

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5938

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 2
) Award No. 2
CONSOLIDATED RAIL CORPORATION)

Martin H. Malin, Chairman & Neutral Member
Jedd Dodd, Employee Member
J. H. Burton, Carrier Member

Hearing Date: May 19, 1997

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

1. The dismissal of Vehicle Operator T. E. Johnston for his alleged failure to comply with the Conrail drug testing policy and provide a urine specimen on February 1, 1996 was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (System Docket MW-4247D).
2. Claimant T. E. Johnston shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

Public Law Board No. 5938, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

At the time of his termination, Claimant had 19.5 years of service and no prior discipline. He was employed as a vehicle operator and was subject to FHWA random drug and alcohol testing because he held a commercial driver's license (CDL) in connection with his job. On February 1, 1996, the Trainmaster advised the Track Supervisor to have all CDL operators submit to a random drug and alcohol screen. The Track Supervisor directed the Foreman to have Claimant report for the test. The Foreman testified that the Track Supervisor told him to have Claimant

report for an alcohol breath test and that he so advised Claimant. Claimant testified that the Foreman told him to report for an alcohol breath test.

Claimant had been suffering from flu-like symptoms, including diarrhea. Claimant and the Foreman drove toward the Lancaster Yard testing facility. En route, Claimant's diarrhea became so acute that he soiled his pants. Consequently, they returned to Claimant's headquarters so that Claimant could clean up, change clothes and go home to seek medical attention. The Foreman testified that Claimant "told me he was sick and going in." Later in the hearing, Claimant testified the Foreman gave him permission to go home. The Foreman was not recalled to clarify his testimony and determine specifically whether he had given Claimant permission to leave. In any event, there is no evidence that the Foreman objected to Claimant's going home.

Claimant's diarrhea continued while he was at home and his wife had to clean up "several messes." Claimant attempted to see his doctor that day, but the earliest appointment he could obtain was for the following morning. Claimant's doctor wrote a note verifying that Claimant was treated for "acute gastro-enteritis, manifested by diarrhea, weakness and tiredness," and prescribed medication. Claimant did not contact his Supervisor to advise him of what had occurred.

Although the facts are not in dispute, the parties disagree over whether Claimant's diarrhea rendered him unavailable for testing under Carrier's drug testing plan. Carrier maintains that unavailability on medical grounds requires hospitalization. Moreover, Carrier maintains, diarrhea is not a sufficiently serious medical condition to render an employee unavailable. Carrier contends that Claimant should have proceeded to the test site to allow Carrier's testing personnel to determine whether he could proceed with the test. Carrier relies on PLB No. 5149, Award No. 37 to support its position. Carrier further contends that Claimant acted improperly by not contacting his Supervisor. Advising the Foreman was insufficient, in Carrier's view, because the Foreman is not a supervisor.

The Organization contends that the medical excuse provision in Carrier's drug testing plan should not be interpreted as narrowly as Carrier maintains. According to the Organization, the critical concern is whether the medical condition is bona fide or merely being offered as a subterfuge to avoid a test out of fear of a positive result. In the instant case, there is no question that Claimant was sick, had soiled his pants, and had to seek medical attention. In the Organization's view, Claimant started to go to Lancaster for the test and only abandoned the trip when he became too sick to continue. Moreover, according to the Organization, although Claimant did not notify his Supervisor, he acted properly by notifying and securing

permission from the employee in charge, i.e. the Foreman, who was the person who instructed him to submit to the test.

This is a very difficult case with highly peculiar facts. Under normal circumstances, Carrier has every right to ensure that employees comply with its drug and alcohol testing program. Carrier must be vigilant to safeguard the program's integrity. Employees must not be allowed to create excuses for missing tests, and claims of unavailability must be scrutinized very closely. Simple illnesses in the typical situation, cannot excuse a failure to submit to the test.

We agree fully with the reasoning and result in PLB 5149, Award No. 37. There, claimant refused to report for the test because he was taking medication for diarrhea. PLB 5149 held, and we agree, that it was not for the claimant to determine unilaterally that the medication he was taking made him unfit to take the test. Claimant should have reported, advised the testing personnel of the medication and allowed them to make the determination.

The instant claim is very different. Claimant began to travel to Lancaster to take the test. En route his diarrhea became so severe that he lost control and soiled his pants. To expect Claimant to continue to Lancaster and submit to the test under such conditions is to subject him to embarrassment and humiliation.

Carrier's drug testing policy provides for "Emergency Excusal" under the following circumstances: "A medical or family emergency, such as a serious injury or acute illness requiring immediate hospitalization, or an unanticipated occurrence requiring the immediate presence of the family member . . . " (emphasis added). The language of the policy is not as narrow as Carrier claims. The use of the words "such as" indicate that immediate hospitalization is offered as an example of a medical emergency rather than as an absolute requirement. The critical element is that the emergency be of sufficient severity to warrant a reasonable person to conclude that he cannot report for the test.

We find that diarrhea sufficiently severe as to cause a person to lose control of his bowels to the point where he soils his pants is a medical condition of sufficient severity to render a reasonable person unavailable for the test. Moreover, the severe diarrhea continued throughout the day, causing Claimant's wife to have to clean up several messes. Accordingly, we conclude that Claimant was unavailable due to a medical emergency.

We do find Claimant at fault in one regard. Claimant never advised his Supervisor of what had occurred. Although Claimant

may have acted appropriately in going home to seek medical attention and only advising his Foreman at the time of his loss of bowel control, there is no explanation as to why he did not contact his Supervisor later in the day. This failing represents an error in judgment which occurred under very trying circumstances. It is not way can serve as the basis for the discharge of an 19.5 year employee with no prior discipline on his record. Discharge was clearly excessive. We find that at most, a five-day suspension was warranted to make it clear that Claimant should have contacted his Supervisor at some point during the day.

Accordingly, we will sustain the claim to the following extent. Claimant will be reinstated to service with seniority and other benefits unimpaired, his dismissal shall be reduced to a five-day suspension on his record, and he shall be compensated for all lost wages except for the five days that he would have been suspended had Carrier issued the appropriate discipline.

AWARD

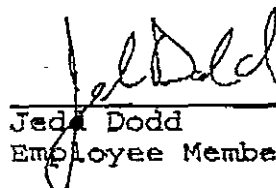
Claim sustained in accordance with the findings.

ORDER

The Board, having found that an award favorable to Claimant should be made, Carrier is ordered to make the award effective within thirty (30) days of the date two members of the Board affix their signatures hereto.


Martin H. Malin, Chairman


J.H. Burton,
Carrier Member


Jedd Dodd
Employee Member

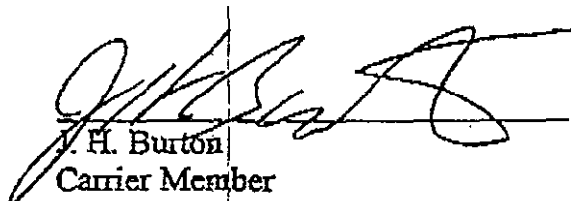
Dated at Chicago, Illinois, June 30, 1997.

7/15/97

CARRIER MEMBER'S DISSENT TO PLB 5938 AWARD NO. 2

The majority is correct in its statement that "This is a very difficult case with highly peculiar facts". However, the facts of this case do not lead to an exception to the Carrier's FHWA Random Drug Testing Policy. The Policy was required by the federal government to end drug use among transportation workers by providing a credible risk that such safety sensitive employees may be subject to a drug test at any time they are on duty, and that failure to submit to the test will have consequences as severe as a positive test result. Thus, the Policy has a very narrow exception for medical emergencies; only those that "require immediate hospitalization". The incident in this case did not meet the terms of that exception and this award cannot broaden the limited exception provided in the FHWA Regulation and the Carrier's Policy.

Furthermore, the Board's award of back pay is grossly improper as the employee should not be rewarded for his non-compliance with Carrier and federal requirements. For these reasons this award can only be limited to the unique facts of this case, and I DISSENT.



J. H. Burton
Carrier Member