

PUBLIC LAW BOARD NO. 4615

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BROTHERHOOD OF MAINTENANCE OF :  
WAY EMPLOYEES :  
"Organization" : Case No. 24  
vs. : Award No. 24  
CONSOLIDATED RAIL CORPORATION :  
"Carrier" :  
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STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) The dismissal of Mr. T. Burger for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 10, 1987, from Medical Director Dr. O. Hawryluk, M.D. in that you did not provide a negative drug screen by May 25, 1987", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3292-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, T. Burger, was a Welder. 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 called to duty for the 1987 production season and, as part of his return to duty physical conducted on April 1,

1987, was required to submit a urine sample. Carrier was subsequently notified by Roche Biomedical Laboratories, the company that performs all of Carrier's urinalysis work, that Claimant's specimen tested positive for cannabinoids.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 10, 1987 from Carrier's Medical Director. Claimant was instructed therein to rid his system of cannabinoids and other prohibited drugs and to provide a negative urine sample within 45 days, which was by May 25, 1987, and that his failure to comply with these instructions may subject him to dismissal. 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 by May 25, 1987. He did provide a second urine sample on May 6, 1987, which also allegedly tested positive for cannabinoids. He did not thereafter provide a negative sample by the May 25, 1987 deadline as set by Carrier.

Accordingly, by letter dated June 15, 1987, Claimant was notified to attend a hearing in connection with charges concerning his alleged failure to comply with Carrier's drug

testing policy. On June 28, 1987, Claimant entered a drug rehabilitation program.

On August 25, 1987, Claimant's hearing was conducted. Following the hearing, Claimant was notified by Notice of Discipline dated September 8, 1987, that he was dismissed 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 Drug Testing Policy Summary attached then 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, did not provide a negative sample within 45 days as required by the policy and ordered by Carrier, and that Claimant was therefore guilty of insubordination. In addition, Carrier asserts that while Claimant did enter a rehabilitation program, it was long after expiration of the 45 day period in which entrance was necessary if Claimant was to avoid discharge. The Carrier further argues that its right to discharge Claimant in such circumstances is not restricted by law, 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 Carrier contends that Claimant's dismissal was violative of the law and the 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. Specifically, it

contends that Carrier's policy is ambiguous, and as Claimant entered the drug rehabilitation program within 125 days, he effectively complied with the policy.

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 denied.

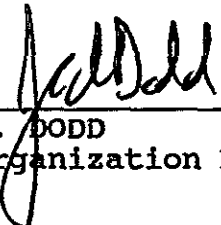
Pursuant to Carrier's policy, Claimant was given a return to work physical which included a drug screen. The testing procedures used in this test, and the May 6, 1987 test administered to Claimant which also proved positive, were adequate. Carrier has established that the results accurately showed that Claimant had cannabinoids in his system and that the presence of that substance was as a result of use by Claimant rather than any other reason. Claimant did not, as required by the drug testing policy, provide a negative sample within 45 days. While Claimant did enter a treatment program within 125 days, under the circumstances the Board is satisfied that Claimant had sufficient notice that if the 45 day period was to be extended entrance into the treatment program must have occurred by the 45th day. As Claimant did not enter the program within 45 days, and he candidly acknowledged at the hearing that he did not comply with Carrier's policy, the Claimant's entrance into the rehabilitation program cannot result in his here avoiding discharge. Accordingly, notwithstanding the extraordinary representation provided the Claimant by the

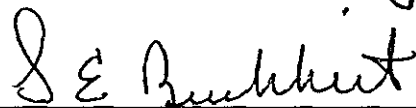
Organization and his commendable efforts at rehabilitation, the claim must be denied.

AWARD

Claim denied.

  
F. DONZALSKI  
Carrier Member

  
J. DODD  
Organization Member

  
S. E. BUCHHEIT  
Neutral Member