

BEFORE PUBLIC LAW BOARD 7115

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL NO. 2052**

and

**CANADIAN NATIONAL RAILWAY COMPANY/
PITTSBURGH & CONNEAUT DOCK COMPANY**

Case No. 2

STATEMENT OF CLAIM:

Appeal of Mr. Dave W. Fausnaught that the discipline of dismissal assessed by letter dated July 31, 2007, be rescinded, and that Mr. Fausnaught be returned to service with pay and all rights of employment restored. This appeal is supported by Section VIII C. of the parties' Agreement.

FINDINGS:

On May 31, 2007, the Claimant was directed to undergo follow-up drug and alcohol testing pursuant to the Claimant's conditional continued employment agreement dated July 29, 2005. The results of the test were positive for the presence of alcohol. By letter dated June 1, 2007, the Claimant was informed that as a result of the positive finding of alcohol in his system, and his non-compliance with the conditional return-to-work agreement that he had signed in 2005, the Claimant was being discharged from his employment with the Carrier. On June 5, 2007, the Organization requested a disciplinary hearing on the Claimant's behalf. After several postponements, the disciplinary hearing was conducted on July 7, 2007. By letter dated July 31, 2007, the Claimant was informed that as a result of the hearing, he was being dismissed from the Carrier service. The Organization thereafter filed an appeal of the Carrier's decision to discharge the

Claimant. The Carrier denied the appeal.

The Carrier initially contends that the Claimant is guilty of violating the Carrier's rules and policies relating to drugs and alcohol, as well as the July 29, 2005, Agreement to Undergo Toxicological Testing, when he twice tested positive for alcohol while on duty on May 31, 2007. The Carrier asserts that despite all of the irrelevant and erroneous material that the Organization submitted on the validity of breath analysis, the evidence adduced at the hearing proves that the Claimant did have measurable amounts of alcohol in his system while on duty. The Claimant was proven guilty of violating the cited rules and policies, in addition to his own agreement to remain substance free.

The Carrier argues that there is no merit to any of the Organization's procedural objections, which were intended to obfuscate the facts. The Carrier maintains that the Organization was timely provided with a complete copy of the hearing transcript. The Carrier points out that a copy of the transcript is provided to the Organization only as a courtesy, and there is no requirement in the parties' Agreement that one be provided to the Organization. The Carrier further emphasizes that the breath collection test was performed in accordance with 49 CFR Part 40.

The Carrier additionally argues that there is no evidence in the record to support the Organization's claim that the Claimant had ingested an amount of gasoline prior to the test, or that the presence of gasoline would have affected the result of his breath test. As for the Organization's emphasis on the fact that the Claimant did not appear to be under the influence of alcohol at the time of the test, the Carrier points out that the Claimant was not tested based on "reasonable cause" or for any "suspected" drug or

alcohol use. The Carrier contends that the Claimant was tested as a follow-up to his 2005 conditional employment agreement, and the test was administered accurately and in compliance with the applicable federal regulations.

The Carrier goes on to point out that the Claimant's employment was terminated in connection with his first alcohol violation in 2005, but the termination was converted to a ninety-day suspension when he signed a conditional employment agreement whereby he agreed that any further violation of the Carrier's drug and alcohol policy, or a positive result on any future alcohol or drug test, would be cause for discharge. The Claimant clearly knew and understood that because of his 2005 alcohol violation, his continued employment was conditional upon his ability to abstain from drug or alcohol use while subject to duty. The Claimant knew that he would be subject to discipline should he test positive for alcohol or drugs in the future.

The Carrier insists that the great preponderance of awards dealing with dismissal after a proven second alcohol violation, and violation of a conditional reinstatement agreement, have refused to overturn the level of discipline imposed, unless the Board finds that the assessment of discipline was arbitrary, capricious, or excessive. The Carrier further argues that its policy is to dismiss an employee found guilty of a second alcohol violation.

The Carrier maintains that railroading is an inherently dangerous profession. The Carrier's strict rules and policies governing drug and alcohol use are designed to protect its employees, equipment, and customers goods, as well as the safety of the general public. The Carrier argues that it is obligated to remove from its service those individuals

who endanger their own and others' lives by reporting for duty under the influence of alcohol, in violation of federal regulations and Carrier rules and policies. The Carrier asserts that this Board should uphold the Carrier's rules on mandatory discharge of employees found guilty of a second alcohol violation.

The Carrier then argues that the Organization's requested remedy is excessive. The Carrier points out that there is no basis for providing an employee with a windfall of money on top of his or her normal earnings. The Carrier maintains that it may deduct any outside earnings and unemployment benefits that an employee actually received or was qualified to receive, and it may calculate time lost based on the employee's attendance record.

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

The Organization initially contends that the Carrier has committed egregious procedural errors during the handling of this matter. The Organization asserts that there is no dispute that the Carrier made its decision to dismiss the Claimant nine days before the hearing transcript even had been prepared. The Organization argues that it is fundamental that the deciding officer, who is not the hearing officer, must consider the evidentiary record before deciding a charged employee's guilt. The Organization maintains that without the evidentiary record, it is plainly impossible to make a record-based decision. The Agreement requires that a hearing be held in order to collect evidence. The Organization insists that the entire disciplinary process is undermined when disciplinary decisions are made without consideration of the evidence, and

numerous Board Awards have held that the record must be considered before a disciplinary decision is reached.

The Organization then emphasizes that a second denial of due process occurred in this case when the Carrier failed to provide the transcript in time for the Claimant to fashion his appeal. The Organization contends that any reasonable evaluation of due process rights will contradict the Carrier's statement that the transcript is not required and is provided only as a "courtesy." The Organization maintains that it is unimaginable that a proper appeal of capital discipline can be fashioned, especially in a case as complex and technical as the instant matter, without benefit of the record. The Organization asserts that the fact that no transcript was prepared to facilitate the appeal, and the fact that no transcript existed upon which to base the disciplinary decision, are both compelling evidence of pre-judgment.

The Organization insists that the practice on this property always has been that transcripts were provided to employees and/or their representatives in a timely fashion to facilitate appeals. This long-standing practice is binding and may be changed only through negotiations. The absence of a timely transcript, as well as the repeated references in the transcript to the reinstatement agreement and the pronouncements therein that the Claimant was guilty of a positive breath-alcohol test, all show that the Claimant was pre-judged in this case. The Organization contends that because of these procedural flaws, the instant claim should be sustained without regard for the merits of the matter.

The Organization goes on to argue that even if the Board does consider the merits,

the claim should be sustained. The Organization contends that the Claimant failed to meet its burden of proof in this matter. The Organization asserts that the testing in this case clearly did not conform to the governing federal regulations. The Organization points to such violations as the fact that the technician did not keep the Claimant on site and did not directly observe the Claimant during the period between the tests. Moreover, the technician himself did not remain on the premises between tests, and the technician also failed to properly complete the forms pertaining to the testing protocol. Pointing to Board Awards that have refused to uphold discipline based upon drug/alcohol testing that did not conform to applicable regulations, policies, or protocols, the Organization maintains that because the testing did not conform to the regulations, it did not satisfy the Carrier's policy and the results must be disregarded.

The Organization further asserts that the evidence in the record is clearly and convincingly exculpatory. The Organization insists that the only evidence produced by the Carrier was the reading generated by the test machinery, but the record does not support a finding that this reading was true and correct. Moreover, the testing machine in question had needed repair on two occasions, and such a machine is not considered accurate enough for use by law enforcement in the State of Ohio.

The Organization insists that the expert testimony dispels the notion that the Claimant had consumed alcohol, and the testimony of Carrier Officer Rogers about his own independent observations does not indicate that the Claimant used alcohol. Rogers testified that there was no odor of alcohol on the Claimant's breath, no slurring of speech or incoherence, no redness of the eyes – in short, none of the observable indicia of

alcohol use or impairment. The Organization then points to the Claimant's testimony that he had not consumed any alcoholic beverages. The Organization emphasizes that the Claimant knew he was subject to unannounced testing, and he had been tested at least sixteen previous times in the nearly two years that his reinstatement agreement had been in effect. Moreover, when summoned for the testing at issue, the Claimant did not demonstrate any concern with this particular test.

The Organization maintains that the test result, by itself, cannot be deemed as constituting substantial evidence to support the Claimant's discharge because of the violation of proper testing protocols, the failure to comply with the Carrier's published policy, and the lack of any supporting physical evidence or indicia of alcohol consumption. 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 procedural arguments raised by the Organization, and we find that several of those procedural issues have substantial merit. First of all, it is evident from the record that the Carrier made its decision to dismiss the Claimant nine days before the transcript of the hearing had ever been prepared and delivered to the Carrier. The officer who made the decision to terminate the Claimant was not the hearing officer, and the deciding officer is required to consider the evidence derived from the hearing before deciding whether or not an employee is guilty. The record reveals that the Claimant received a letter from Bulk Material Service Director Mike Suter, informing

him that Suter had decided to dismiss the Claimant. The Carrier did not receive the transcript from the Claimant's hearing until August 8, 2007. Consequently, it is obvious that Mr. Suter could not have relied on the hearing transcript and the evidence contained therein in making his decision.

In First Division Award No. 25933, the Board held that:

The rendering of a decision without the advantage of the Transcript constitutes prejudgment and failure to provide a fair and impartial investigation. The principle is particularly applicable when the Hearing Officer does not render the decision. Where, as in this case, the discipline was assessed by the Superintendent, the Transcript of the Investigation obviously becomes critical in determining whether discipline was warranted. The Superintendent did not hear and observe the witnesses as they testified, and, thus, a proper decision would have to be predicated on review of the Hearing Transcript.

It also appears that the Carrier failed to provide a transcript to the Organization in time for the Claimant to fashion his appeal of the disciplinary decision. The Organization has argued, without rebuttal from the Carrier, that the practice on the property has been that the transcripts were to be provided to the Organization in a timely fashion to facilitate their appeals. That did not occur in this case.

Consequently, this Board must find that the Claimant was not given his full due process rights throughout the hearing and investigation stage of this proceeding. Those procedural rights are important and would justify the overturning of this finding.

It is important to note, however, that this Board has many questions with respect to whether or not the Carrier has actually met its burden of proof in this case. Moreover, there is some evidence that the machine that was used to test the Claimant had twice

needed repair and may not have been accurate. There was no observational evidence of the Claimant being under the influence of alcohol on the day in question, and the Claimant testified that he did not consume any alcoholic beverages.

Since this Claimant had been tested sixteen previous times in the two years subsequent to his reinstatement agreement in 2005, although that is not dispositive of this case, it must be taken into consideration when making an evaluation as to whether or not it was likely that the Claimant was under the influence of alcohol on the date in question.

To sum up, the procedural inadequacies set forth in this lengthy transcript are so overwhelming that this case must be sustained. The Claimant shall be reinstated to service with back pay, with the caveat that any back pay that he receives be reduced by the amount of any interim earnings since he was terminated. Moreover, the Claimant will be returned to the status that he was in before where he can be regularly tested for alcohol on a random basis because of his prior finding of guilt in his earlier termination and reinstatement.

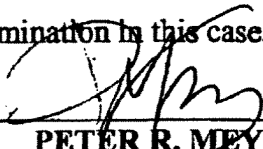
AWARD:

The claim is sustained in part. The Claimant shall be reinstated to service with back pay, but his back pay shall be reduced by the amount of any interim earnings that he received since his termination. Moreover, the Claimant shall be returned to his status as a prior offender of the Carrier's drug and alcohol rules and he shall be subject to random

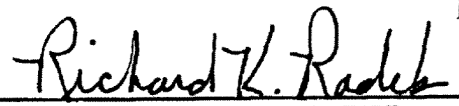
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testing as he was before his termination in this case.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 12/15/08



CARRIER MEMBER

DATED: 12/15/08