

PUBLIC LAW BOARD NO. 4615

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* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *	*
* vs. *	* Award No. 113
* CONSOLIDATED RAIL CORPORATION *	* Case No. 113
* * * * *	*

DOCKET NO.: MW-2783-D

CLAIMANT: G. J. Smart

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. G. J. Smart for alleged '... failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated May 15, 1992 in that you did not, by September 17, 1992, complete the initial phase of the treatment plan developed in conjunction with the Conrail Employee Counselor.' was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System Docket MW-2783D).
2. As a consequence of the violation referred to in Part 1 above, the Claimant shall be reinstated with seniority and all other rights including overtime and benefits unimpaired, 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, G. J. Smart, 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 cocaine 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 May 15, 1992 from Dr. O. Hawryluk, M.D., Medical Director/Medical Review Officer, the Claimant was directed to (1) by June 29, 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 September 17, 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)

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by September 17, 1992 have submitted a urine sample which tests negative at a medical facility approved by the company. The May 15, 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 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 was not properly notified of the hearing in this matter is refuted by the fact that proper notice of the rescheduled hearing was mailed and received at the Claimant's residence. The Employer maintains that the Union's argument that Employee Counselor McMahon refused to discuss any of the submitted evidence without a signed release from the Claimant fails as Mr. McMahon was prohibited from doing so on the grounds of confidentiality. The Employer asserts that the Union's argument that the results of the urine test contained no quantitative measure of the amount of the substance in the Claimant's urine

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sample is refuted by the fact that the Employer is no longer provided with such quantitative results from drug testing laboratories but is instead provided with a Certification of Positive Results which, in the Claimant's case, were exceeded. 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 sufficient evidence approaching proof beyond a reasonable doubt that its determination to dismiss the Claimant was based upon his 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 hearing he was to attend in this matter was rescheduled twice, thereby confusing him as to the actual date upon which he was expected to attend such hearing. The Union asserts that the Employer violated the Claimant's right to due process by holding the hearing without first ascertaining the reason for the Claimant's absence, or otherwise failing to postpone the hearing. Therefore, the Union maintains, the Claimant was dismissed unjustly and should be reinstated and be otherwise made whole.

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### 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 possessed sufficient just cause to dismiss the Claimant. This is so given the Employer's unrefuted positive test results of the Claimant's drug use which warranted the Claimant's dismissal pursuant to the Employer's drug testing policy.

Both parties have cited several awards to support their respective positions. After reviewing said awards, this Referee finds the awards cited by the Employer, primarily Award No. 40 which denied a claim based upon the employer's ability to establish that drug test results accurately showed that the claimant had cannabinoids and cocaine within his system, to be dispositive in this case.

The cases cited by the Union can be distinguished from the present case. First, there is no question that the Claimant tested positively for cocaine use given the positive drug test results. Thus, the Employer sufficiently met its burden of proof in this regard.

Second, the notice used by the Employer to notify the Claimant of the rescheduled hearing date was unambiguous despite the Claimant's contention that he was "completely confused". In

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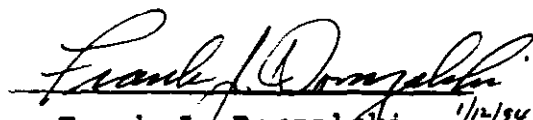
fact, to assume that the two different rescheduling notices "completely confused" the Claimant is to assume that both were indeed received by the Claimant, unlike the notice which was apparently not received by the claimant in Award No. 20734. Thus, the Claimant's right to due process was not violated.


Therefore, in light of the foregoing reasons, the Claimant's claim is denied in its entirety.

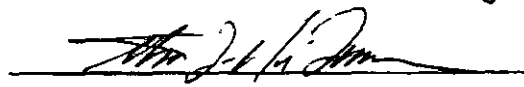
AWARD

The claim is denied.

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Frank J. Domzalski 1/12/94

  
Jed Dodd

  
Thomas J. DiLauro  
JAN 13 1994