

PUBLIC LAW BOARD NO. 4615

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BROTHERHOOD OF MAINTENANCE OF	:
WAY EMPLOYEES	:
"Organization"	:
	:
	:
VS.	:
	:
CONSOLIDATED RAIL CORPORATION	:
"Carrier"	:
	:
	:
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Case No. 23  
Case No. 32  
Award No. 23  
Award No. 32

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

Case No. 23 - (1) Holding Mr. R. W. Jones out of service for failure to comply with the Conrail Drug Testing Policy in that he did not provide a positive urine specimen when he was tested at his normal return-to-duty physical on June 8, 1987, was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3291).

Case No. 32 - (1) The dismissal of Mr. R. Jones for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated June 15, 1987, from Medical Director Dr. G. R. Gebus, in that you did not, within 45 days of that letter provide a negative drug screen", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3368-D).

(2) As a consequence of the violations referred to in Part (1) above, the Claimant shall be compensated for all time lost, including overtime for the period between June 15, 1987 through July 13, 1987 inclusive, and continuing, and his record shall be cleansed of any drug related offenses.

OPINION OF THE BOARD

Claimant, R. W. Jones, was a Repairman. On June 8, 1987, Claimant received a regular periodic medical examination, which included a drug screen. 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.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated June 15, 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. Claimant did, however, provide another specimen on July 23, 1987, which also allegedly tested positive for cannabinoids. Carrier therefore continued to withhold Claimant from service. Claimant did not thereafter submit a negative sample within the 45 day period established by Carrier.

Accordingly, by certified letter dated August 13, 1987, Claimant was notified to attend a hearing concerning his alleged

failure to comply with Carrier's Drug Testing Policy. Following the hearing, Claimant was notified by Notice of Discipline dated December 1, 1987 that he was dismissed in all capacities for failure to provide a negative drug screen within 45 days.

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 withheld from service and later dismissed pursuant to its drug testing policy. Carrier further argues that it is its right to withhold from service and discharge the 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 being withheld from service, and his subsequent dismissal, was violative of the law and the parties' Collective Bargaining Agreement.

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 claim 23 must be denied and claim 32 sustained in part.

Concerning claim 23, the Board has ruled in other similar cases that the Carrier generally acts within its rights when withholding an employee from service due to a verified positive test result. No factors are here present which cause the Board


to conclude that withholding Claimant from service was improper in this case.


Concerning claim 32, Carrier has established that Claimant did not submit through its program a verified negative specimen or enter an approved assistance program within the required 45 days. Claimant must bear primary responsibility for his failure to meet this clear deadline. Nonetheless, the Board is satisfied that sufficient mitigating factors here exist to warrant Claimant's reinstatement without back pay. More specifically, Claimant testified at the hearing on the property that he was led by a substitute Carrier clerk to believe that a doctor would need to be present for giving a urine sample, and that one would not be available after July 23, seven days prior to expiration of the 45 day period set by Carrier. Claimant's contention in this regard is buttressed by the fact that he self referred to another drug test on July 25. In addition, while it is apparent that Claimant did not begin a rehabilitation program until after expiration of the 45 day period, he testified that he began, unsuccessfully, attempting to make contact with the employee counselor prior to the 45 day period expiring. Given the totality of these factors, and Claimant's apparently sincere desire for an opportunity for re-employment with Carrier, the Board determines that Claimant shall be reinstated, subject to all the conditions normally in place for an employee reinstated under similar circumstances.

AWARD

Claims sustained in part consistent with the above Opinion.

  
F. DOMZALSKI  
Carrier Member

  
J. DODD  
Organization Member

  
S. E. BUCHHEIT  
Neutral Member