

PUBLIC LAW BOARD NO. 4615

**BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES**

"Organization"

vs.

CONSOLIDATED RAIL CORPORATION
"Carrier"

Case No. 29

Award No. 29

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMW that:

(1) The dismissal of Mr. J. Bourne for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated June 15, 1987, from Medical Director G. R. Gebus, in that you did not, within 45 days of that letter, provide a negative drug screen", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3333-D).

(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, J. Bourne, 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 June 8,

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 June 15, 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 July 30, 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 drug screen within the prescribed 45 day limit. Claimant later testified at the hearing on the property, however, that he went to the facility designated by Carrier and attempted to have a drug screen taken on Thursday, July 30, the 45th day. According to Claimant, he was told by a nurse at the facility that drug screens were not done except on

Mondays and Wednesdays, and as this was a Thursday, he would have to return the following Monday. Carrier official Klinkbeil however, testified that the facility is under instructions to perform drug screening during all hours they are open, and to the best of his knowledge, no one had ever been deprived of the opportunity to submit to urinalysis. For whatever reason, Claimant did not supply a urine sample until Monday, August 3, 1987. The results of this test proved negative.

By notice dated August 10, 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 August 31, 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;
- 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 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 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. Finally, Carrier maintains that there were certain inconsistencies in the Claimant's assertion that he attempted without success to give a drug screen on July 30, and that in any event a credibility

dispute exists in regard to this point between Claimant and Carrier witness Klinkbeil, and that Carrier acted within its prerogative in resolving that conflict in favor of Klinkbeil.

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 parties' Collective Bargaining Agreement. It further argues that there exist specific irregularities in Carrier's handling of this case which must result in sustaining of the claim. Finally, the Organization contends that as no credibility dispute here existed Claimant's assertion that he attempted to submit a drug screen on July 30 must be credited, and it follows that Carrier was arbitrary and capricious in application of its policy when it discharged Claimant notwithstanding his submission of a negative sample on August 4.

The Board has determined that the claim must be sustained. The record evidence developed on the property establishes that Carrier's application of its drug testing policy was here arbitrary and capricious against Claimant.

More specifically, it is undisputed that Claimant provided a negative urine specimen on Monday, August 3, 1987. While it is true that this was four days beyond the 45 day time limit established by Carrier, Claimant testified at his hearing on the

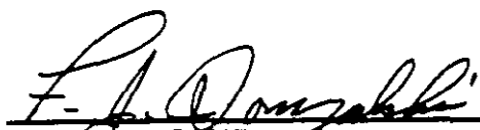
property that he attempted to provide a urine sample on July 30, which was within the 45 day limit, but was told by a nurse at the testing facility that he must come back on a Monday or Wednesday to have the specimen taken. While the Carrier asserts that this contention by Claimant is incredible on its face, careful reading of the testimony proves otherwise. While Claimant did once state he came back "the following morning" to take his drug test, a fair reading of Claimant's full testimony indicated that this was an intended misstatement, as he clearly testified that he came back the following Monday. Moreover, there is no inherent reason why the nurse could not have instructed Claimant as he testified. In addition, while the Carrier contends that a credibility dispute exists on this matter, the Board concludes otherwise. Klinkbeil did not have complete knowledge as to the facility's actual practices or specific knowledge as to what Claimant was in fact told on July 30, only what instructions the facility had been given concerning testing of Carrier's employees. It is certainly possible that Claimant was told something inconsistent with the instructions given to the testing facility by Carrier. Thus, no direct credibility conflict exists, and Carrier was not privileged to disregard Claimant's contention.


While in Award No. 1 this Board stated that it will generally abide by precedent concerning the legitimacy of Carrier's drug testing policy, it has also made clear that it will review any irregularities or mitigating factors which may be present in an individual case. In this case, it was arbitrary

for Carrier to discharge Claimant, an employee who had worked for Conrail and its predecessor since 1974, due to his providing a negative urine specimen within 49 days rather than 45. Claimant's apparent unsuccessful attempt to provide a sample within 45 days provided a clear justification for his slight delay in providing the negative urine sample. Notably, Claimant submitted the negative urine sample on the first Monday after having attempted to submit the sample on July 30. Finally, as the sample provided by Claimant on August 3, 1987 was negative, he is entitled to be made whole for all lost wages and benefits from that date forward.


AWARD

Claim sustained consistent with the above Opinion. All money owed to be paid within thirty (30) days.


 F. DOMZALSKI
 Carrier Member


 J. DODD
 Organization Member

Dissent Attached


 S. E. BUCHHEIT
 Neutral Member

JUN 08 1992