

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 8, (Case No. 9)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline (dismissal) imposed upon Mr. Dilts on May 12, 2009 for alleged violation of Company Policy 1819 - Troubled Employee Personal Program Agreement dated June 23, 2008 and of GCOR Rule 1.5 effective April 3, 2005, upon results of his follow up testing on April 6, 2009 was arbitrary, capricious, excessive and in violation of the Agreement (Carrier's File 8-00668).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Dilts shall now be reinstated to service with all rights unimpaired and made whole for all time lost beginning July 21, 2009 until reinstated."

FINDINGS:

Public Law Board No. 7357, 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 dispute were given due notice of the hearing thereon and did participate therein.

On April 15, 2009, the Carrier notified Claimant to appear for a formal Investigation on April 21, 2009, concerning in pertinent part the following charge:

"...The purpose of this Investigation will be to determine your responsibility, if any, for your alleged violation of Company Policy 1810 - Troubled Employees,

Personal Program Agreement dated June 23, 2008 and of GCOR Rule 1.5 effective April 3, 2005, upon results of your follow up testing April 6, 2009."

On May 12, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed from service.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because the Hearing Officer did not render the decision and the Charging Officer did render the decision. It argued that on that basis alone the Board should sustain the claim without even addressing the merits.

On the merits the Organization argued that although the Claimant tested positive for an illegal drug all the Carrier should have done in the instant case was offer the Claimant a Waiver Agreement and allowed him to enroll in Employee Assistance Program (EAP) under the terms and conditions of that Agreement and imposed demerits (if appropriate) for violation of the Troubled Employee Policy. According to it, that in as much as Company Policy 1810 - Troubled Employee, Personal Program is a separate and distinct program from the Drug and Alcohol Policy Violation Waiver Program within the EAP, nothing prevented the Carrier from allowing the Claimant to enter into a waiver agreement and afford him the counseling he needed. Additionally, it argued that the Carrier violated the EAP rules when it changed Claimant's counselor without a forewarning. It closed by asking that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that the evidence substantiates that Claimant was afforded all of his contractual rights and "due process". It argued that Claimant contacted the EAP in May of 2008 seeking help. He enrolled into the EAP and successfully completed the program and signed the Personal Program Agreement stating that, he would not use any illegal drugs, unauthorized drugs or alcohol and maintain a healthy lifestyle. Claimant was returned to work and placed into a follow-up program, recommended by the EAP.

Carrier further argued that the Claimant was working as a Trackman on April 6, 2009, and was subject to a follow up drug test. He was tested on that date and was found positive for cocaine and account of testing positive for an illegal drug, the Carrier held a formal Investigation after which it dismissed the Claimant. It concluded that dismissal was proper and requested that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Organization's allegation that Claimant was denied "due process" is found lacking substance in this instance. The Organization also objected to the Carrier's handling of this matter because it failed to notify the Claimant that his EAP Counselor was changed from M.

Hornya to M. Weiss. That argument has no value because the facts reveal that M. Hornya left the Carrier's employment and because of that the Claimant's case was reassigned to M. Weiss with no change to its policy. The case will be resolved on its merits.

There is no dispute between the parties that the Claimant tested positive for an illegal drug on April 6, 2009, while on duty and subject to a follow up drug test. It is the Carrier's position that Claimant's failure to remain drug free after being afforded help through the EAP correctly resulted in his dismissal while the Organization contends that he should have been offered a waiver agreement.

The Organization's argument is essentially one of equity, as it suggested that the Claimant was more severely punished for voluntarily seeking help than an employee who hides his problem and seeks help only after it is discovered. It reasoned, that on its face, that action by the Carrier screams of disparate treatment and discourages employees from using the voluntary program. On the other hand the Carrier stated that it did not matter whether you entered the program voluntarily or were required to because if you failed in either instance you were subject to dismissal.

The resolution of this dispute will not be based upon the parties conflicting theories as to whether or not an employee who voluntarily entered into the Troubled Employee, Personal Program and subsequently tested positive for illegal drugs was then entitled to enter into the Drug and Alcohol Policy Violation Waiver Program. That discussion is for another day as this case will be resolved on the basis of the on-property arguments. During the appeal process the Organization argued on the property in its letter of June 19, 2009, that the Claimant was subjected to disparate treatment. It specifically stated in pertinent part the following:

"...The Organization does not condone any intentional actions or behavior that would result in a true positive result in a drug screen; however, the Organization also understands that people make errors and deserve second chances.

Mr. Dilts in the instant dispute was not offered a second chance as other employees who have tested positive before him have been given through a Drug and Alcohol Waiver, formerly known as a Rule G Waiver. (Underlining Board's emphasis)

Furthermore, Mr. Dilts was not on a Drug and Alcohol Waiver (Former Rule G Waiver) when he tested positive on a follow up test under his EAP Personal Program and therefore should not have been treated as if he was on a Drug and Alcohol Waiver (Dismissed on a 2nd Positive Test Result under the provisions of a Drug and Alcohol Waiver)...."

The Organization went on to state:

"...Employees who do not seek the assistance from the EAP until after a first time positive drug screen get more opportunities than employees who voluntarily contact the EAP for assistance...."

The Carrier responded to the Organization's allegation as follows:

"...The discipline imposed on Mr. Dilts was fair and reasonable. He was clearly responsible for violating his personal program agreement. It is very clear that Mr. Dilts agreed not to use any illegal drugs, per his June 23, 2008 signed agreement, he violated this agreement when he tested positive on April 6, 2009...."

The Carrier's answer to the Organization's assertion was unresponsive and there is nothing in the record during the handling of the case on the property that refutes the Organization's position that the Claimant was treated differently than other employees or disparately, thus, on the same basis as Award No. 7 of this Board the Organization's unchallenged position is accepted as being factually correct in this instance and this instance only.

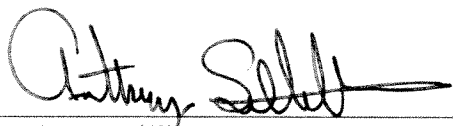
Therefore, the Board finds and holds that the discipline was excessive and it is reduced from a dismissal to a lengthy suspension with no back pay, but seniority rights intact and benefits unimpaired. However, before the Claimant is reinstated he must be approved for service by the EAP. If not initially approved he will be required to enter the Carrier's Drug and Alcohol Policy Violation Waiver Program and will not return to service until authorized by the EAP after which he will be subject to its follow-up program and rules.

AWARD

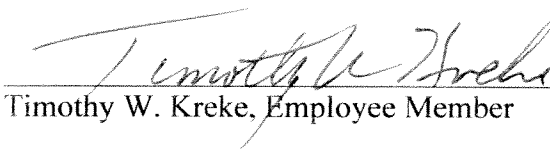
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



Anthony Stillitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010