

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 22
vs. : Award No. 22
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) Holding Mr. D. DiFiore out of service for failure to comply with the Conrail Drug Testing Policy in that he did not provide a positive urine specimen when he was tested at his normal return-to-duty physical on April 20, 1987, was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3242).

(2) As a consequence of the violations referred to in Part (1) above, the Claimant shall be compensated for all time lost, including overtime for the period between April 27, 1987 through May 27, 1987 inclusive and his record shall be cleansed of any drug related offenses.

OPINION OF THE BOARD

Claimant, D. DiFiore, was a B & B Mechanic. 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

20, 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 cocaine.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 24, 1987 from Carrier's Medical Director. Claimant was instructed therein to provide a negative urine sample within 45 days. 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. Claimant did, however, provide another specimen on April 27, 1987, which allegedly tested positive for benzodiazepine and cannabinoids. Carrier therefore continued to withhold the Claimant from service. Again, on May 6, 1987, Claimant provided another specimen which allegedly tested positive for cocaine. Carrier continued to withhold Claimant from service. Claimant did have an independent drug screen urinalysis performed on May 6, 1987, the results of which allegedly proved negative. Carrier would not, however, accept

the results of this test, and therefore continued to withhold Claimant from service. Finally, on May 19, 1987, Claimant provided a fourth specimen, which tested negative. Accordingly, as this last test was still within the 45 day period, Carrier qualified Claimant for return to duty on May 26, 1987 subject to his remaining free of prohibited drugs as demonstrated in unannounced periodic follow-up testing. Claimant returned to work on May 28, 1987. He was not compensated for the time period during which he was withheld from service.

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;

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 employee enters an approved treatment program, the employee 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 withheld from service pursuant to its drug testing policy. It argues that Claimant was aware of the policy, that he was found to have cocaine and other substances in his system during his return to work physical, and thereafter he was properly withheld from service until such time as he provided a negative urine sample through testing done by Carrier. In this regard, Carrier argues that it was not obligated to accept the results of the drug test independently done by Claimant. Finally, Carrier contends that its right to withhold Claimant without compensation in such circumstances is not restricted by law, rule or the parties' Collective Bargaining 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 being withheld from service without compensation was violative of the

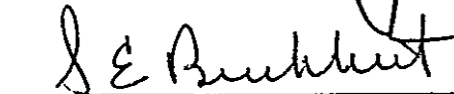
law and the parties' Collective Bargaining Agreement.

In Award No. 1 this Board set forth guidelines concerning how it would consider certain cases arising under Carrier's drug testing policy. Applying those principles to the facts of this case, the Board finds 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 in this test, and in subsequent tests, were adequate. Carrier has established that the test results accurately showed that Claimant had cocaine and other substances in his system, and that the presence of those substances was as a result of use by Claimant rather than any other reason. Carrier acted within its prerogative by medically disqualifying Claimant until such time as he provided a negative sample within 45 days or referred to the employee counselor. Moreover, Carrier was not obligated to accept the results of the drug test independently done by Claimant. Finally, there are no irregularities or mitigating factors particular to this case which can be found to warrant sustaining of the claim. Accordingly, the claim must be denied.

AWARD

Claim denied.


F. DOMZALSKI
Carrier Member
J. DODD
Organization Member
S. E. BUCHHEIT
Neutral Member