

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 57

System Docket No. BMW-380D

STATEMENT OF CLAIM

A. Carrier's dismissal of Claimant Thomas Christopher was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

B. Claimant Christopher shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided in Rule 15 of the Scheduled Agreement.

FINDINGS

Following an investigative hearing on February 10, 2000, the Claimant was dismissed from service on February 18, 2000, having been found guilty of the following Specification:

It is alleged that on January 20, 2000 you provided a urine specimen for testing on connection with a Company required CDL [Commercial Driver License] periodic physical [examination]. Notification to this office on January 24, 2000 from Amtrak's Medical Review Officer, with respect to the integrity of the drug test results, confirmed the sample to be "Specimen Adulterated, Nitrite Too High".

The Claimant is an employee in the Maintenance of Way craft. According to the record, he has held a Commercial Driver License for some time, although not utilized in connection with his Carrier employment. The Claimant learned that a list of qualified vehicle drivers was being prepared. Upon achieving such position, the Claimant was clearly aware that he would thereafter be subject to random drug testing (and physical examination) under Federal and Carrier regulations.

The Claimant voluntarily applied for qualification as a vehicle driver, and on January 20, 2000 he presented himself for the required urine test for drugs, as well as a physical examination. The urine sample showed a nitrite content at an "abnormally high level" of 4,700 micrograms per milliliter. The Carrier's Drug and Alcohol Policy ("PERS-19"), under a list of Terms, including "Adulterated", states the following in pertinent part:

A urine specimen is defined, but not limited to the following, as adulterated if:

- The nitrite concentration is ≥ 500 [mg/ml].

Based on the Claimant's urine sample results, the Carrier's Medical Officer concluded that the Claimant had adulterated his urine sample so as to disguise the results thereof. The Claimant,

both before and during the investigative hearing, denied that he used drugs or that he had taken any action to adulterate his sample. During the hearing and in the subsequent claim handling procedure, the Organization and the Claimant argued that the sample had somehow been mishandled by other than the Claimant and that the Carrier had no proof that the Claimant had placed nitrite in the sample. The Board finds no proven irregularities in the testing procedure and concludes that the results as to nitrite content were accurate. As noted above, the Claimant was nevertheless removed from service following the hearing.

The Board, at the outset, states its full recognition that it is a gravely serious offense for an employee to deliberately adulterate a urine sample taken to detect drug use and that dismissal from service may well be the appropriate consequence. If there were no more to the matter than what is related above, the Board would have no basis to question the Carrier's conclusion and subsequent disciplinary action.

There are, however, other considerations substantively distinguishing this matter from most drug testing situations. The following points from the record must be considered as a whole:

1. The Specification itself is inaccurate. The Claimant was not subject to a "Company required CDL periodic physical". He was not serving as a certified vehicle driver and was not subject to "periodic" drug testing. The test was voluntary as part of an attempt to become qualified as a driver.

2. PERS-19 regulates in detail eleven situations requiring drug and/or alcohol testing (accident/injury, reasonable suspension, rule violation, etc.). The category applicable here appears to be "Pre-Employment Testing", since it includes:

An employee applying for a transfer into a position subject to FRA or FHWA pre-employment testing is required to provide a urine specimen that tests negative for prohibited drugs.

This category, as do many other categories, includes the following:

An employee who intentionally interferes with the integrity of [i.e., adulterates] a test sample will be charged with violating Amtrak Standards of Excellence and subject to discipline up to and including termination.

3. There is ample basis to believe that the Carrier's Medical Office had some reason to believe that the high nitrite showing may have been related to other than adulteration of the sample. The following are excerpts from the hearing record:

Q Now after the test was done and it was sealed up, what happened then?

A (by Claimant) That's when the physician came over to me and handed me this note saying that I had high nitrites and I had blood in my urine, my sugar was low and my protein was low. And she advised me that either I had a kidney infection, bladder infection of some sort and she recommended I go to my own doctor. . . .

Q All right. And then the actual doctor that did your physical then told you that you should probably go to your own doctor?

A Well, it was the same doctor that gave me this note is the doctor that gave me my physical. Her name is on my physical card. . . .

Q [After the Claimant returned to work for two days] . . . Did you receive a phone call from a Medical Review Officer regarding your test results?

A Yes I did.

Q Was it [the Medical Review Officer] that called you?

A Yes

Q All right. Could you explain what happened during that conversation?

A Um, he had informed me that my urine sample was tampered with because I had a high nitrite level. And he said that's, they usually come from products trying to hide drugs. He told me three examples are "Clear, A Urine Aide and a Whizz Aide". And I explained to him that I did not do drugs and I explained to him the note that was given to me by the physician at OMS about a possible kidney infection or bladder infection and I also told him about the chain of custody being broken.

Q Did he express any kind of concern about what you had stated?

A No

4. Prior to the testimony quoted above, there was testimony from a Medical Review Officer (but not the same Medical Review Officer who had spoken to the Claimant). This Medical Review Officer stated that there was "no legitimate medical explanation" for the degree of nitrite in the Claimant's urine sample. While there was no challenge to this conclusion, it must be viewed in the context of another physician's reported statement, quoted above, suggesting that the Claimant had other medical symptoms (blood in the urine, low sugar, low protein) indicating a possible kidney or bladder infection.

5. The claim handling then takes a strange twist. By letter dated February 22, 2000, the Organization appealed the Claimant's dismissal. Conference was held on March 7. The Director-Labor Relations responded to the Organization by letter dated March 14. Nothing in either letter makes any reference whatsoever to the hearing testimony quoted above.

6. At the Board hearing on June 14, 2000, the Organization introduced two physician's notes, which were received by the Board without objection. There was no specific indication that these notes had been previously supplied to the Carrier. The first note, dated March 6, 2000, states as follows:

The above pt. [the Claimant] is being treated for nitrates and blood in his urine. Please call with any questions.

The second note, dated March 15, 2000, states as follows:

Pt. had a repeat urinalysis following completion of his antibiotic. The urine was negative for any blood or nitrates. Any questions or problems, please call me.

Discussion

It is, of course, most unusual for new evidence or documentation to be presented at a Board hearing. There was, however, no objection raised by the parties to the Board's consideration of the physician's notes. There was also no question raised as to the authenticity of the notes.

More troubling is the consideration that the Claimant was apparently advised by a Carrier physician on January 20 to "go to [his] own doctor", yet the Claimant failed to provide documentation

of such treatment at the time it commenced (the March 6 physician's note states he is "being treated"). Thus, the claim-handling letters and correspondence occurred without such information.

In addition, the Board notes the reference to "nitrites" by the Carrier and "nitrates" by the physician. As a layman, the Board Neutral Member has learned that the only difference is the amount of oxygen in the two chemicals.

Even without the medical explanation of the Claimant's urine content, it is difficult to fathom why the Claimant would subject himself to a voluntary urine test if he were a current drug user. The medical advice given to the Claimant by a Carrier physician at the time of his examination, however, certainly suggests that some further medical inquiry would have been useful before reaching the conclusion that the Claimant was guilty of adulteration.

The contention that the Claimant adulterated a specimen for a "periodic physical", as stated in the Specification, is, of course, erroneous. Even if the Carrier is understood to mean that the Claimant adulterated a voluntary urine test, the Board finds the Carrier has failed to prove that the Claimant did so.

The claim seeks payment of lost wages. There is no basis for this, since the Claimant failed to provide an affirmative defense until after the claim handling had been reviewed on the property. The Award will provide for the Claimant's reinstatement to his former position with seniority unimpaired but without back pay or retroactive benefits, and record of this disciplinary action

removed from his record. A return-to-work physical examination may be required at the Carrier's discretion.

A W A R D

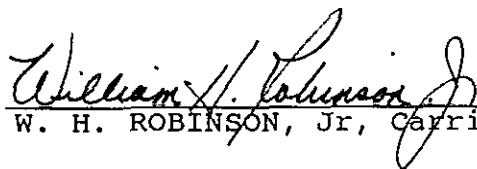
Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: JULY 13, 2000