

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 40
vs. : Award No. 40
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWF that:

(1) The dismissal of Mr. R. A. Myers for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated August 28, 1987 and subsequent letter dated September 14, 1987 from Medical Director Dr. Bishop, in that you failed to provide a negative sample by October 29, 1987, as specified in the letter of September 14, 1987", was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3446-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, R. A. Myers, was a Trackman. On August 19, 1987, Claimant received a medical examination, during which he 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 and cocaine.

In accordance with Carrier's policy on drugs, Claimant was medically disqualified from service by letter dated August 28, 1987 from Carrier's Medical Director. Claimant was instructed therein to rid his system of cannabinoids and cocaine and other prohibited drugs and to provide a negative urine sample within 45 days 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.

Carrier thereafter received information, within the 45 day period, that Claimant was entering a treatment program. Claimant did not, however, successfully pursue that program. Accordingly, on September 14, 1987, Carrier's Medical Director again notified Claimant of his failure to comply with Carrier's policy, advising him to provide a negative urine sample by October 29, 1987. Claimant did not do so.

By notice dated November 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. Following the hearing, Claimant was notified by Notice of

Discipline dated December 2, 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 this policy, did not successfully complete a treatment program, and 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. In addition, Carrier argues that contentions by the Organization that Claimant was here subjected to a random drug test is a new argument that was not raised on the property.

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 Carrier has not established any justification for testing Claimant on August 19, as it has not been established that it was a return to work or periodic physical, and that the

test must be therefore considered random and improper.

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.

Claimant was given a physical which included a drug screen. Under the circumstances, the Board cannot now conclude that Carrier acted outside its rights in requiring Claimant to submit to this examination. Notably, the reason for the examination was apparently not questioned or contested until long after the fact. Carrier has established that the test result accurately showed that Claimant had cannabinoids and cocaine within his system, and that the presence of these substances was as a result of use by Claimant rather than any other reason. Moreover, while Claimant entered a treatment program, he did not successfully pursue it. He also did not provide a negative sample within 45 days. Thus, Carrier's drug testing policy was not complied with. Finally, there are no irregularities or other mitigating factors particular to this case which can be found to warrant sustaining of the claim. Accordingly, notwithstanding the extraordinary representation provided the Claimant by the Organization, the claim must be denied.

AWARD

Claim denied.


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