

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN/WISCONSIN CENTRAL RAILROAD**

Case No. 7

STATEMENT OF CLAIM:

Appeal of the dismissal of Claimant J. Serich, and for Claimant's reinstatement to service with seniority and all other rights unimpaired and compensation for all time lost, because the Carrier improperly terminated the Claimant's seniority.

FINDINGS:

By letter dated October 19, 2004, the Claimant was directed to attend a formal hearing and investigation in connection with charges that the Claimant had violated Carrier rules by allegedly being under the influence of a controlled substance while on duty on Company property, in connection with the Claimant testing positive for amphetamines in a drug screen. After a postponement, the investigation was conducted on November 4, 2004. By letter dated December 8, 2004, the Claimant was informed that as a result of the investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the investigation was held in accordance with the Rules, and that both sides presented testimony and witnesses, or were offered the opportunity to do so. The Carrier asserts that the hearing was conducted in a straight-

forward, fair, and impartial manner. The Carrier emphasizes that the Claimant failed a random drug test, testing positive for amphetamines. The Carrier maintains that the Claimant did not deny this during the hearing, and he did not offer any explanations. The Carrier points out that if the Claimant wished to dispute the test findings, such an objection must be presented at the hearing. The Carrier argues that this objection was not timely raised in this proceeding.

The Carrier additionally points out that the Claimant's record shows that he has a long-standing problem with alcohol and drug abuse. The Carrier argues that it has tried to work with the Claimant for a long time, but his issues have accelerated. The Carrier maintains that the instant infraction was the Claimant's second Rule G violation, and dismissal for a second Rule G violation cannot be considered improper or disparately harsh. The Carrier asserts that the discipline assessed is neither harsh nor excessive under the circumstances.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that during the investigation, the Carrier failed to present all pertinent documentation relating to the charges and failed to have all witnesses present. The Organization therefore asserts that the Carrier did not conduct a full, fair, and impartial investigation in this case.

The Organization further argues that the discipline assessed is harsh and excessive. The Organization maintains that the Carrier's long-standing policy and practice has been

to allow employees in similar circumstances to go through the EAP and be conditionally reinstated subject to and upon completion of such a program. The Organization points out that the Carrier simply severed the Claimant's employment, instead of allowing the Claimant the opportunity to enter the EAP.

With regard to the Claimant's discipline history, the Organization acknowledges that the Carrier has the right to progressively assess discipline, but the Organization argues that this should have been part of the letter of discipline, and it should not have been added later. The Organization additionally argues that the Claimant's February 2000 discipline was for absenteeism, not for alcohol or drug abuse. Moreover, the fact that the Claimant subsequently entered the EAP on his own after a DWI conviction, this is part of his medical record and not part of his discipline record.

The Organization argues that the discipline assessed was harsh and excessive. Moreover, this discipline is inconsistent with the long-standing policy and practice of allowing employees to enter the EAP upon a first positive drug test. The Organization insists that the violation at issue was the Claimant's first proven Rule G violation; the Organization emphasizes that the Carrier did not present any evidence of an investigation or waiver relating to an earlier alleged Rule G violation.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

This Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of his second Rule G offense when he tested positive for possessing prohibited substances in his body on September 28, 2004. The record reveals that the Claimant had previously been suspended for being on Carrier property while under the influence of alcohol on January 14, 1992. Moreover, the Claimant had failed to complete a counseling and treatment program and was disciplined with a ten-day suspension on February 7, 2000.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant's record shows a long-standing problem with alcohol and drugs. In February of 2000, the Claimant received discipline instead of entering a treatment program. He later went through an EAP treatment program as a result of a DUI conviction. The Carrier has given the Claimant every opportunity to reform his behavior and he has failed. Therefore, this Board cannot find that the Carrier's action in terminating the Claimant's employment for this latest offense is unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 8-22-06



CARRIER MEMBER

DATED: 8-22-06