

BEFORE PUBLIC LAW BOARD NO. 7051

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
DETROIT, TOLEDO, AND IRONTON RAILROAD COMPANY**

Case No. 1

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

- (1) The dismissal of Mr. D. Thomas on December 18, 2003 for alleged violation of the Leniency Reinstatement Agreement signed on April 28, 2003 in connection with alleged refusal to submit to an unscheduled body fluids and breath testing on December 16, 2003 was arbitrary, capricious and in violation of the Agreement (System File DTI-134-104-001/8365-825-DTS).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. Thomas shall now be ' . . . reinstated to service with all seniority, vacation qualifying days and medical benefits fully reinstated beginning December 18, 2003 and continuing until Claimant Thomas has been reinstated. We further request that Claimant Thomas be compensated for any and all monetary loss he has suffered as a result of Carrier's actions commencing December 18, 2003 and continuing until such time as Claimant Thomas has been reinstated to his former position."

FINDINGS:

By letter dated December 18, 2003, the Claimant was informed that he was returned to dismissed status for failing to comply with the terms and conditions of his Leniency Reinstatement Agreement when he refused to submit to unscheduled bodily fluid and breath tests on December 16, 2003. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to dismiss the Claimant from service. The Carrier denied the claim.

The Carrier initially contends that there is no dispute that the Claimant voluntarily signed the Leniency Reinstatement Agreement as a waiver to a pending investigation, thereby voluntarily relinquishing his rights to an investigation and/or further appeal. The

Carrier asserts that this waiver also bars further appeal, including the instant appeal to this Board, of the Company's imposition of the self-executing provisions.

The Carrier argues that the Organization's case essentially is a request for leniency. The Carrier maintains that because the Board has no power to grant a leniency request that the Carrier has denied, the instant claim should be dismissed without further consideration.

The Carrier emphasizes that this case does not involve discipline, but rather the return of an employee to dismissed status under the terms of a Leniency Reinstatement Agreement. The Carrier points out that in such cases, the burden of proof is on the Organization, which must provide probative evidence to support the validity of its claim that the Carrier violated the Leniency Reinstatement Agreement.

The Carrier argues that the Organization has failed to provide the evidence necessary to support its case here. Essentially, the Organization has done nothing more than request another leniency reinstatement by alleging that the Carrier somehow violated the first Leniency Reinstatement Agreement and certain article of the parties' Working Agreement. The Carrier insists that the Organization has not shown how the Carrier violated either of these Agreements.

Addressing the Organization's allegation that the Carrier removed the Claimant from service without benefit of any due process, in violation of the Working Agreement, the Carrier maintains that there has been no substantive showing that the Claimant was entitled to an investigation or further appeal under the specific terms of his Leniency Reinstatement Agreement. The Carrier contends that the terms and conditions of the

Leniency Reinstatement Agreement are clear, unambiguous, and were agreed to in order to address the behavior of an employee who admittedly tested positive for an illicit prohibited drug in clear violation of Carrier rules. The Carrier emphasizes that the Organization has been unable to show that the Leniency Reinstatement Agreement provides for an additional investigation or appeal if the Claimant fails to comply with its terms, because the Agreement does not so provide.

As for the Organization's argument that the Carrier failed to consider the alleged immediate medical emergency faced by the Claimant, the Carrier asserts that the Organization has not shown any language documenting that the Carrier agreed to consider extenuating circumstances before it imposed the self-executing consequence set forth within the Leniency Reinstatement Agreement. Under the specific terms of the Leniency Reinstatement Agreement, the Claimant was to submit to testing "whenever required," and the record is equally undisputed that before the Claimant left the property, he was advised the he must take the tests or face disciplinary consequences for refusing.

The Carrier maintains that even if it were required to consider the alleged immediate medical emergency, which it was not, and even if there were any merit to the Claimant's self-serving written statement, which there is not, there obviously was no medical emergency that justified the Claimant's abruptly leaving without taking a "couple of minutes" to comply with the Leniency Reinstatement Agreement. The Carrier insists that it is clear from the statements of the Claimant, his father, and Supervisor Gasiecki that no emergency service or medical service was required by or given to the Claimant's father on the date in question. Moreover, the record demonstrates that the

Claimant did not immediately leave Carrier's property when first contacted about his father's situation. The Carrier points out that it was only after the Claimant was aware that he was to take unscheduled urine and breath tests that he found it necessary to immediately leave.

The Carrier goes on to maintain that on the following day, the Claimant was unable to provide any reason why he failed to answer Gasiecki's phone calls on December 16th. Moreover, when Gasiecki instructed the Claimant to provide records to validate the alleged emergency to potentially save his job, the Claimant failed to do so. The Carrier emphasizes that the Claimant never has provided any of those vital telephone records showing the date and time of his father's call. The Carrier argues that the Claimant's inaction renders his version of events self-serving and not credible, especially in light of the extraordinary and numerous opportunities extended to the Claimant to provide such information.

The Carrier asserts that the evidence demonstrates a clear, impermissible, non-compliant attempt by the Claimant to avoid being tested when unexpectedly confronted to do so. The consequence of such conduct is clear, unambiguous, and self-imposed. The Carrier contends that the Claimant, at his own peril, failed to fulfill his responsibility to protect his job. The Carrier argues that the Claimant alone enacted the self-executing provision of the Leniency Reinstatement Agreement that returned him to dismissed status without right of an investigation or appeal.

The Carrier maintains that the Organization cannot show that the Leniency Reinstatement Agreement provides for an investigation, appeal, or extenuating

circumstances in the event of a failure to comply with its terms. The Claimant failed to comply with the Leniency Reinstatement Agreement, so he properly was returned to dismissed status. The Carrier therefore argues that the instant claim must be denied.

The Carrier points out that under the Leniency Reinstatement Agreement, the Claimant enjoyed the substantial and immediate benefit of both retaining his employment and the Carrier's assistance in controlling his substance abuse problem. The Carrier emphasizes that in return, the Leniency Reinstatement Agreement placed very specific terms and obligations upon the Claimant in order to continue his employment, including the obligation to submit to unscheduled body fluid and breath testing, and the understanding that failure to comply with the Leniency Reinstatement Agreement would result in the Claimant's immediate return to dismissed status, without benefit of an investigation or an appeal. The Carrier insists that the Claimant himself triggered the self-executing provision that resulted in the Claimant's return to dismissed status.

The Carrier maintains that on the date in question, the tester advised the Claimant that the test would take only a couple of minutes, and that if the Claimant left, it would be considered a refused test. The Carrier emphasizes that the Claimant responded by stating that he was "tired of this shit," and then leaving. The Carrier argues that the Claimant clearly and admittedly failed to submit to unscheduled testing whenever required, as mandated by the Leniency Reinstatement Agreement. The Carrier further asserts that there is no legitimate reason for the Carrier to prevent the self-executing consequence imposed by the Leniency Reinstatement Agreement, and the instant claim therefore must be denied.

The Carrier additionally argues that even if the Organization had established the merits of the claim, which it has not, the Organization has failed to support the monetary claim. The Carrier asserts that there is nothing to indicate that the Claimant would have passed the tests had he stayed to take them, and the Claimant's failure to provide documentation to support his version of events casts considerable doubt. The Carrier maintains that the instant claim should be dismissed or denied in its entirety, but if the Board should reinstate the Claimant, this should be without back pay or other compensation.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier made absolutely no attempt whatsoever to conduct any type of inquiry or investigation into the issue in dispute. Instead, the Carrier chose to impose the ultimate penalty of permanent dismissal on the basis of the Claimant's alleged and unproven violation of the self-executing provisions of the Leniency Reinstatement Agreement. The Organization asserts that for this reason alone, the instant claim should be sustained in full.

The Organization argues that the CFR provisions that govern random alcohol and drug testing programs include an exception that excuses compliance with such testing in the case of a documented medical or family emergency. The Organization maintains that the record confirms that the Claimant experienced a documented family medical emergency on the date in question. The Organization emphasizes that the Claimant advised Foreman Decant of the emergency and obtained authority to leave the property to

attend to the situation. The Organization asserts that when the Claimant was informed of the random follow-up drug test, he explained the family medical emergency to the tester and left the property to attend to his ailing father. The Organization maintains that because of the Claimant's documented family medical emergency, he temporarily was exempted from complying with the Carrier's mandate to submit to a random follow-up drug test on December 16, 2003.

The Organization goes on to assert that the Carrier failed to produce any probative evidence to support its affirmative defense that the tester had advised the Claimant that the test would take only a couple of minutes, and that it would be considered a refusal to be tested if the Claimant left. The Organization suggests that it would have been a very simple matter for the Carrier to obtain a statement from the tester to support its contention, but it failed to do so. The Organization argues that this contention therefore is mere hearsay and unworthy of further consideration.

The Organization points to the fact that the Carrier took no exception to the Claimant's justifiable decision to leave the property on December 16, 2003. The Claimant obtained authorization from Foreman Decant to leave the property in order to assist his ailing father. The Organization insists that the record reveals that at no time did the Claimant "refuse" to submit to the disputed testing on December 16, 2003, and the Claimant voluntarily offered to submit to a follow-up drug test less than twenty-four hours following his alleged "refusal" to submit to such testing on the previous day. The Carrier declined the Claimant's good-faith offer.

The Organization goes on to assert that rather than conduct any type of inquiry or

investigation as required by the Agreement, the Carrier simply chose to impose the supreme penalty of permanent dismissal on the basis of the Claimant's alleged "refusal" and the unjust application of the self-executing provisions of the Leniency Reinstatement Agreement.

The Organization then asserts that it is puzzled by the Carrier's contention that the Claimant failed in some way to document the "alleged" family emergency situation. The Organization cites the Claimant's handwritten statement describing the events of December 16, 2003; the handwritten statement from the Claimant's father confirming his emergency situation on December 16, 2003; and a typewritten letter signed by the physician treating the Claimant's father that related his medical condition and the related "flare-up" that occurred on December 16, 2003. The allegation that the Claimant did not provide documentation clearly is inaccurate.

The Organization then challenges the Carrier's attempt to confuse the issue by questioning the sequence of events. The Organization emphasizes that the Claimant learned of his father's emergency situation and obtained permission from Foreman Decant to leave the property in order to attend to his father before he was informed that he was scheduled for a random follow-up drug test.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that there is sufficient

evidence in the record to support the finding that the Claimant was guilty of violating the Leniency Agreement that he had signed when he was previously discharged for testing positive for an illicit substance (cocaine) in his bodily fluids. After the Claimant signed the Leniency Agreement allowing him to come back to work, he was ordered to take an unscheduled bodily fluid and breath test. He was told that the test would only take a few minutes. Despite the orders, the Claimant left the premises and refused to take the test. Although the Claimant stated that his father had a medical emergency and he had to leave, the record reveals that he told the tester that “he was tired of this shit and had to leave.”

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier’s imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant had previously signed a Leniency Reinstatement Agreement which was self-executing if the Claimant failed to live-up to the requirements of the agreement. The Claimant had previously been discharged and knew he would go back to a discharge status if he failed to comply with the requirements of the agreement, one of which was to take an unscheduled test. The Claimant admittedly did not take the unscheduled test on the date in question and, therefore, we find that the Carrier properly removed the Claimant from service. The Carrier’s action was not unreasonable, arbitrary, or capricious.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept. 5, 2008



CARRIER MEMBER

DATED: Sept 5, 2008