

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5732

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES )  
and ) Case No. 5  
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY ) Award No. 5  
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Martin H. Malin, Chairman & Neutral Member  
Donald D. Bartholmay, Employee Member  
John H. Young, Carrier Member

Hearing Date: January 13, 1997

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Laborer C. Follmer for her alleged failure to work safely and being under the influence of a controlled substance on July 31, 1996 was without just and sufficient cause, based on unproven charges and in violation of the Agreement.
3. Track Laborer C. Follmer shall now be reinstated with seniority, all back pay and service months for retirement in accordance with Rule 10.

**FINDINGS:**

Public Law Board No. 5732, upon the whole record and all the evidence, finds and holds that Employees and Carrier are employees and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 31, 1996, Claimant was injured while using a hydraulic spike puller. Because of the accident, Claimant was asked to provide a urine sample for a drug screen. The results of the drug test were positive for marijuana.

On August 9, 1996, Carrier notified Claimant to report for an investigation on August 21, 1996. The notice charged Claimant with failing to work safely and being under the influence of a controlled substance. The hearing was postponed to and held on September 5, 1996. On September 12, 1996, Carrier advised Claimant that she had been found guilty of the charges and that she was dismissed from service.

The Organization contends that Claimant was not provided with a fair hearing. The Organization argues that the hearing officer displayed bias and pre-judgment. The Organization relies on the manner in which the hearing officer read the charges, a statement that he would strike any statements he did not consider appropriate, the hearing officer's "stifl[ing]" the Organization from asking questions, and his asking Carrier witnesses for opinions as to what happened.

The Organization further argues that Carrier failed to meet its burden of proof with respect to the charges. The Organization contends that none of Carrier's witnesses actually observed Claimant's injury and that Carrier's case was based on speculation rather than evidence. Furthermore, the Organization maintains that there was no evidence that Claimant was under the influence of marijuana on the date in question, and that the chain of custody in the handling of Claimant's urine sample was flawed. Furthermore, according to the Organization, because Claimant was not responsible for her injury, Carrier lacked reasonable cause to require a drug screen. Finally, the Organization contends that the discipline assessed was excessive and was not consistent with the way Carrier has handled similar incidents in the past.

Carrier contends that it provided Claimant with a fair and impartial hearing and proved the charges by substantial evidence. Carrier argues that the evidence established that Claimant placed herself in an unsafe position by using her foot as a brace to hold the spike puller on the spike. Furthermore, Carrier maintains, the drug test was not flawed and the results support the charge of being under the influence of marijuana. Carrier urges that the dismissal be upheld in light of the serious nature of the offense.

The Board has reviewed the record carefully. We find that Claimant was provided with a fair hearing. We see no reason to infer bias or pre-judgment on the part of the hearing officer. It was proper for the hearing officer to set forth the ground rules in order to maintain an orderly hearing. The hearing officer afforded the Organization considerable leeway in questioning the witnesses. We see nothing improper in the hearing officer eliciting from

Carrier witnesses their analyses of Claimant's actions in handling the spike puller.

We further find that Carrier proved the charges by substantial evidence. The evidence established that Claimant used her foot as a brace when using the hydraulic spike puller and that, in so doing, she placed herself in an unsafe position. Claimant's responsibility for the injury provided reasonable suspicion to justify the drug test. The record does not show that the chain of custody of Claimant's urine sample was faulty. Claimant testified that the person who received her sample told her that she may have placed the wrong name on the sample. Shortly, thereafter, the individual told Claimant that the matter had been straightened out. The record does not show that Claimant's sample was mixed up with one from another person. At most, it suggests that Claimant's sample may have been mislabeled initially and corrected shortly thereafter.

Accordingly, we turn to the penalty assessed. Under the particular circumstances of this case, and without establishing a precedent for any other Rule G case, it is this Board's opinion that Carrier should give Claimant one last chance. Carrier shall reinstate Claimant with seniority unimpaired, but without any compensation for time out of service, provided Claimant accepts the following conditions:

1. Claimant must contact Carrier's Employee Assistance Program Administrator (EAPA) and submit to a complete evaluation of her condition, within thirty days after the date of reinstatement. She must undertake and successfully complete the recommended treatment and aftercare program, if any, including documented attendance at AA/NA meetings and counseling sessions, as a condition of her continued employment.

2. Claimant shall have no rights to work until she has been approved to return to work by the EAPA and Carrier's chief medical officer. She must pass a return to work - physical, including a drug screen

3. Subsequent to reinstatement, Claimant must furnish the designated Carrier official no later than the tenth day of each month, documented proof that she is complying with any aftercare program recommended by the EAPA.

4. Claimant shall be subject to periodic testing for the presence of drugs and/or alcohol in her system without prior notice for three years from the first day worked. Carrier shall use this authority in a diligent and reasonable manner, and not to harass Claimant.


It is further understood that should Claimant not accept reinstatement on the conditions set forth above, her dismissal shall stand undisturbed. Should Claimant fail to comply with any part of these conditions during the period specified, she will be removed from service and returned to a dismissed status.

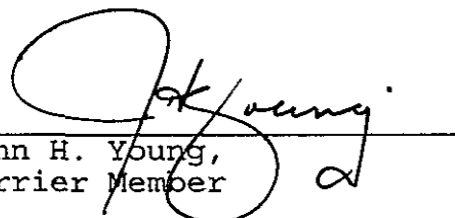
#### AWARD

Claim sustained in accordance with the Findings.

#### ORDER

Carrier is ordered to make this award effective within thirty (30) calendar days of the date two or more members of this Board affix their signatures hereto.

  
Martin H. Malin, Chairman

  
John H. Young,  
Carrier Member

  
Donald D. Bartholmay,  
Employee Member

Dated at Chicago, Illinois, February 1, 1997.