

SPECIAL BOARD OF ADJUSTMENT  
PUBLIC LAW BOARD NO. 3729

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CONSOLIDATED RAIL CORPORATION	*	
"CARRIER"	*	
	*	CASE NO. 16
-and-	*	
	*	AWARD NO. 14
BROTHERHOOD OF MAINTENANCE OF	*	
WAY EMPLOYEES	*	
"ORGANIZATION"	*	
	*	
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STATEMENT OF CLAIM

Claim of the Brotherhood (CR-1699-D) that:

- (a) The dismissal of Plumber R.H. Broking was without just and sufficient cause in a capricious and arbitrary manner.
- (b) The dismissal of Claimant R.H. Broking was in violation of Rule 27 of the current Scheduled Agreement.
- (c) The Claimant should be exonerated of all charges and compensated for all lost wages, including overtime, and returned to service without loss of seniority, vacation rights, and all the privileges and benefits he enjoyed prior to being placed out of service on or about January 25, 1982.

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This claim arose when the Carrier charged R.H. Broking, hereinafter the Claimant, with being under the influence of alcohol.

The specific charge, contained in an undated notice, was as follows:

On Monday, Jan. 25, 1982 you were observed acting in a strange and improper manner while in the office of Supv. of Structures of Hoboken, N.J. As a result of your actions, you were requested to submit to a blood test by Company Physician, Dr. D'Agostino, which you agreed to.

In connection with this matter you are charged with the alleged violation of Rules B and G, Rules of the Transportation Department.

Rule B and G state as follows:

Rule B: Employees must be familiar with and obey all rules and special instructions. They must follow instructions from proper authorities and must perform all duties efficiently and safely.

Rule G: The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.

The hearing was held on August 19, 1985. The Claimant was present and represented by the Organization. By notice dated August 22, 1985, the Carrier notified the Claimant that he had been found guilty of the charge and assessed discipline of discharge. The above-quoted claim was then filed on behalf of the Claimant.

This Board heard oral argument concerning the claim on February 13, 1986. The Claimant was notified of the Board meeting by certified mail, but did not attend.

The Claimant was a plumber with one year service at the time of the incident giving rise to his discharge. On January 25, 1982, he was allegedly observed at work acting in a strange and improper manner. The Carrier asked the Claimant to take a blood test to

check for intoxication and he complied. One test report apparently stated that the Claimant had alcohol in his blood at a low level (0.082 percent) that could be indicative of alcohol intoxication within the law.

The Claimant was taken out of service in connection with this incident, without any written notification, on January 26, 1982. He was returned to service on January 28 or 29, 1982. Shortly thereafter, the Claimant was again taken out of service, allegedly because of the visual disorder of amblyopia, which was diagnosed while the Claimant was at the doctor's office for the blood test on January 25. The hearing concerning this claim was originally scheduled for February 8, 1982, but was held in abeyance pending a determination of the Claimant's medical disqualification.

By letter dated March 1, 1985, a doctor authorized the Claimant to return to work, effective January 29, 1985. The hearing was then rescheduled concerning this claim. After several further postponements, it took place on August 19, 1985.

#### POSITIONS OF THE PARTIES

The Carrier maintains that there is substantial evidence in the record, including the Claimant's own testimony, to support a finding that the Claimant was under the influence of alcohol when he reported to work on January 25, 1982. Terminating the Claimant for this violation of Rule G was appropriate and not arbitrary. Furthermore, the Claimant received a fair hearing and the failure to provide him with written notification that he was being held out of service was in no way prejudicial. Finally, should the claim be sustained, there can be no Carrier liability prior to January, 29, 1985, as before then the Claimant was not medically authorized

The Organization contends that the evidence relied upon by the Carrier does not establish the Claimant's guilt. The blood test was not authenticated and at most establishes that the Claimant had such a low level of alcohol in his blood that he would not be considered intoxicated by the laws of virtually every state. Moreover, the Carrier committed numerous violations of Rule 27, including failing to provide the Claimant with written notification that he was being held out of service and the reasons therefore, as well as holding the hearing years after the alleged incident. The Claimant's remedy should include back pay from January 25, 1982, as the Grievant was really held out of service during that entire time because of this incident, rather than for any medical problems.

OPINION OF THE BOARD

The claim shall be sustained. As argued by the Organization on the property, the Carrier did not comply with the procedural requirements of Rule 27. Most importantly, the Claimant was not given written confirmation that he was being held out of service or the reasons for the action. Furthermore, the Carrier unilaterally, without advance notification to the Claimant or Organization, postponed the hearing concerning this claim on approximately four occasions, which resulted in substantial delay before it was finally held. The Carrier's actions have resulted in confusion concerning the Claimant's status and the true reason he was held out of service. In these circumstances, the claim must be sustained without consideration of the merits.

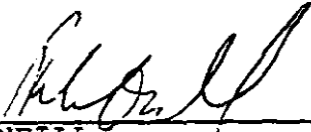
The Claimant's remedy of back pay and benefits shall be

limited to the period from January 29, 1985, the date upon which it has been determined that he was physically able to return to full duty. The evidence establishes that the Claimant was independently removed from service for medical reasons after January 25, 1982, the date of the incident giving rise to this claim. The evidence does not support a finding that the medical removal was deliberately fictitious. Accordingly, this Board must find that the Claimant was not medically authorized to perform work prior to January 29, 1985. Any contention that the medical removal was improper is not properly part of the claim now before this Board.

AWARD

Claim sustained. As a remedy, the Carrier shall reinstate the Claimant and pay him all lost wages and benefits resulting from his improper termination. Such payments, if any, shall cover the period beginning January 29, 1985 and be made consistent with the provisions of Rule 27, Section 4 of the applicable Schedule Agreement between the parties. The Carrier shall pay money owed within 30 days of the date of this Award.

  
S.E. BUCHHEIT  
Neutral Member

  
R. O'NEILL  
Carrier Member

  
J.P. CASSESE  
Organization Member