

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 26
vs. : Award No. 26
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) The dismissal of Mr. J. Ottaviani for alleged:

- "1. Violation of Rule "G", Paragraph 1, of the Conrail Rules of the Transportation Department in that you tested positive in urine specimen given by you while on duty and under pay on July 21, 1986 for cocaine and opiates.
2. Violation of Rule 3010 of the Conrail Safety Rules of the Maintenance of Way Employees in that you tested positive in the urine specimen given you while on duty and under pay on July 21, 1986 for cocaine and opiates.
3. Violation of Rule 3342 of the Conrail Safety Rules of the Maintenance of Way Employees in that you operated Boom Truck G-8250 in an unsafe and improper manner while on the Betsy Ross Bridge at approximately 8:30 a.m. on July 17, 1986.
4. Violation of Rule "E" of the Conrail Rules of the Transportation Department in that you were assuming the attitude of sleep while operating Boom Truck G-8250 and stopped at Intersections of Route 413 and State Road and Route 413 and Route 13 at 7:40 a.m. and 7:45 a.m. respectively on July 16, 1987."

was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in

violation of the Agreement. (System File CR-3329-D).

OPINION OF THE BOARD

Claimant, J. Ottaviani, was the Operator of a Boom Truck on the dates in question. On July 16, 1986, while operating this vehicle, with his supervisor Mr. Haye present in the passenger seat, Claimant allegedly fell asleep twice. On the following day, again with Mr. Haye as passenger, a truck driven by Claimant hit a medial strip on the approach to the Betsy Ross Bridge. As a result of these actions and others that Haye considered erratic, he reported Claimant's behavior to his superiors. This subsequently led to a directive that Claimant undergo a drug screen, which was accomplished on July 21, 1986. The test allegedly proved positive for cocaine.

Claimant was thereafter medically disqualified from performing service. By notice dated July 30, 1986, Claimant was instructed to attend a hearing on August 6, 1986, in connection with the above-noted charges. The hearing was postponed at the Organization's request due to the fact that Claimant was hospitalized for a drug dependency problem. The hearing was not held until September 29, 1987, approximately one year later. Claimant was present and represented by the Organization. Thereafter, Carrier dismissed Claimant in all capacities for his guilt of the charges listed previously.

Carrier contends that Claimant is guilty as charged. It contends that the testimony of Carrier witness Haye was

sufficient to establish the violations of Rule 3342, concerning the unsafe manner in which he drove his truck on the Betsy Ross Bridge, and Rule E, concerning his sleeping on duty. In addition, the Carrier contends that the testimony of Hays when coupled with the results of the drug screen administered to Claimant establish his use of illegal substances. Finally, Carrier contends that the violations here at issue are extremely serious, and setting aside the discipline assessed would be improper and undermine Carrier's fight against the use of illegal substances in the work place.

The Organization contends that Carrier has completely failed to prove any of the allegations against Claimant. It contends that the evidence assessed was insufficient to establish that Claimant was sleeping on duty or drove his truck negligently. Furthermore, the Organization contends that at worst such violations would warrant a written warning. As to the allegation of drug use, the Organization asserts that the testimony of Hays was insufficient to establish such usage, that the drug test was untimely and the results unreliable in that they showed no chain of custody, and that in any event such results would not show usage of drugs or impairment while on duty.

The Board has determined that the claim must be sustained in part.

As Claimant's termination occurred prior to imposition of Carrier's drug testing policy, the standards set forth in that policy are here inapplicable. Carrier's case must therefore be

based upon establishing violations of Rule E, G, 3010 or 3342.

In this regard, Carrier cannot establish that Claimant was under the influence of drugs on July 16 and 17. Establishing Claimant's guilt of driving negligently and assuming the attitude of sleep while on duty is not analogous with establishing Claimant's drug usage on the days here in question. Furthermore, the Board is troubled by the fact that the drug test administered to Claimant did not occur until four days after the alleged indication of drug usage, and that the results were not accompanied by chain of custody documentation. Moreover, while a verified positive test result on July 21 would establish that Claimant was using drugs, it would not establish that he was under the influence of drugs at any time while at work, or using drugs at any time while at work or in the hours prior to reporting for work.


After careful consideration, the Board has concluded that the Claimant should be given the opportunity for reinstatement, subject to the same conditions as all employees who are reinstated under such circumstances. As to back pay, the Board has further determined that it is not here warranted. Carrier has established that violations were committed by Claimant on July 16 and 17 involving unsafe and improper driving and assuming the attitude of sleep while on duty. While the circumstances under which these violations occurred do not now provide a basis for denying the claim, they are a factor in determining that back pay is not appropriate. In addition, the Claimant admittedly had

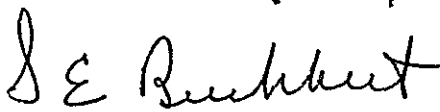
a drug problem in 1986, and for this reason the hearing on the property was postponed for approximately one year while Claimant underwent treatment. Thereafter, it is not clear as to the Claimant's condition or his suitability for work with Carrier. In these circumstances, back pay is not appropriate.

AWARD

Claim sustained in part consistent with the above Opinion.


F. DONZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member