PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES "Organization"	:	Case No. 1
vs.	:	Award No. 1
CONSOLIDATED RAIL CORPORATION "Carrier"	:	

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWE that:

(1) The dismissal of Mr. G. Little for alleged "...failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 09, 1987, from Medical Director G. R. Gebus, in that you did not, within 45 days of that letter, either provide a negative drug screening or enter Conrail's Employee Assistance Program" was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3155D).

(2) As a consequence of the violations referred to in Part (1) above, the Claimant shall be reinstated with seniority and all other rights including overtime and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be paid for all wage loss suffered.

OPINION OF THE BOARD

Claimant, G. Little, was a Trackman. As is typical with many employees who occupy like positions, Claimant was essentially a seasonal employee who would normally be furloughed for the winter until the following spring.

Claimant was recalled to duty for the 1987 production season

and, as part of his return to duty physical conducted on April 3, 1987, was required to submit a urine sample. Carrier was subsequently notified by Roche Biomedical Laboratories, the company that performs all of Carrier's drug screen urinalysis work, that Claimant's specimen allegedly tested positive for cannabinoids.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 9, 1987 from Carrier's Medical Director. Claimant was instructed therein to rid his system of cannabinoids and other prohibited drugs and to provide a negative urine sample within 45 days, which was by May 24, 1987, and that his failure to comply with these instructions may subject him to dismissal. In addition, the Medical Director recommended in this letter that Claimant contact Carrier's employee counselor and follow any recommendations that the counselor might make on Claimant's behalf. The Medical Director further advised that if Claimant entered a counselor-approved educational or treatment program, the time period for providing a negative urine sample could be extended.

Claimant did not enter the Carrier sponsored treatment program and he did not produce a urine specimen within the prescribed 45 day limit. On May 28, 1987, four days after the 45 day period expired, however, Claimant provided another urine sample. This test allegedly revealed that the level of cannabinoids in Claimant's urine had dropped from 145 ng per ml in the specimen taken on April 3, 1987 to 25 ng per ml in the

specimen taken on May 28, 1987.

By notice dated June 15, 1987, Claimant was notified to attend a hearing in connection with charges concerning his alleged failure to comply with Carrier's drug testing policy. The hearing was held with Claimant present and represented by the Organization. Following the hearing, Claimant was notified by Notice of Discipline dated July 14, 1987 of his dismissal in all capacities for failing to comply with Carrier's drug testing policy.

Carrier's drug testing policy, insofar as it is applicable to this case and all cases now before this Board, was unilaterally established and set forth in a letter from Carrier's Chairman and Chief Executive Officer to employees dated February 20, 1987. Carrier's Chairman stated therein that "safety is inconsistent with the use of illegal drugs by any employee, because such use endangers the welfare and safety of other employees and the public. Accordingly, Conrail is establishing a policy on drugs which is an enhancement of our current medical practice and standards. A summary of that policy is included with this letter...". The referenced policy summary which was attached to the letter stated the following:

> Conrail will include a screen for drugs when the following medical examinations are conducted:
>
> - pre-employment physical examinations;
>
> - required periodic and return-to-duty physical examinations;
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> - before return to duty and during a follow-up period after a disqualification for any

reason associated with drug use; and

executive physical examinations.

An employee with a positive test for illegal drugs will:

be withheld from service by Health Services;

be required to provide a negative drug test within 45 days, at a medical facility to which the employee is referred by Conrail's Medical Director, in order to be restored to service. This 45-day period begins with the date of the letter notifying the employee of his/her being withheld from service.

An employee whose first test is positive will be offered the opportunity for an evaluation by Conrail's Employee Counseling Service.

If the evaluation reveals no addiction problem, in order to be returned to service a negative drug test must be provided within a 45-day period beginning with the date of the letter notifying the employee of his/her being withheld from service.

If the evaluation indicates an addiction problem and the employe enters an approved treatment program, the employe will be returned to service upon recommendation of the treatment program and the Conrail Employee Counseling Service and must provide a negative drug test within 125 days of the date of the initial positive test. This time period can be extended by Health Services when warranted.

An employee who fails to comply with the recommended treatment plan will be required to provide a negative drug test within the 45-day or 125-day time period referred to above, whichever is less, in order to be returned to service.

An employee may be subject to dismissal if he or she:

refuses to submit to drug testing as part of the physical examination;

fails to provide a negative test within the

45-day or 125-day period referred to above, whichever applies; or

fails to provide negative drug tests in a three year follow-up period arranged and monitored by Health Services.

This policy applies to agreement and non-agreement employees subject to required physical examinations.

The Carrier maintains that Claimant was properly dismissed pursuant to this drug testing policy. It argues that Claimant was aware of the policy, did not provide a negative sample within 45 days as required by the policy and ordered by Carrier, and that Claimant was therefore guilty of insubordination. The Carrier further argues that its right to dismiss Claimant in such circumstances is not restricted by law, rule or the parties' Collective Bargaining Agreement ("Agreement") and has in fact been endorsed by every tribunal which has heard similar cases involving Carrier, including Public Law Board 3514, which is comprised of the same Carrier and Organization as this Board.

The Organization raises an extraordinary number of arguments and defenses on behalf of Claimant. In general, the Organization does not unequivocally oppose drug testing, but rather Carrier's unilateral implementation of a drug testing program. More specifically, the Organization contends that Claimant's dismissal was violative of the law and the parties' Collective Bargaining Agreement. It further argues that there exist specific irregularities in Carrier's handling of this case and others which must result in sustaining of the claim.

This case is the first of many now before the Board

concerning Carrier's drug testing policy. It is therefore appropriate that the Board here set forth general guidelines concerning how it will view these cases.

The Board notes at the outset that it is not privileged to decide the many difficult issues before it in a vacuum. To the contrary, there is much precedent to consider.

Concerning questions of Constitutional and statutory rights, the Board is of course obligated to take into account any applicable legal precedent, particularly that established by the Supreme Court of the United States. The Boards' authority on matters of law does not exceed that of the Supreme Court, no matter how favorably or unfavorably the Board views Supreme Court precedent.

The Board is not here prepared to hold that Carrier's unilateral implementation of the drug testing policy was violative of Constitutional rights. The initial legal action brought forth by the RLEA against Carrier's drug testing policy included a claim that it violates the Fourth Amendment of the United States Constitution. The United States District Court for the Eastern District of Pennsylvania dismissed the Fourth Amendment contention, reasoning that the RLEA had failed to show that Conrail was a "federal actor" whose actions are subject to constitutional scrutiny. The RLEA chose not to appeal this aspect of the district court's order. In these circumstances, and in the absence of clear legal precedent establishing that Fourth Amendment rights are here at issue, the Board will not now

sustain claims on Constitutional grounds. These difficult issues are better addressed in legal forums more competent to handle them.

It also is apparent to the Board that it cannot sustain any claim on the basis that Carrier's unilateral implementation of the drug testing policy violated its bargaining obligations to the Organization as set forth in the Railway Labor Act. From the time the drug testing policy was first announced in the letter of February 20, 1987, the RLEA legal challenge included a claim that its implementation constituted a "major dispute" under the Railway Labor Act and that Carrier therefore must abide by statutory bargaining procedures. The United States District Court for the Eastern District of Pennsylvania dismissed the claim, finding that it entailed a "minor dispute" subject exclusively to resolution by an adjustment board. The Court of Appeals for the Third Circuit reversed the district court, concluding that Carrier's actions constituted a "major dispute" and the policy therefore could not be implemented unilaterally. The litigation on this issue culminated in Conrail v. RLEA, 109 S.Ct. 2477 (1989). The Supreme Court therein reversed the Third Circuit, holding that Carrier had demonstrated that it at least had an "arguably justified" contractual basis to unilaterally implement its drug testing policy and therefore the Organization's challenge was a "minor dispute" subject to the exclusive jurisdiction of an adjustment board under the Railway Labor Act. In light of this holding, this Board is constrained

to consider the claims before it a "minor dispute", and therefore must also find that Carrier did not violate any of its legal bargaining obligations in unilaterally promulgating its drug testing policy.

The Board's determination that what is before it is a "minor dispute" does not, of course, dispose of the contractual arguments here raised by the Organization. To the contrary, the Organization correctly notes that the Supreme Court expressly stated that "in no way do we suggest that Conrail is or is not entitled to prevail before the Board on the merits of the dispute."

The Organization has put forth in this case and others before it a voluminous number of arguments as to why Carrier's unilateral implementation of its drug testing policy violated the Agreement or established practice. These arguments include that the policy (1) changes both the Scope of Rule G of the Rules of the Transportation Department concerning use of alcohol or drugs, and the method of enforcing that Rule, by allowing for drug testing of employees without reasonable suspicion or probable cause; (2) creates an irrelevant subterfuge of charging employees who fail a drug test with insubordination rather than a Rule G violation; (3) charges employees improperly with insubordination, as the order to submit to a drug test is unreasonable, and for an employee to be guilty of insubordination the order must be a reasonable one; (4) is of a punitive nature and is not designed to enhance medical fitness; (5) is unconcerned with impairment on

the job, is overly intrusive, and seeks to regulate off-duty behavior for the first time; and (6) is applied in a sloppy manner which is violative of an employee's Rule 27(a) right to a fair and impartial hearing, in that Carrier generally has failed to establish adequate chain of custody, medical standards, and to allow for a medical officer to be present at the hearing on the property.

All these questions of contractual rights have already been addressed, implicitly or explicitly, by numerous boards of jurisdiction on Carrier's property. Carrier has provided to this Board numerous Awards involving its drug testing policy, including those from Engine Service (SBA 909 - Blackwell - Award No. 94), Train Service (SBA 910 - Peterson - Award No. 371), Laborers (PLB 2720 - Mikrut - Award No. 92), Carmen (PLB 4410- Blackwell - Award No. 29), Signalmen (SBA 996 - Peacock - Award No. 40), and Machinists (PLB 4291 - Hays - Award No. 6). In all of these Awards, indeed apparently in all Awards on the subject, challenges to Carrier's contractual right to implement the drug testing policy, as set forth in the letter of February 20, 1987, have been rejected. In addition, Carrier has cited Division Awards involving its drug policy as further precedent for its position.

This Board cannot lightly ignore the above cited precedent. Carrier has imposed its drug testing policy in the same manner for employees covered by all Organizations. The relevant past practice and contractual principles involved here are generally

similar to, if not identical with, the past practice and contractual principles involved in these other cases involving Carrier. This Board would therefore be going against overwhelming precedent on the property should it alone find that Carrier's unilateral implementation of the drug testing policy, and the manner in which it was applied, was violative of the Organization's contractual rights.

Much more important, however, is the fact that these questions of contract interpretation and practice are not ones of first impression insofar as they concern this Carrier, Organization, and Collective Bargaining Agreement. To the contrary, Carrier has provided to this Board at least 60 Awards of PLB 3514, all of which involve Carrier's drug testing policy. In each Award the claim was denied, with the sole exception of one Award in which the involved Claimant was reinstated without back pay due to the particular factual circumstances of the case. Each of these Awards involved the same Carrier and Organization as this Board. While it is true that a different Federation was there involved, the same Contract and principles were at issue.

It is well settled through precedent too numerous to mention that when a Board is faced with a claim involving the same parties, Contract, and issues as were involved in a previously issued Award, the precedential decision should be followed unless clearly erroneous and palpably incorrect, no matter how the Board would decide the issue if one of first impression. This provides for stability in labor relations, something which is in the long

run of benefit to all concerned.

Aside from this general principle, it would be particularly troublesome here should this Board now make rulings which were inconsistent with those rendered by PLB 3514. In that circumstance, there would be no means to reconcile these inconsistent decisions, a situation in direct contrast with that which exists in the legal system wherein the Supreme Court can ultimately resolve inconsistent rulings by the various courts of appeal. Should PLB 3514 and this Board issue inconsistent rulings on matters so important and fundamental as the propriety of Carrier's drug testing policy, it would leave the parties in the intolerable situation of having employees of the Carrier who are represented by the same Organization being treated differently solely because the case of one employee is decided by this Board and the case of another is decided by PLB 3514.

This Board recognizes that the Organization has also cited extensive precedent in support of its contractual arguments. The Board has carefully considered this precedent. Almost completely, however, it does not involve this property, and in many instances does not involve the railroad industry. Accordingly, the totality of contract language and practices involved in those cases are not the same as that before this Board.

This Board also fully understands the Organization's passionate belief that it should not be constrained by the decisions of PLB 3514. The only apparent difference between the

practice of PLB 3514 and this Board, however, is that the PLB 3514 Awards were made without the benefit of written submissions by the parties, whereas this Board has received extensive submissions from both the Organization and Carrier. Nonetheless, the Carrier member of this Board is the same as that on PLB 3514, and he has unequivocally represented that all issues placed before this Board were thoroughly argued before, and dealt with by, PLB 3514. Moreover, because there is little reason to believe that Carrier has historically treated the Federation involved with this Board any different from the Federation involved in PLB 3514, as a practical matter it would be unrealistic to conclude that there were issues involved in this case and others before this Board which were not also dealt with in a manner adverse to the Organization by PLB 3514. In addition, if PLB 3514 had sustained the claims before it concerning Carrier's drug testing policy, this Board has little doubt that the Organization would now be arguing that this Board could not deviate from that precedent, no matter how extensive the documentation that was here submitted by Carrier.

Accordingly, this Board cannot disregard the precedent before it and decide the various issues of contract construction and practice as if they were ones of first impression. Furthermore, while the Board has given consideration to all Awards and decisions placed before it, for the reasons stated above it will place emphasis on the precedent involving this property, and give special emphasis to that involving PLB 3514.

After careful consideration, the Board has determined that the precedent on the property, and particularly the Awards of PLB 3514, are not "clearly erroneous" insofar as they reject the various contractual arguments here raised by the Organization and find that Carrier's drug testing policy was in essence an enhancement of its medical practices. The Supreme Court itself has found that the Carrier's contractual arguments were "arguably justified" rather than "frivolous or insubstantial". Every Board on the property that has considered the matter, including PLB 3514, has determined that Carrier acted within its proper discretion in unilaterally implementing the drug testing policy. While the Organization has argued strenuously that time will reveal that precedent supporting Carrier's position in this matter was incorrect and a product of a period of hysteria concerning drug use, the Board concludes that in light of the current status of the law and precedent, particularly that of PLB 3514, it would be arrogant, rather than courageous, for this Board to sustain claims under circumstances that would clearly be at odds with this vast body of precedent.

Accordingly, this Board generally will not sustain claims on the basis that Carrier's drug policy is violative of the law or the parties' Collective Bargaining Agreement. Before moving to the specifics of Case No. 1, several other general observations are in order.

In this case, as well as in most others now before the Board, the Organization has contended that Carrier failed to

prove that adequate chain of custody exists for urine samples, and that Carrier has in general failed to prove the accuracy of positive test results. PLB 3514, however, has found that the Roche Biomedical Laboratories chain of custody and testing procedures are adequate. Award 314 of that Board stated that "we have a testing process here that includes the use of a highly reputable laboratory and withstands vigorous scrutiny. Accordingly, because the key data, in this case the test results of a urine test, came about from this process, it can reasonably be judged to be a medical fact". This Board does not consider the finding of PLB to be clearly erroneous in this regard. The chain of custody documentation provided by Roche Biomedical Laboratories is extensive, and the testing procedure used involves a general screening test as well as a confirmatory gas chromatography - mass spectrometry test. The record evidence establishes, and this Board can now take judicial notice that, when followed properly those chain of custody and testing procedures of Roche Biomedical Laboratories contain adequate safeguards to ensure the accuracy of a specimen test.

Moreover, this Board does not consider "clearly erroneous" the finding of PLB 3514 that the Carrier generally need not have present a medical official at the hearing on the property in order to ensure the due process required by Rule 27. While on this point the Organization has cited precedent on the property finding to the contrary, specifically Award No. 313 of Special Board of Adjustment 910 (Conrail/UTU), this does not mean that

the finding of PLB 3514 is "clearly erroneous". It can reasonably be found that under normal circumstances the Roche Biomedical Laboratories' business records are authentic and adequately explain the findings of the urine specimens.

It is of course possible that while the chain of custody and testing procedures are in general adequate, in any particular case the Carrier has not established that those procedures were followed. In this regard, however, it is apparent that in a general sense PLB 3514 has decided that Carrier's method of proof is adequate. In not one case has PLB 3514 sustained a claim due to a finding that Carrier had submitted insufficient chain of custody documentation. Moreover, there has not been a clear understanding between the parties as to when chain of custody arguments were first raised by the Organization. The Board has carefully reviewed the transcripts of the hearings in the cases for which it issues Awards this day. It appears that in most, if not all, of these hearings on the property there was not an explicit challenge raised as to the lack of chain of custody documentation. The Carrier therefore had reason to believe that its chain of custody documentation, which generally included a laboratory report stating "COC (Chain of Custody) Performed", was not in dispute as of the time of these hearings. In these circumstances, for purposes of this case and all others now before it, the Board finds it appropriate to consider all available chain of custody documentation. This documentation, along with surrounding circumstances, generally establishes that

the reported results of drug screens were indeed accurate. In future cases, however, the Carrier is advised to promptly submit to the Organization, as soon as it is available, all chain of custody documentation that is maintained by Roche Biomedical Laboratories. This will prevent a myriad of chain of custody questions from again arising such as has occurred in these cases.

Finally, it is apparent that precedential awards of PLB 3514 establishes that where dismissal is called for by Carrier's drug testing policy the discharge will not normally be set aside due to an employee's years of service or good record. This holding also cannot be found to be "clearly erroneous", and the Board therefore will also abide by it.

Applying these standards to the facts of this particular case, it follows that the claim must be denied. Pursuant to Carrier's policy, Claimant was given a return to work physical, which included a drug screen. The testing procedures used were adequate. Carrier has established that the test results accurately showed that Claimant had cannabinoids in his system and the presence of that substance was as a result of use by Claimant rather than any other reason. Notably, Claimant did not deny using marijuana prior to submitting the urine sample on April 3, but only denied using marijuana between that date and the second test. Claimant did not, as required by the drug testing policy, provide a negative sample within 45 days or refer to an approved educational or treatment program. Finally, no irregularities or mitigating factors particular to this case can

be found to warrant sustaining of the claim. In these circumstances, notwithstanding the extraordinary representation provided to Claimant by the Organization, the claim must be denied.

AWARD

Claim denied.

F. DOMZALSKI
Carrier Member

J. DODD
Organization Member dissent to follow

S. E. BUCHHEIT
Neutral Member

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