

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 17
vs. : Award No. 17
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) The dismissal of Mr. D. Cole for alleged "... Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 14, 1987 and subsequent letter dated April 20, 1987 from Medical Director Dr. P. F. Maranzini, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on July 13, 1987 testing positive", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3231-D).

(2) As a consequence of the violations 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.

OPINION OF THE BOARD

Claimant, D. Cole, was a Machine Operator. As is typical with many employees who occupy like positions, Claimant was essentially a seasonal employee who would normally be furloughed for the winter until the following spring.

Claimant was recalled to duty for the 1987 production season

and, as part of his return to duty physical conducted on April 2, 1987, was required to submit a urine sample. Carrier was subsequently notified by Roche Biomedical Laboratories, the company that performs all of Carrier's drug screen urinalysis work, that Claimant's specimen allegedly tested positive for cannabinoids and cocaine.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 14, 1987 from Carrier's Medical Director. Claimant was instructed therein to provide a negative urine sample within 45 days. In addition, the Medical Director recommended in this letter that Claimant contact Carrier's employee counselor and follow any recommendations that the counselor might make on Claimant's behalf. The Medical Director further advised that if Claimant entered a counselor-approved educational or treatment program, the time period for providing a negative urine sample could be extended.

Claimant did not enter the Carrier sponsored treatment program. On April 20, 1987, however, Claimant provided another specimen which tested negative. He was therefore qualified for return to duty on April 20, 1987, subject to his remaining free of prohibited drugs as demonstrated in unannounced periodic follow-up testing.

On July 13, 1987, Claimant provided a specimen for periodic follow-up testing. The specimen allegedly proved positive for cocaine.

By notice dated July 24, 1987, Claimant was notified to attend a hearing in connection with charges concerning his alleged failure to comply with Carrier's drug testing policy. After postponement, the hearing commenced on August 25, 1987, was adjourned by Carrier in order to obtain certain additional information, was rescheduled, postponed, and finally concluded on September 17, 1987. Claimant was present at the hearing and represented by the Organization throughout this proceeding. Following the hearing, Claimant was notified by Notice of Discipline dated October 1, 1987 of his dismissal in all capacities for failing to comply with Carrier's drug testing policy.

Carrier's drug testing policy, insofar as it is applicable to this case and all cases now before this Board, was unilaterally established and set forth in a letter from Carrier's Chairman and Chief Executive Officer to employees dated February 20, 1987. Carrier's Chairman stated therein that "safety is inconsistent with the use of illegal drugs by any employee, because such use endangers the welfare and safety of other employees and the public. Accordingly, Conrail is establishing a policy on drugs which is an enhancement of our current medical practice and standards. A summary of that policy is included with this letter...". The referenced policy summary which was attached to the letter stated the following:

Conrail will include a screen for drugs when the following medical examinations are conducted:

pre-employment physical examinations;

required periodic and return-to-duty physical examinations;

before return to duty and during a follow-up period after a disqualification for any reason associated with drug use; and

executive physical examinations.

An employee with a positive test for illegal drugs will:

be withheld from service by Health Services;

be required to provide a negative drug test within 45 days, at a medical facility to which the employee is referred by Conrail's Medical Director, in order to be restored to service. This 45-day period begins with the date of the letter notifying the employee of his/her being withheld from service.

An employee whose first test is positive will be offered the opportunity for an evaluation by Conrail's Employee Counseling Service.

If the evaluation reveals no addiction problem, in order to be returned to service a negative drug test must be provided within a 45-day period beginning with the date of the letter notifying the employee of his/her being withheld from service.

If the evaluation indicates an addiction problem and the employee enters an approved treatment program, the employee will be returned to service upon recommendation of the treatment program and the Conrail Employee Counseling Service and must provide a negative drug test within 125 days of the date of the initial positive test. This time period can be extended by Health Services when warranted.

An employee who fails to comply with the recommended treatment plan will be required to provide a negative drug test within the 45-day or 125-day time period referred to above, whichever is less, in order to be returned to service.

An employee may be subject 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 three year follow-up period arranged and monitored by Health Services.

This policy applies to agreement and non-agreement employees subject to required physical examinations.

The Carrier maintains that Claimant was properly dismissed pursuant to this drug testing policy. It argues that Claimant was aware of the policy, tested positive for cocaine during periodic follow-up testing, and that Claimant was therefore guilty of insubordination. The Carrier further argues that its right to dismiss Claimant in such circumstances is not restricted by law, rule or the parties' Collective Bargaining Agreement and has in fact been endorsed by every tribunal which has heard similar cases involving Carrier, including Public Law Board 3514, which is comprised of the same Carrier and Organization as this Board.

The Organization raises an extraordinary number of arguments and defenses on behalf of Claimant. In general, the Organization does not unequivocally oppose drug testing, but rather Carrier's unilateral implementation of a drug testing program. More specifically, the Organization contends that Claimant's dismissal was violative of the law and parties' Collective Bargaining Agreement. It further argues that there exist specific

irregularities in Carrier's handling of this case which must result in sustaining of the claim. It contends that the hearing here afforded Claimant on the property was procedurally deficient, in that Carrier did not provide certain necessary information and did not make available for cross-examination a witness who testified on direct examination.

In Award No. 1 this Board set forth guidelines concerning how it would consider certain cases arising under Carrier's drug testing policy. Applying those principles to the facts of this case, the Board finds that the claim must be sustained in part.

Pursuant to Carrier's policy, Claimant was given a return to work physical which included a drug screen. The testing procedures used in that test, and in the subsequent tests, were adequate. The results of the first test were not initially contested, as no claim was filed for the time in which he was held out of service. Thereafter, Carrier acted within its rights in requiring Claimant to submit to periodic follow-up drug testing for a three year period. Carrier has established that the test results from the July 13 test accurately showed that Claimant had cocaine in his system, and that the presence of that substance was a result of use by Claimant rather than any other reason.

The Carrier has here established the normal elements necessary for proving its case. Nonetheless, the Board concludes that under the circumstances the Claimant should here be given an opportunity for reinstatement. More specifically, the Board


finds troubling Carrier's handling of the hearing on the property. Notably, Carrier did not permit full cross-examination of Carrier witness Evers, who provided considerable testimony on direct examination on the first day of hearing, was not thereafter subjected to full cross-examination by the Organization, and was not, over the Organization's objection, made available as a witness on the second day of hearing. To allow Claimant's dismissal in these circumstances would give Carrier little incentive to insure that such deficiencies are not repeated in the future.

In these circumstances, and given Claimant's apparent sincere desire to obtain re-employment with Carrier, the Board has determined that Claimant shall be given an opportunity for reinstatement without back pay. Claimant's reinstatement shall, of course, be contingent upon complying with all requirements for an employee reinstated under similar circumstances.

AWARD

Claim sustained in part consistent with the above Opinion.


F. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member