

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 42
vs. : Award No. 42
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWWE that:

(1) The dismissal of Mr. L. Erickson for alleged "...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 6, 1987 and subsequent letter dated November 3, 1987 from Medical Director Dr. O. Hawryluk, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample you provided on August 3, 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-3541-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, L. Erickson, was a Vehicle Operator. 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 March 26, 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 6, 1987 from Carrier's Medical Director. Claimant was instructed therein to rid his system of 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.

Claimant did not enter the Carrier sponsored treatment program. Claimant did, however, provide a specimen within the prescribed 45 day time limit which tested negative. Accordingly, he was qualified for return to duty on April 24, 1987, subject to his remaining free of prohibited drugs as demonstrated in unannounced periodic follow-up testing.

On July 16, 1987, Claimant provided a specimen for periodic

follow-up testing. The urine specimen allegedly tested positive. Accordingly, on July 23, 1987 Claimant was notified not to report to work due to medical disqualification.

Claimant, however, believed that the results of the July 16 test were inaccurate. Accordingly, on August 3, 1987, Claimant voluntarily provided another urine sample for drug screening. This specimen was also tested in the usual manner by Roche Biomedical Laboratories, who reported the specimen tested positive for cannabinoids. Carrier did not, however, at that time bring charges against Claimant due to the results of the August 3 test.

Rather, solely as a result of the allegedly positive July 16, 1987 test, Claimant received a notice to attend a hearing investigation for the following charge:

"...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 6, 1987 and subsequent letter dated April 24, 1987 from Medical Director Dr. Hawryluk, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on July 16, 1987 testing positive."

The hearing commenced on August 26, 1987. Following the hearing, Claimant was notified by Notice of Discipline dated September 11, 1987 of his dismissal in all capacities for failing to comply with Carrier's drug testing policy. On October 13, 1987, an appeal hearing was held for the discipline assessed on September 11. On October 23, 1987, the Manager of Labor Relations sustained the appeal based upon broken chain of custody in the July 16 test.

On October 24, 1987, Claimant entered the Cameron Treatment Center for treatment of a substance abuse problem. On November 20, 1987, Claimant completed treatment at Cameron. After completion of this treatment, he took another return to duty drug screen on November 23, 1987, which was negative. This test was taken in accordance with the Manager of Labor Relations' letter dated October 23, 1987, wherein he sustained Claimant's appeal of the discipline assessed as a result of the July 16, 1987 allegedly positive test result.

Carrier nonetheless did not consider Claimant eligible for active service. Instead, on November 23, 1987, Claimant was notified to attend a hearing in connection with the following charge:

"...Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated April 6, 1987 and subsequent letter dated November 3, 1987 from Medical Director Dr. Hawryluk, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on August 3, 1987 testing positive."

Following the hearing, Claimant was notified by Notice of Discipline dated January 5, 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, tested positive for cannabinoids in his return to work physical examination, 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' 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 notes that while the notice of November 23, 1987, may have been in error in referring to Carrier's letter of November 3 rather than the letter of April 24, in any event Claimant received clear notice that he was required to keep his system free from drugs, and he failed to comply with this order.

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. The Organization further argues that it was illogical and improper for Carrier in its notice of November 23, 1987 to charge Claimant with failing on August 3, 1987 to comply with an order of November 3, 1987, as Claimant obviously could not comply with an order issued three months after the conduct in dispute. According to the Organization, Carrier obviously bungled the August 26, 1987 hearing concerning the July 16, 1987 test results and was looking for a way to correct the problem. It here makes a special request for the Claimant's reinstatement, claiming that he never should have been withheld from service.

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.


In numerous other cases issued this date the Board has generally upheld the Carrier's right to unilaterally implement its drug testing policy and dismiss employees who fail to comply. Here, the propriety of discipline against Claimant based upon the July 16 test is no longer at issue, as that claim was sustained on appeal by Carrier on October 23, 1987. Thereafter, the results of the August 3 test became at issue. While the handling of discipline for this test result was less than ideal, the Board finds insufficient basis for sustaining the claim. Clearly, Claimant was on notice by the letter of April 24 and other documents that it was his obligation to keep his system free of drugs, and failure to do so could result in discharge. Carrier has established that the results of the August 3, 1987 test submitted by Claimant proved that he failed to comply with this order. While it is true that Carrier's notice to Claimant of November 23, 1987 referred to Claimant's failure on August 3 to abide by an order made on November 3, and Claimant obviously could not after-the-fact comply with the order, the charge would have been entirely correct if it had referred instead to Carrier's letter of April 24. As it were, Claimant suffered no apparent prejudice by the incorrect reference to the letter of November 3. Finally, while it is admirable that Claimant completed a treatment program, this was after he had failed to keep his system clear of drugs as ordered by Carrier. There are no other mitigating factors which here justify setting aside

otherwise warranted discipline. Thus, the Board is compelled to deny the claim.

AWARD

Claim denied.


F. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member