence of probative value on which it based its determination that the Claimant was in non-compliance of the Employer's drug testing policy, and that the Claimant should therefore be exonerated of any wrongdoing and be reinstated to his former position with the Employer with back pay and with all rights unimpaired.

The Union contends that the Employer dismissed the Claimant despite his eighteen years of unblemished service with Conrail. The Union asserts that the Claimant conceded to having attended a Vietnam Veterans reunion at which he consumed substances of abuse, but stated that this was a one time occurrence and that he did not use drugs. The Claimant also conceded that his positive drug test results were accurate, but stated that he was only

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concerned about his return to service upon recommendation of his EAP counselor.

The Union argues that the Claimant had no contact whatsoever with Mr. McMahon since the Claimant's admittance into Westmoreland Gateway Drug and Alcohol Rehabilitation Center, and that Mr. McMahon failed to testify on the Employer's behalf as to what the Claimant was failing to do in relation to his inpatient therapy. Thus, the Union claims, Mr. McMahon's assertion that the Claimant was failing to progress with his treatment is unsubstantiated by probative evidence. The Union contends that the Claimant was informed that he was being released from his inpatient treatment at Westmoreland due to the cessation of his insurance coverage. Therefore, the Union maintains, the Claimant was dismissed unjustly and should be reinstated and be otherwise made whole.

FINDINGS

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934. This Public Law Board has jurisdiction over the dispute involved herein.

This Referee finds that the Employer did not possess sufficient just cause to dismiss the Claimant. This is so given the Employer's failure to properly inform the Claimant that he

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was being dismissed due to his insufficient progress with his inpatient treatment at Westmoreland Gateway Drug and Alcohol Rehabilitation Center.

Both parties have cited several awards to support their respective positions. After reviewing said awards, this Referee finds the awards cited by the Union, primarily Award No. 8260 which upheld a claim based upon the carrier's failure to notify the claimant of the offense for which he was being charged and for its failure to present all evidence against the claimant at the investigation, to be dispositive in this case.

The cases cited by the Employer can be distinguished from the present case. Although the Claimant is bound as a Conrail employee to follow a properly authorized and communicated instruction, and Conrail's drug testing policy is reasonable and necessary as ordinarily implemented, the Employer must come forward with evidence of an employee's failure to continue to participate satisfactorily in an employee counseling service program where a substantial reason to the contrary exists. In Awards Nos. 392, 395, and 396 cited by the Employer, no such substantial reason to the contrary was found to have existed, thereby preserving the confidentiality established between the counselor and the participating employee.

In the present case, however, evidence was submitted indicating that the Claimant was not a drug user and that his consumption of substances of abuse was a one time only

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occurrence. Thus, the Employer's witness, Mr. McMahon, could properly have been questioned as to the Employer's grounds for dismissing the Claimant, and the Claimant himself may rightly have been afforded the opportunity to waive his privilege of confidentiality in this manner to preserve his employment with Conrail. As the Employer did not make Mr. McMahon available for questioning, it failed to properly present all the evidence it had against the Claimant prior to his dismissal, and thereby lacked sufficient just cause to dismiss him.

However, it is undisputed that the Claimant violated the Employer's policy by testing positive for drug use. Therefore, in consideration of this fact, this Referee hereby directs the Employer to return the Claimant to his former position at Conrail subject to the terms which appear in the Award below.

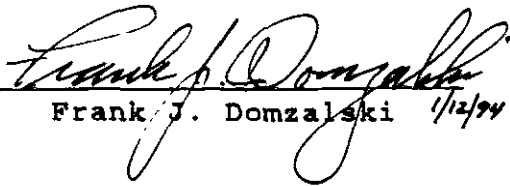
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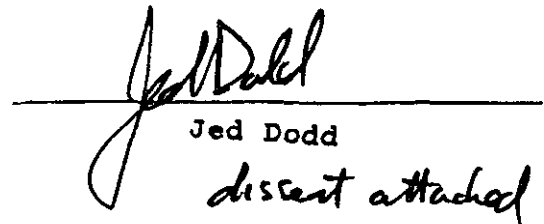
The claim is sustained in part, denied in part.

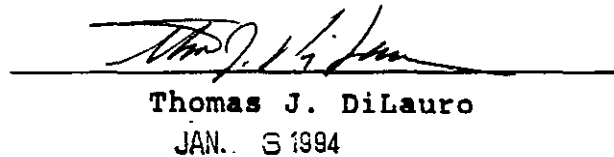
This Referee reviewed the file as developed on the property. Based on that information, the Employer is directed to reinstate the Claimant to his former position at Conrail without back pay or benefits and with seniority unimpaired.

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Frank J. Domzalski 1/12/94


Jed Dodd
dissent attached


Thomas J. DiLauro
JAN. 6 1994

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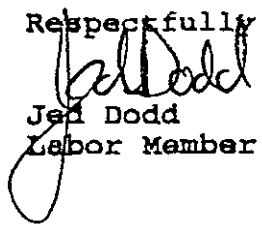
LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
TO
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(Referee DiLauro)

The Majority correctly found that the Agreement was violated when the Carrier improperly dismissed the Claimant for his alleged failure to comply with the Carrier's Drug Testing Policy. At the point, however, the Majority clearly strayed from the path on which it was assigned. It is undisputed that the reason for charging the Claimant with an alleged violation of the Carrier's Drug Testing Policy arose from the Claimant's testing positive for prohibited substances. That fact was never a point of contention during the handling of this dispute on the property. The crux of the instant claim was that the Claimant allegedly failed to comply with the Carrier's Drug Testing Policy as he was instructed within a letter dated January 31, 1992. While it is not our intention to reargue our "Position" within this concurrence and dissent, we are impelled to point out that the Majority held that the Claimant was not allowed any monetary relief because he "...violated the Employer's policy by testing positive for drug use." The Claimant was never charged with a violation of the Carrier's rules by testing positive for drug use. The obvious problem with this finding is that the Claimant never denied the results of the initial drug testing report but in fact readily admitted he had ingested prohibited

substances. The reason the Claimant was charged and eventually dismissed from the Carrier's service was because he allegedly failed to comply with the initial phase of his rehabilitation program. The Carrier alleged that he was released from the rehabilitation program because of lack of progress. The Claimant stated that he was released because Traveler's Insurance Company refused to pay for the remaining few days of the twenty-eight (28) day program. This was the crux of the dispute on the property and was clearly the thrust of the Organization's position throughout the handling. While, the Board correctly held that the Carrier failed to "... present all the evidence it had against the Claimant prior to his dismissal, and thereby lacked sufficient just cause to dismiss him." it incorrectly denied him compensation for time lost based on an allegation for which he was never charged. All of the various Divisions and Boards of The National Railroad Adjustment Board has consistently held that the Carrier shoulders the burden of proof in discipline cases in Awards so numerous as to preclude the necessity of citation here. If the Carrier fails to carry its burden of proof, as it did in this case, the Claimant is entitled to be reinstated and compensated for all time lost. In this case, since the Carrier clearly failed to substantiate the charges leveled against the Claimant, the Majority had no basis on which it could rely in failing to award compensation to the Claimant. Hence, while the Majority rightfully held that the Claimant should be reinstated to his former position, it's failure to compensate him for his wrongful dismissal is clearly wrong-headed and a

dissent to that aspect of this case is required. Inasmuch as the precedential value of an award is no greater than the reasoning in the award, this award has no precedential value insofar as the Board's failure to award the monetary relief requested is concerned. It is clear that that portion of the award is an anomaly that is in conflict with the consistent and overwhelming majority of awards on this issue. Therefore, I dissent to that part of the award that denies compensation for the violation of the Agreement.

Respectfully submitted,


Jed Dodd
Labor Member