PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 4865

AWARD NO. 1

Case No. 1

Docket No. CA-41

Referee Fred Blackwell

Carrier Member: J. H. Burton Labor Member: L. M. Mann

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Appeal of the dismissal of Train Dispatcher D. J. Mackey on 12/16/88.

FINDINGS:

Upon the whole record and all the evidence, after July 16, 1990 hearing in Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Claimant, who was duly notified of said hearing and of his right to be present and participate in same, did not attend said hearing; and that this Board is duly constituted by Agreement and has jurisdiction of the parties and of the subject matter.

OPINION

This is a discharge case in which the Claimant appeals and protests the Carrier action of December 16, 1988, whereby the Carrier dismissed the Claimant for his alleged failure to comply with the Conrail Drug Policy.

The record reflects that as a result of tests of speci

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mens of Claimant's urine in April 1987, the Claimant became subject under the Conrail Drug Policy to unannounced drug screens for a period of three (3) years from April 30, 1987. The Claimant submitted urine specimens on an unannounced basis in July 1987 and February 1988 that tested negative for prohibited drugs. On November 15, 1988, the Claimant submitted a urine sample that tested positive for cannabinoids, a prohibited drug under the Conrail policy, whereupon, under date of November 17, the Claimant was notified by Conrail that he was medically disqualified for service due to the presence in his system of a prohibited substance. At the time of the Claimant's disqualification from service on November 17, 1988, the Claimant was assigned to a guaranteed Extra Train Dispatcher position.

By Notice dated November 21, 1988, the Claimant was notified of charges and of a hearing thereon respecting his alleged failure to comply with the Conrail Drug Policy. The hearing was held on December 9, 1988, with the Claimant in attendance, on the following charge:

> "Your failure to comply with Conrail Drug Testing Policy as you were instructed in letter dated April 16, 1987, and subsequent letter dated April 30, 1987, from Medical Director O. Hawryluk, M.D. in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on November 15, 1988."

Following the hearing the Carrier concluded that the hearing evidence established the Claimant's guilt of the infrac-

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tion referenced in the charge, whereupon, on December 16, 1988, the Carrier instituted the dismissal action against the Claimant which is the subject of the herein appeal.

* * * * * * * * * * *

The position of the Organization is that the dismissal of Claimant should be set aside and Claimant reinstated to service with pay for all time lost. The Organization makes three (3) basic arguments in support of this position, namely:

1. That Conrail lacked authority to conduct the drug testing that led to the dismissal of the Claimant:

2. That Conrail did not use proper procedures in the collection and testing processing of the urine specimen of the Claimant; and

3. That Conrail did not meet its burden of proof at the hearing.

The Carrier asserts that the subject discipline is supported by substantial evidence in the record as a whole and on that basis, should not be disturbed.

* * * * * * * * * * *

After due study of the foregoing and of the record as a whole, including the submissions presented by the parties in support of their respective positions in the case, the Board concludes and finds that the record contains no procedural irregularities that warrant altering the discipline and that the record contains substantial evidence to support the Carrier's findings

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the Claimant's guilt of the infraction referenced in the charge and that discipline for such infraction was warranted.

The Organization's argument that Conrail lacked authority to conduct the herein drug testing (Item A., page 4 of the Organization Submission), has been rejected in numerous prior Board awards that have found the Conrail Drug Policy to be a proper and reasonable exercise of Conrail's managerial prerogatives. Indeed, since its establishment in February 1987, the Conrail Drug Policy has been upheld by various referees as a proper exercise of Conrail's obligation and duty to the public and to its own employees to provide safe railway operations. No prior Board authorities cited of record, has found the policy unreasonable or that Conrail lacks authority to conduct the drug policy.

The reasonableness of the policy was confirmed in Award No. 92 of Public Law Board No. 2720 (03-20-89).

> "Second, as a general principle, we find Carrier's drug policy, both in its formulation and administration, to be reasonable and fair, particularly in light of the dangerous nature of the work which is involved in the railroad industry.
>
> Third, as an extension of the preceding area of consideration, we concur that Carrier is entitled to expect a drug-free workforce, and to promulgate and enforce reasonable rules, regulations, policies and procedures among its employees in the pursuit of that goal."

Prior Board awards have also enunciated the Carrier's right to dismiss an Employee for failure to comply with the drug

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policy. For example, in Public Law Board No. 2720, Award 88 (02-09-89), the Board denied the appeal of such a dismissal with this comment:

> "Given Claimant's obvious, continued lack of interest in preserving his job with Carrier, and given Carrier's duty and responsibility to employ a sober workforce in carrying out its mission, we find that Carrier did not abuse its discretion by dismissing Claimant for failure to comply with Carrier's drug testing policy."

These conclusions are not dispelled by the contra AMTRAK Awards (Cases Nos. 16, 26, and 28, Public Law Board No. 4418 (07-27-90)) cited by the Organization, because there are substantial fact differences between the disputes in the AMTRAK awards and the confronting dispute. Although Public Law Board No. 4418 rejected AMTRAK's claim of authority to include a drug screen as part of a return to work physical of a TCU-AMTRAK employee, this decision was based upon the Board's reading of AMTRAK Rule 23 (a) as precluding "the Carrier from routinely requiring physical examinations, including drug tests of employees returning from leaves." The text of the TCU-AMTRAK Rule 23 (a), governing "Physical Examinations and Disqualification" reads as follows:

> "Employees, after completing sixty (60) calendar days o service, will not be required to submit to physical exam ination unless it is apparent their physical condition i such that an examination should be made."

No rule such as the one above quoted is cited in the herein recor as applicable the this case and hence, the AMTRAK authorities ha

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no application to the circumstances of this case.

As regards the Organization's suggestion that the dismissal of the Claimant is not well founded, because, the Carrier's dismissal action was not based upon evidence of the Claimant's impairment at the time of his disqualification from service, the Board observes that for sound reasons the Conrail Drug Policy is not restricted to the conditions that apply to alcohol abuse such as on-duty use or impairment while on duty. The possession of prohibited drugs is illegal; the possession of alcohol is not. But more important, scientific disciplines have established beyond question that the referred to prohibited drugs may impair human faculties and hence, 'in many work areas including major parts of the railroad industry, a policy has emerged of removing a particular Employee from the work environment when a test of his bo fluids shows positive for a prohibited drug(s). The potential harm to the particular Employee and others, established by irrefutable scientific evidence that use of the prohibited drugs may impair the faculties of the Employee, is not only the reason why the distribution of the drugs covered by Conrail's policy is prohibited by law, but also is the reason why a railroad employer need not delay removing the Employee from the railroad environment until impairment is evident or the Employee is caught using a prohibited drug(s).

We have also found unpersuasive the Organization's arguments that Conrail did not use proper procedures in the collectio

and testing process of the Claimant's urine specimen (Item B., page 4 Organization Submission). The Board notes in this regard that the record of the hearing transcript, Exhibit Q, contains the notarized certification, which relates to the drug test of the Claimant's specimen, by a Roche Biomedical Laboratories' Medical Technologist, Caroline A. Smith, and her Supervisor, Daniel G. Aichele, stating as follows:

> "I hereby certify that the data, instrument function checks and the Chain-of-Custody documentation pertaining to analysis of the specimen listed above have been reviewed. The results are accurate and reliable as reported."

The Board notes that inasmuch as the record contains no contra evidence or challenge in the transcript of the investigative hearing, the cited certification and similar evidence of record is accepted by the Board as satisfactorily validating the efficacy and reliability of the drug testing procedures involved in this case.

The Organization's final argument is that the Carrier did ndt meet its burden of proof at the hearing, because it failed tc provide a competent witness to testify about the test results anc the testing procedures (Item C, page 4 Organization Submission). This argument of the Organization has been very closely analyzed, because the Carrier witness who introduced the documentation or the results of the Claimant's drug test, acknowledged that he wa: not qualified to testify about the type of tests made on the urin

specimen and whether drugs such as "tylenol" would show up in the specimen as a prohibited drug such as "marijuana". However th Union Representatives did not request at the hearing that a competent witness be brought in to testify and answer questions about the drug test; and instead, the Organization now argues that the lack of knowledge of the Carrier witness shows the Carrier's failure to meet its burden of proof. Accordingly, the facts of this case do not come within the line of prior Board rulings that a due process defect arises in circumstances where the presence of a witness who is competent to testify on the medical and technical considerations of a drug test, is reasonably necessary, is requested by or in the Claimant's behalf, and is not made available by the Carrier.

In Award No. 430 of UTU-Conrail SBA No. 910 (05-05- for example, the Board noted that the Carrier is allowed latit in hearing procedures where "...no request for additional materia witnesses had been made while the hearing is in progress ...": th Board then went on to find prejudicial error resulted from Car rier's denial of the Local Chairman's request to call two (2) nam ed witnesses who had prepared a "Medical Report" submitted by Co: rail to support the charge that Claimant had violated the Conra Drug Policy. As noted, however, the facts of the confronting di: pute do not evidence a denied request by Conrail for a materi witness, which is essential to come within the rationale of a thorities such as Award No. 430.

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Consequently, the Organization argument that this facet of the case shows the Carrier's failure to meet its burden of proof, is unpersuasive, and, moreover, the documentary evidence comprised of the laboratory results of the testing of the Claimant's urine specimen, and the findings relative thereto by appropriate technical and medical professionals, makes a prima facie case of the Claimant's guilt of the charge of failure to comply with the Conrail Drug Policy. Nothing submitted in the Claimant's behalf rebuts and dispels that prima facie case.

The Board further concludes and finds that the record contains no mitigating circumstances or other considerations that warrant altering the Carrier's decision to dispense the discipline of dismissal to the Claimant, and that the discipline of dismissal is not unreasonable or arbitrary in light of the nature of the offense established by the evidence.

In view of the foregoing, and on the basis of the record as a whole, it is found that the record contains substantial evidence to support the Carrier's findings of the Claimant's guilt of the infraction referred to in the charge and that the discipline of dismissal was warranted for such infraction. The claim will therefore be denied.

AWARD:

Claim denied.

BY ORDER OF PUBLIC LAW BOARD NO. 4865

Fred Blackwell

Fred Blackwell, Neutral Member

J. H. Burton, Carrier Member

L. M. Mann, Union Member

Executed on 11-27, 1990

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DISSENT BY AMERICAN TRAIN DISPATCHERS ASSOCIATION

Aside from the other issues relating to the lack of Conrail's authority to conduct the testing herein, and the improper procedures used in the collection and testing of the urine specimen, this dissent will focus on Conrail's failure to meet its burden of proof at the hearing.

Conrail failed to provide any witness who could testify as to the type of test that was performed or to any other relevant questions concerning the specifics of the drug test which was performed. In view of the various problems which continue to exist in the field of drug testing, it is imperative that a referee requires a strict burden of proof of the validity and reliability of any drug test which is performed. The fact that the failure of a union representative to specifically request a competent witness to be provided at the hearing should not preclude such a requirement in meeting the minimum burden of proof. There is a responsibility upon the referee to assure that the hearing is fairly conducted, and that the minimal requirements of proof are met. Simply providing a person as a witness who

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has no knowledge of the drug testing procedures, falls way short of any minimum requirements. For these reasons, I hereby respectively dissent.

Lawrence M. Mann
Labor Member