

PUBLIC LAW BOARD NO. 6832

PARTIES TO THE DISPUTE:

MASSACHUSETTS BAY COMMUTER RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF CLAIM:

“ I appeal to you the dismissal case of Todd Gould (Carrier File 05094). Mr. Gould was dismissed effective November 30, 2005, following a hearing held on November 22, 2005. We disagree with this decision”.

OPINION OF BOARD: Mr. Todd Gould ("Claimant") established seniority in commuter rail service (Amtrak) on September 14, 2001 and became an employee of MBCR effective July 1, 2003. He held a position in the Engineering (Maintenance of Way) Department until his dismissal from service, effective November 30, 2005. Following a properly noticed hearing at which he appeared with representation, Carrier terminated the Claimant's employment for alleged violation of the terms of a "Rule G Waiver Agreement", which he had signed on August 10, 2005. The record shows that the Claimant and Carrier entered into that Waiver Agreement, in lieu of termination of his employment for testing positive for a 'banned substance' during a per a DOT random testing event on July 22, 2005. Among the terms the Claimant agreed to were the following:

* * * * *

3) I must provide a negative drug and / or alcohol test specimen ... for at least six (6) unannounced follow-up tests during the first 12 month period of active service following my return to duty..."

4) I further understand that if I test positive in any future drug/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all MBCR service."

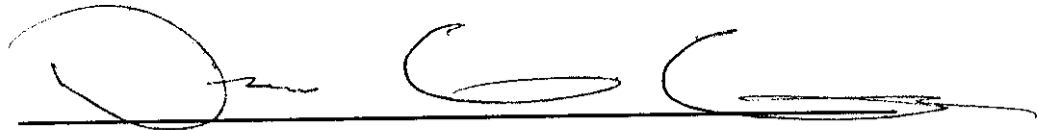
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The Claimant was brought up on charges of violating his August 10, 2005 Waiver Agreement because during an unannounced follow-up test just two months later, on October 7, 2005, he tested positive for cocaine metabolite at a level of 11,060 ng/ml. (The screening cut-off for cocaine is 150 ng/ml.). At the formal investigation, after the Carrier provided protocol, chain of custody and laboratory testing evidence establishing a *prima facie* showing that he was guilty as charged, the Claimant made the following a self-incriminating admission of his culpability: "If I knew, if I even had an incline (sic) that I was going to come up positive, I would not have taken it".

The Organization's allegations of a fatal violation of Claimant's right to a fair hearing due to confusion allegedly caused by use of the July 1, 2003 rather than October 15, 2003 versions of the Drug and Alcohol Policy as an exhibit at the formal investigation denied for reasons explained fully in Award No. 1 of this Board. Nothing in this record persuades us do reverse or modify the dismissal action taken by the Carrier in this case.

AWARD

Claim denied.



Dana Edward Eischen, Chairman



Union Member



Company Member

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MASSACHUSETTS BAY COMMUTER RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF CLAIM:

"I appeal to you the dismissal case of Timothy McCarthy (Carrier File 05-139). Mr. McCarthy was dismissed effective December 1, 2005, following a hearing held on November 22, 2005. We disagree with this decision."

OPINION OF BOARD: Mr. Timothy McCarthy ("Claimant") became an employee of MBCR effective July 1, 2003, after establishing seniority in commuter rail service (Amtrak) on October 29, 1971 and transferring to MBCR. He held a position in the Engineering (Maintenance of Way) Department until his dismissal from service effective December 1, 2005. Following a properly noticed hearing at which he appeared with representation, Carrier terminated the Claimant's employment for alleged violation of the terms of a "Rule G Waiver Agreement", which he had signed on December 14, 2004. The record shows that the Claimant and Carrier entered into that Waiver Agreement, in lieu of termination of his employment for testing positive for a 'banned substance' during DOT "reasonable cause" testing on November 14, 2004 following an on-track accident. Among the terms the Claimant agreed to were the following:

* * * * *

3) I must provide a negative drug and / or alcohol test specimen ... for at least six (6) unannounced follow-up tests during the first 12 month period of active service following my return to duty..."

4) I further understand that if I test positive in any future drug/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all MBCR service."

* * * * *

The Claimant was brought up on charges of violating his December 14, 2004 Waiver Agreement because, during an unannounced follow-up test ten months later, on October 14, 2005, he tested positive for cocaine metabolite at a level of 9,555 ng/ml. (The screening cut-off for cocaine is 150 ng/ml.). At the formal investigation, the Carrier provided protocol, chain of custody and laboratory testing evidence adequate to establish a *prima facie* showing that the Claimant was guilty as charged.

The Organization's allegations of a fatal violation of Claimant's right to a fair hearing due to confusion allegedly caused by use of the July 1, 2003 rather than October 15, 2003 versions of the Drug and Alcohol Policy as an exhibit at the formal investigation are denied for reasons explained fully in Award No. 1 of this Board. Notwithstanding the uncontraverted record evidence that the Claimant had 60 times the base-line cut-off limits of cocaine in his system when tested at work on October 14, 2005, the Organization asserts that was not guilty of violating the terms of the Waiver Agreement because he "did not appear to be impaired". That creative argument and the Claimant's belated assertions that he did not fully understand the consequences of testing positive for cocaine under the clear and unambiguous terms of the Waiver Agreement warrant no further comment by this Board. Neither those unsupported assertions nor anything else in this record persuade us to reverse or modify the dismissal action taken by the Carrier in this case.

AWARD

Claim denied.



Dana Edward Eischen, Chairman



Union Member



Company Member