

PUBLIC LAW BOARD NO. 4877

FRATERNAL ORDER OF POLICE

"FOP"

VS.

CONSOLIDATED RAIL CORPORATION

"CARRIER"

CASE NO. 2
AWARD NO. 5

(N. Woodman)

STATEMENT OF CLAIM

Appeal of dismissal assessed Nicholas Woodman as outlined on Form G-32 Notice of Discipline dated April 7, 1988, in connection with the following:

"Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated May 1, 1987 and subsequent letter dated June 1, 1987 from Medical Director, O. Hawryluk, M.D. in that you failed to refrain from the use of prohibited drugs as evidenced by urine sample provided on February 11, 1988, testing positive."

OPINION OF THE BOARD

Claimant entered service of Carrier in 1984 and was subsequently assigned as a Patrolman on the Chicago Division. In January, 1986, Claimant left his position and served in a non-Agreement position until April, 1987, at which time he left the non-Agreement position to return to his position of Patrolman. Upon his return as Patrolman, Carrier required Claimant to take a physical examination, which included a urine test for the presence of drugs or other controlled substances. Claimant objected to that examination and test when it was given, but submitted to it on April 20, 1987. Carrier was subsequently

notified by Roche Biomedical Laboratories, who tested Claimant's specimen, that the urinalysis tested positive for cannabinoids, the use of which is prohibited under Carrier's drug policy. In accordance with Carrier's policy, Claimant was medically disqualified from service by letter dated May 1, 1987. He was also instructed on that date to rid his system of cannabinoids and other prohibited drugs and to provide a negative urine sample within 45 days. Claimant was also offered the opportunity to contact the employee counselor, but he declined. Claimant subsequently provided another specimen which tested negative. On or about June 1, 1987, Claimant was informed by Carrier that he could return to work. Carrier further instructed Claimant, however, that he must remain drug free and he would be subject to unannounced periodic follow-up testing for three years. On February 11, 1988, Claimant provided a specimen for periodic follow-up testing. According to Carrier, the specimen tested positive for cannabinoids. Accordingly, Carrier charged Claimant with insubordination in that he failed to comply with Carrier's drug testing policy of remaining drug free. A hearing on the property commenced on March 28, 1988. Claimant was present and represented by the Organization. Subsequent to the hearing, Carrier dismissed Claimant in all capacities.

Carrier asserts that substantial evidence produced at a fair and impartial trial proves that Claimant violated Carrier's drug testing policy and is guilty as charged. Carrier further contends that the discipline assessed was commensurate with the offense and no change should be made in Carrier's decision to

dismiss Claimant.

The Organization raises a number of defenses on behalf of Claimant. It contends that all discipline assessed against Claimant must be set aside.

The Board has determined that the claim must be denied.


While not conceding Carrier's right to conduct drug testing of employees, the focus of the Organization's argument in this case is that the initial drug test given to Claimant in April, 1987 did not properly establish that he was using drugs, and that Carrier committed a due process violation by not allowing information concerning that test to be presented at the hearing on the property in this matter. The Board here agrees with Carrier, however, that the accuracy of the initial drug test can no longer be before it for determination. Claimant had the right to contest the initial drug test when it occurred. He chose not to do so. The Agreement requires that a claim be filed within a certain time period to be considered by this Board. The time period had long since expired for challenging the first drug test by the time of the Claimant's discharge. Accordingly, while it may be true that what followed thereafter was dependent upon the initial drug test, the Board cannot now consider the accuracy of the initial test. In addition, it follows that the Carrier committed no procedural errors by not allowing consideration of this initial drug test at the hearing on the property. Finally, the Board is persuaded that Claimant did indeed fail to abide by Carrier's instruction to remain drug free. Accordingly, the Organization's defense of Claimant must be rejected and the claim

must be denied.

AWARD

Claim denied.


J. H. BURTON
CARRIER MEMBER


E. R. FLAKE
ORGANIZATION MEMBER


S. E. BUCHHEIT
NEUTRAL MEMBER

FEB 14 1991