

PUBLIC LAW BOARD NO. 4615

```
-----
BROTHERHOOD OF MAINTENANCE OF      :
WAY EMPLOYEES                      :
      "Organization"                :      Case No. 5
      vs.                          :      Award No. 5
CONSOLIDATED RAIL CORPORATION      :
      "Carrier"                     :
-----
```

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) The dismissal of Mr. F. Williams for alleged "...failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 21, 1987, from Medical Director G. R. Gebus, in that you did not, within 45 days of that letter, either provide a negative drug screening or enter Conrail's Employee Assistance Program" was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3167D).

(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, F. Williams, was a Trackman. 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 15, 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.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 21, 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 June 5, 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 and he did not produce a drug screen within the prescribed 45 day limit. Claimant had, however, been scheduled to provide a urine sample on June 3, 1987, within the 45 day limit. He did not keep this appointment and provided no urine sample on that date. On June 8, 1987, three days after the 45

day limit expired, Claimant did provide a negative sample.

By notice 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. The hearing was held with Claimant present and represented by the Organization. Claimant testified at this hearing that he did not keep the June 3, 1987 appointment to provide the negative urine specimen within 45 days due to suicide attempt by his daughter. In support of this claim, Claimant produced a letter dated July 10, 1987 from the Rochester Psychiatric Center reading that "Patient was hospitalized at Rochester Psychiatric Center from 6/3/87-7/1/87." Following the hearing, Claimant was notified by Notice of Discipline dated July 22, 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, 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. 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. Finally, Carrier maintains that it has established that the letter from Rochester Psychiatric Center was fraudulently altered by Claimant to state that his daughter was hospitalized from "6/25/87" to read that she was hospitalized from "6/3/87", and that the Board should not

endorse such a fraud by allowing this claim to be sustained.

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. Finally, the Organization contends that Carrier cannot at this late date attack the legitimacy of the letter from the Rochester Psychiatric Center, that Carrier improperly obtained information concerning that letter through the issuance of a subpoena, and that under the circumstances Carrier has not established that the letter was altered in any way or Claimant's testimony of his daughter's suicide attempt was not accurate.

The Board has determined that the claim must be sustained. The record evidence developed on the property establishes that Carrier's application of its drug testing policy was here arbitrary and capricious against Claimant.

More specifically, it is undisputed that Claimant provided a negative urine specimen on June 8, 1987. While it is true that this was three days beyond the 45 day time limit established by Carrier, Claimant was scheduled to provide a urine sample on June 3, 1987, within the 45 day limit. Claimant testified at his

hearing on the property that his failure to keep this earlier appointment was caused by extreme mitigating circumstances. More specifically, Claimant alleged that at that time his daughter attempted suicide and he was on June 3 at her bedside in New York. Claimant supported this contention by providing a letter from Rochester Psychiatric Center allegedly stating that his daughter was hospitalized as of June 3, 1987. Carrier did not on the property refute Claimant's testimony in this regard or the accuracy of the letter from the Rochester Psychiatric Center. Rather, notwithstanding this evidence, Carrier determined to dismiss Claimant because he nonetheless did not provide the negative specimen as required within the 45 day limit.

While in Award No. 1, also issued this day, this Board stated that it will generally abide by precedent concerning the legitimacy of Carrier's drug testing policy, it has also made clear that it will review any irregularities or mitigating factors which may be present in an individual case. In this case, it was arbitrary for Carrier to discharge Claimant, an employee who had worked for Conrail and its predecessor since 1968, due to his providing a negative urine specimen within 48 days rather than 45. His daughter's alleged suicide attempt and subsequent hospitalization provided a clear justification for his slight delay in providing the negative urine sample. Notably, Claimant submitted the negative urine sample on the first business day after returning from his daughter's bedside.

The Board has carefully considered the Carrier's arguments


concerning the fraudulent alteration of the letter from the Rochester Psychiatric Center. The Board does not here determine whether or not this letter was fraudulently altered. The Board does find, however, that all arguments in this regard could have, and should have, been handled on the property. Examination of the letter from the Rochester Psychiatric Center could have occurred then as well as now. Claimant has here been deprived of any opportunity to respond to Carrier's allegations concerning the alteration of the document. Moreover, the Board believes it would indeed set a dangerous precedent if it allowed claims to be denied on the basis of material which was subpoenaed only days before a hearing before this Board.


In sum, Claimant was dismissed due to his alleged failure to comply with Carrier's drug testing policy, not for alteration of documents. As the evidence on the property establishes that Carrier's application of its drug testing policy was here arbitrary and capricious, it follows that the claim must be sustained and the Claimant reinstated with full seniority. Moreover, as Claimant provided a negative urine sample on June 8, 1987, he is unquestionably entitled to be made whole for all lost wages and benefits from that date forward.

AWARD

Claim sustained consistent with the above Opinion. All money owed to be paid within thirty (30) days.


F. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member

APR 12 1991