

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 41
vs. : Award No. 41
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWE that:

(1) The dismissal of Mr. R. Henry for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated August 6, 1987 and subsequent letters dated August 20, 1987, September 15, 1987 and October 16, 1987 from Medical Director Dr. G. R. Gebus, in that you did not provide a negative drug screen by November 30, 1987", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3540-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, R. Henry, was a Repairman. Claimant was out on disability over thirty days and was required to take a physical examination before returning to duty. As part of this physical, conducted on July 31, 1987, Claimant was required to submit a urine sample. As a result of this examination, Claimant was found medically unfit to return to work due to ongoing knee

problems. In addition, Carrier was 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 August 6, 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 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.

On August 14, 1987, Claimant provided another specimen which also allegedly tested positive for cannabinoids. Thereafter, in September, 1987, Claimant entered a rehabilitation program with Carrier's assistance. As this was done within the 45 day limit set forth by Carrier, Claimant was not then dismissed. Carrier's Medical Director, however, was subsequently notified that Claimant had ceased satisfactory participation in the treatment program. Accordingly, by letter dated October 16, 1987, the Medical Director informed Claimant that he must provide a

negative urine sample to the specified medical facility by November 30, 1987. Claimant did not meet this deadline.

Accordingly, by notice dated December 11, 1987, Claimant was notified to attend a hearing in connection with charges concerning his alleged failure to comply with Carrier's drug testing policy. Claimant testified at the hearing that he attempted to provide a negative urine sample by November 30, 1987, but the facility at which he gave his original sample was no longer taking specimens from Carrier employees, and thereafter he was unable to make timely arrangements to provide a negative sample at another facility. Following the hearing, Claimant was notified by Notice of Discipline dated February 3, 1988 of his dismissal in all capacities for failing to comply with Carrier's drug testing policy. Thereafter, the record indicates that Claimant continued to have ongoing difficulties with drugs and sought renewed rehabilitation help.

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, did not provide a negative sample by November 30, 1987 as required by the policy and ordered by Carrier, 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. In addition, it notes that Claimant submitted a negative urine sample to ADA, the treatment center recommended by Carrier EAP counselor McMahon. Finally, the Organization asserts that as Claimant was unable to return to work due to knee injury during the entire period now in question, his dismissal was particularly improper.

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.

Under the circumstances Claimant's dismissal was not proper. First, the Organization correctly notes that as a result of the July 31 physical, at which Claimant gave his first urine sample, Claimant was disqualified from work for a reason wholly unconnected to drug usage, namely his knee. Thereafter, irrespective of the situation involving drug usage, for the entire time period prior to charges being brought against Claimant he was apparently not available for work. Moreover, it appears clear that Claimant attempted to give a urine sample by the established deadline of November 30, but the facility at which he was directed to provide the sample would no longer


provide such service. While it is true that Claimant waited until the end of the period set by Carrier in order to provide the sample, it is equally true when an employee seeks to submit a specimen within the designated period and the designated facility is unavailable for use through no fault of the employee, it is arbitrary to automatically terminate the employee for not meeting the precise deadline set for submitting the specimen without consideration of the circumstances involved. Furthermore, the record is clear that once Claimant became aware that the facility would not be available for his use, he made efforts to contact Carrier concerning the matter. Claimant is therefore entitled to reinstatement, subject to the normal conditions imposed upon an employee returning under similar circumstances.

The Board has further determined, however, that the reinstatement should be without back pay. The only drug tests given to Claimant for which results have been properly verified were those he submitted to on July 31, 1987 and August 14, 1987, both of which tested positive for cannabinoids. In this regard, Carrier was not required to accept the results of the private drug test Claimant allegedly underwent on December 18, 1987, the results of which were allegedly negative, that was referenced in the General Chairman's Appeal in this matter. Moreover, as of the date of the hearing on the property, Claimant was continuing to undergo drug counseling. In these circumstances, it cannot be found that Claimant was free of drug usage and medically fit for work. Accordingly, no back pay is here proper.

AWARD

Claim sustained in part consistent with the above Opinion.


F. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member