

PUBLIC LAW BOARD NO. 4615

**BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES**

"Organization"

VS.

CONSOLIDATED RAIL CORPORATION
"Carrier"

Case No. 39

Award No. 39

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMW that:

(1) The dismissal of Mr. J. Armagost for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 16, 1987 and subsequent letter dated April 24, 1987 from Medical Director Dr. Bishop, in that you failed to refrain from the use of prohibited drugs as evidenced by urine sample provided on November 10, 1987 testing positive", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3443-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. Armagost, 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 10, 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 benzodiazepine.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated April 16, 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. On April 24, 1987, however, Claimant provided another specimen which tested negative. Accordingly, Carrier qualified Claimant for return to duty on April 27, 1987 subject to his remaining free of prohibited drugs as demonstrated in unannounced periodic follow-up testing.

On November 10, 1987, Claimant provided a specimen for periodic follow-up testing. This specimen allegedly tested positive for benzodiazepine.

Accordingly, by letter dated December 1, 1987, Claimant was notified to attend a hearing in connection with charges concerning his alleged failure to comply with Carrier's drug testing policy. Following the hearing, Claimant was notified by Notice of Discipline dated January 14, 1988, that he was dismissed in all capacities.

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, that he was found to have benzodiazepine in his system during his return to work physical, and thereafter did not remain drug free 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' 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 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 sustained in part.

The Board here finds substantial reason to disapprove of the

testing procedures used by Carrier. It is apparent that the specimens collected in the Emporium area at the time when Claimant gave his samples were done by having employees urinate into a "urinal-type" basin. The specimens were then emptied into a bottle inserted beneath the basins. While Carrier has contended that Claimant's specimens could not be contaminated if such a basin was properly washed between uses, there was here insufficient evidence that in fact the basin was properly washed after each use. Clearly, use of such a basin did not comply with procedures established by Roche Biomedical Laboratories. In these circumstances, the Board concludes that Claimant is entitled to reinstatement, subject to all conditions applicable to an employee returning to work in similar circumstances.

The Board has further concluded, however, that Claimant's reinstatement should not be with back pay and benefits. This case is distinguishable from Award Nos. 9 and 31 of this Board, where there existed substantial reason to doubt that the involved employees had used drugs. Here, by contrast, Claimant twice tested positive for benzodiazepine. It would appear extraordinarily unlikely that on two separate occasions Claimant's specimen would incorrectly be found to contain this substance, a finding of which was apparently unusual even among those employees who tested positive for drugs. Thus, common sense dictates that it is highly likely that there was some improper usage by Claimant of drugs during this time period.

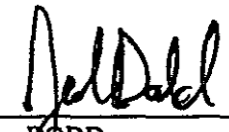
Accordingly, under the circumstances the proper outcome of

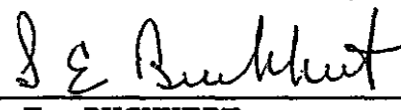
this case is that Claimant be reinstated without back pay. Reinstating the Claimant will take into account Carrier's improper testing procedure and provide necessary incentive to insure such procedures are not used again. Reinstating without back pay, however, will take into account Claimant's highly probable drug use and resulting insubordination.

AWARD

Claim sustained in part consistent with the above Opinion.


F. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member