

PUBLIC LAW BOARD NO. 4615

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :
"Organization" : Case No. 9
vs. : Award No. 9
CONSOLIDATED RAIL CORPORATION :
"Carrier" :

STATEMENT OF CLAIM

Claim of the Pennsylvania Federation, BMWE that:

(1) Holding Mr. John Herron 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 March 30, 1987, was without just and sufficient cause, arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File CR-3218).

(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 13, 1987 and April 21, 1987 inclusive and his record shall be cleansed of any drug related offenses.

OPINION OF THE BOARD

Claimant, J. Herron, Jr., 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 March

30, 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 3, 1987 from Carrier's Medical Director. Claimant was instructed therein to provide a negative urine sample within 45 days, or by May 18, 1987. 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 16, 1987, however, Claimant provided another specimen which tested negative. Accordingly, Carrier qualified Claimant for return to duty on April 21, 1987 subject to his remaining free of prohibited drugs as demonstrated in unannounced periodic follow-up testing. Claimant returned to work on April 23, 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 dismissed pursuant to this drug testing policy. It argues that Claimant was aware of the policy, that he was found to have cannabinoids 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. 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 ("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 the urine test conducted by Claimant's personal physician on March 30, 1987, which purported to show a negative result, is of no relevance to Carrier's drug testing policy or this case.

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 withholding from service and 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. More specifically, the Organization alleges that Claimant was compelled to give his sample in a "urinal" type of environment which created substantial possibility that his specimen may have been contaminated.

In Award No. 1, also issued this day, the 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.

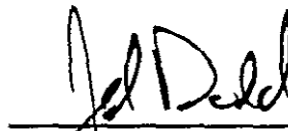
The Board here finds substantial reason to doubt the accuracy of the positive test result for the urine sample submitted by Claimant on March 30, 1987. Claimant obviously believed at the time of the test that the urine sample was taken under circumstances of questionable validity. For this reason he gave a second urine sample on that date which was tested by Claimant's personal physician and purportedly proved negative. In addition, the Organization has alleged that specimens were collected in the Emporium area at that time by having the employees urinate into a "urinal-type" basin. The specimen was then allegedly emptied into a bottle inserted beneath the basin. While Carrier has contended that Claimant's specimen could not be contaminated if such a basin was properly washed between uses, there is 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. Finally, it is notable that Claimant retested negative a short time after the test of March 30.

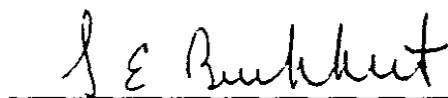
Given the totality of circumstances, it has not been established to the Board's satisfaction that Claimant's initial positive drug test was accurate. It follows that he was improperly withheld from service until the time of his second test. Accordingly, the claim must be sustained.

AWARD

Claim sustained. All monies owed shall be paid within thirty (30) days.


F. J. DOMZALSKI
Carrier Member


J. DODD
Organization Member


S. E. BUCHHEIT
Neutral Member

APR 12 1991