PUBLIC LAW BOARD NO. 4950

NEW JERSEY TRANSIT RAIL OPERATIONS, INC. "Carrier"	:	Case No. 95
vs.	:	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES "Organization"	:	Award No. 88

OPINION OF THE BOARD

By notice of hearing dated May 5, 1995, Carrier instructed Claimant, W. Bundy, to appear at a hearing in connection with the following:

> On Tuesday, May 2, 1995, at approximately 10:20 a.m. at Maplewood you were instructed to submit to a drug and alcohol test due to reasonable suspicion. Specifically, you had an odor of alcohol, had a red face, appeared nervous, and had difficulty dressing yourself. You were insubordinate by failing to submit to a drug and alcohol test when directed to do so.
>
> Therefore, in connection with this matter you are charged with violation of: NJ Transit Drug and Alcohol Free Workplace Core (3.25) Policy Section V. Standards of Conduct, A. "Prohibited Behaviors" (Core Page 5 of 26)"; E. "Behavior That Constitutes A Refusal To Cooperate" (Page 7 of 26); Engineering Department Safety Rules D and G.

Following the hearing, Carrier found Claimant guilty as charged and assessed him the penalty of dismissal from all service.

The Organization appealed and asserts numerous procedural and substantive defenses on behalf of Claimant. It alleges that

as on May 2 Claimant was taking an annual physical, Carrier had no right to ask him to submit to a drug and alcohol test. The Organization further contends that the smell of alcohol detected on Claimant actually came from cough syrup Claimant had taken earlier that morning and that several individuals did not smell alcohol on Claimant's breath. The Organization also asserts that the revised Drug and Alcohol Free Workplace Policy ("Policy") effective January 1, 1995 was not given to the Claimant until February 28, 1995, and from then until May 2, 1995 no attempt was made by Carrier to educate the employees as to the changes in the new Policy or educate them pursuant to the mandates of Article XII of said Policy. Finally, the Organization contends that Carrier committed numerous procedural errors and notes that Claimant is a long-term employee of the railroad and has a blemish-free work record. The Organization requests that Claimant be returned to service, albeit subject to the mandatory EAP, with seniority unimpaired and be compensated for all lost wages and benefits.

The Board has determined that the claim must be denied.

The Board finds that there is substantial evidence in the record to support Carrier's assertion that it had reasonable suspicion to test Claimant on May 2. Claimant was on duty and had traveled to Medical Services in a Carrier vehicle. While it is true that on that date Claimant was only to undergo an annual physical, during the course of that physical several individuals detected alcohol on Claimant's breath and observed other behavior

which they reasonably believed to be indicative of intoxication. In these circumstances, reasonable suspicion was created, permitting Carrier to subject Claimant to a drug and alcohol test.

The record further reveals that Claimant was in violation of the Drug and Alcohol Policy when he refused to submit to a test as directed. On a number of occasions on the date in question several different individuals explained to Claimant that he was obligated to take a drug and alcohol test. It was further explained to Claimant that if he did not take a test, it was a violation of the Policy and the equivalent of admitting his guilt. Nonetheless, Claimant took no drug and alcohol test whatsoever on the date in question. In these circumstances, Claimant cannot successfully contend that his difficulties were caused by his not being given adequate notice of the Policy.

Carrier has established that it did not act arbitrarily or capriciously in terminating Claimant. Refusal to take a drug and alcohol test when properly instructed to submit to such a test is a serious offense. The Policy is clear that employees must comply with a reasonable suspicion test and failure to do so may result in termination. While the Board is mindful of the arguments of mitigation so well argued by the Organization, were it to sustain this claim it would perhaps encourage others to refuse to undergo a test when required to do so. Finally, the Board finds no procedural defects by Carrier which would justify overturning otherwise valid discipline.

Accordingly, notwithstanding the Organization's strenuous representation of Claimant, and numerous defenses it has raised on his behalf, the claim must be denied.

AWARD

Claim denied.

P. Charles
Carrier Member

Dissent to Follow
G. Barbati
Organization Member

S. E. Buchheit
Neutral Member

4950-88

Labor Member's Dissent
to
Award No. 88
Public Law Board 4950

Brotherhood of Maintenance of Way Employes

vs.

New Jersey Transit Rail Operation

(Referee Mr. S. E. Buchheit, Neutral Member)

As in all arbitration cases the parties attempt to portray what it believes to be the facts of the case in the most favorable light to support its position. This case is no different and while the Labor Member does not believe all the facts were given equal weight, a decision has been reached and the parties are bound by it.

However, the Majority clearly erred when it held "While the Board is mindful of the arguments of mitigation so well argued by the Organization, were it to sustain this claim it would perhaps encourage others to refuse to undergo a test when required to do so." For the Majority to speculate as to what might happen in the future with other employes is presumptuous. Speculation is not grounds for turning away an employe with twenty two years of service who possessed an unblemished record.

If speculation were to be used, then it should have been used to speculate that given the chance, an employe with twenty two years of service who made one terrible mistake during his tenure with the Carrier and one who exhibits true remorse for his actions should be given the chance to be a productive employe in the future. That is, rehabilitation and salvaging a career of an individual who has suffered greatly.

To do as the Majority has done here is truly an injustice and requires this dissent.

Gregory J. Barbati
Member