

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6319

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BELT RAILWAY COMPANY OF CHICAGO

)
) Case No. 3
)
) Award No. 3
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
T. E. Coffey, Carrier Member

Hearing Date: November 29, 2000

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator R. Robinson for his alleged violation of Rules 1.6, 1.15 and 1(A) in connection with a vehicle incident on the Belt Railway Company of Chicago property on July 27, 1999 was without just and sufficient cause, unsupported and in violation of the Agreement (System File BRC-6560D).
2. As a consequence of the violation referred to in Part (1) above, Machine Operator R. Robinson shall now be reinstated to service with seniority and all other rights unimpaired, compensated for all lost wage loss suffered, and have his record cleared of this incident.

FINDINGS:

Public Law Board No. 6319, 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.

On July 27, 1999, Claimant was a passenger on a Carrier crew bus, when the bus backed up and struck a dumpster. Claimant returned to his machine and resumed working. About two hours later, Claimant and the other maintenance of way employees who had been on the bus were ordered to take a drug test. Two trainmen who were also on the bus were not ordered to be

tested. Claimant reported for the test as ordered, but left before being tested and without saying anything to supervision.

On July 28, 1999, Carrier notified Claimant that his employment was terminated, effective immediately. The letter terminating Claimant's employment was signed by the Engineer Track and B & B. Pursuant to the Agreement, Claimant requested a formal hearing. By letter dated August 3, 1999, Carrier scheduled the hearing for August 9, 1999. The letter charged Claimant with violating Rules 1.6, 1.15, and 1(A). The hearing was postponed to and held on August 26, 1999. The hearing officer was the Manager of Crew & Development. The first witness to testify against Claimant was the Engineer, Track and B & B. By letter dated August 30, 1999, signed by the Engineer Track and B & B, Carrier reaffirmed Claimant's dismissal.

The Organization contends that Claimant's due process rights were violated because the hearing officer had prior contact with a Carrier witness and because the Engineer Track and B & B made the decision to reaffirm Claimant's dismissal. The Organization further contends that Claimant was the victim of disparate treatment because the two trainmen were not tested, that Carrier lacked reasonable suspicion to test Claimant, and that Claimant left the testing location because of an emergency telephone call from his wife that Claimant reasonably believed presented a life-threatening situation.

Carrier contends that Claimant received a fair and impartial hearing, that if any defects occurred in the hearing they were cured by a fair and impartial appellate review, and that Carrier proved the charges by substantial evidence. Carrier observes that there is no dispute that Claimant left without being tested. Furthermore, in Carrier's view, Claimant presented no evidence to corroborate his story about the emergency telephone call. Carrier concludes that it proved the violations and that dismissal was the appropriate penalty.

The Board has reviewed the record carefully. We find it necessary to address only one of the Organization's arguments because that argument compels us to sustain the claim. Specifically, we hold that the Manager Track and B & B was too interested in the proceeding to be able to make a fair and impartial evaluation of the record when he reaffirmed Claimant's dismissal.

The record reveals that the Engineer Track and B & B was involved in the decision to order Claimant and the other maintenance of way employees to be drug tested. He was the Carrier official who terminated Claimant's employment when Claimant walked away from the drug testing location. He was the first and principal witness against Claimant. Under these circumstances, it is inconsistent with fundamental concepts of due process to allow this same Carrier official to find the facts and determine whether the dismissal should be overturned or affirmed.

On the specific record presented, we are not persuaded that such a fundamental due

process violation was cured by subsequent appellate review. It is true that there was no dispute over the fact that Claimant left the testing area before he was tested and without notifying supervision. What was at issue, however, was whether extenuating circumstances excused or mitigated the seriousness of Claimant's actions. Claimant testified that the day before the incident, his wife had experienced seizures. Claimant further testified that while waiting to be tested, he received a call from his wife on his cell phone. However, he was disconnected before he received all of the details and he was unable to reestablish the connection. Fearing for the worst, Claimant left the testing facility to check on his wife. It turned out that the call concerned his uncle, whose health had worsened. According to Claimant, his uncle passed way the following week.

A critical factual issue in evaluating the decision to dismiss Claimant was the credibility of Claimant's testimony as to the circumstances leading to his departure from the testing location. On the one hand, Claimant offered no evidence, such as cellular phone company records or hospital records, to corroborate his testimony. On the other hand, the evidence reflected that Claimant willingly reported to the drug testing facility and even volunteered to be the first person tested. He was not the first person tested and, he maintained, he received the telephone call while he was awaiting his turn.

Under these circumstances, Claimant was denied a fair and impartial investigation when the same Carrier official who dismissed Claimant and testified against him evaluated the credibility of Claimant's explanation. Moreover, although Claimant received a fair and impartial appellate review of the decision, such review cannot substitute for a fair and impartial initial decision. In this case, Claimant's credibility was a critical issue, and credibility determinations are made at the trial level and generally deferred to at subsequent levels of appeal.

We recognize that Carrier has only a small number of managers. However, there is no explanation in the record as to why the Manager of Crew Development & Performance, who served as the hearing officer, did not find the facts and make the determination to uphold or overturn Claimant's dismissal. Even if the Manager of Crew Development & Performance was not available, there is no explanation as to why another manager from another department was not called in to review the record and make the critical factual findings.

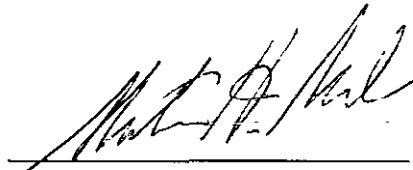

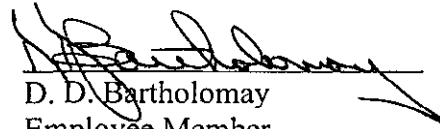
Accordingly, because Claimant was denied a fair and impartial investigation, the claim must be sustained.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman
T. E. Coffey
Carrier Member
D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, December 23, 2000.

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CARRIER MEMBER'S DISSENT

The Carrier must take formal exception to this award.

In sustaining this claim, Referee Malin has allowed a minor procedural error to take precedence over clear and substantial evidence of a claimant's culpability. The Claimant herein departed Carrier property without permission while awaiting a drug and alcohol test and presented no justification for doing so. Referee Malin has failed, in my opinion, to look at the totality of circumstances in determining whether the Claimant's treatment herein, taken as a whole, was fair and impartial.

Moreover, in addition to reinstatement, Referee Malin has awarded back pay to a Claimant who was clearly trying to avoid being tested. This is unwarranted, especially given the gravity of the Claimant's offense. I am concerned that this award may send the wrong message to railroad employees that drug and alcohol test avoidance may be a chance worth taking.

I respectfully dissent.


Timothy E. Coffey
Carrier Member