

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 3

STATEMENT OF CLAIM:

- (a) Carrier's dismissal of Claimant Chris Bizzle was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Schedule Agreement.
- (b) Claimant Bizzle shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Schedule Agreement and his record cleared of the charge.

FINDINGS:

By letter dated February 2, 2006, the Claimant was directed to attend a formal hearing and investigation in connection with charges that the Claimant had violated the Carrier's Drug and Alcohol Policy in connection with a reasonable-cause test conducted on January 26, 2006, following an accident/collision, that resulted in a positive indication for the presence of marijuana metabolites. After a postponement, the investigation was conducted on March 13, 2006. By letter dated March 22, 2006, 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 in all capacities. 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 there is no dispute that the Claimant was

involved in a collision incident and was found guilty of significant rule violations. Moreover, there is no dispute that the drug and alcohol test administered to the Claimant following the collision incident confirmed the presence of marijuana metabolites in the Claimant's system in an amount that exceeded the established cut-off limit. The Carrier points out that the Organization has not raised any issues regarding the integrity of the testing procedure or the chain of custody, and neither the Claimant nor the Organization has denied that Claimant had marijuana in his system. The Claimant also has not raised any defense to the test results.

The Carrier argues that nothing in the record refutes the facts that gave rise to the charge, and the record leaves no doubt that the charge against the Claimant was supported by substantial evidence. The Carrier insists that both the Claimant and the Organization have conceded the correctness of the test results. The Carrier points out that this case is entirely based on technical and procedural issues raised by the Organization. The Carrier maintains that the Organization's position represents nothing more than a desperate search for a defense.

Contradicting the Organization's assertion that the charge letter was in error, the Carrier insists that the charge letter correctly advised the Claimant that the test was "for Reasonable Cause based on the accident/collision occurring that day on the Dorchester Branch." The Carrier maintains that it publishes its policy on post-accident, reasonable suspicion and reasonable cause testing as part of its Drug and Alcohol Policy. Pursuant to the Policy, the Carrier conducts such tests whenever any employee is determined to have been involved in an FRA-reportable accident/injury, and there has been a

determination that the employee's action contributed to said accident. The Carrier asserts that the Organization obviously does not understand that the testing in this case was not done under FRA authority, but rather under the Carrier's own policy authority.

The Carrier then emphasizes that the Organization bases its erroneous conclusions on a form prepared by the testing facility. The Carrier maintains that it has no control over what box might be checked by the collector, a contractor employed to collect specimens and forward them to the lab. The Carrier asserts that the "post accident" designation on the lab form obviously was incorrect, but it was nothing more than a clerical error. The Carrier insists that this does not establish grounds for invalidating the test under the theory that the Carrier had no authority to test the Claimant. The Carrier contends that the only document relevant to this issue is the Carrier's Form 2744, prepared by the Claimant's supervisor, which establishes that the testing was for cause. The Carrier argues that this designation unmistakably indicates that the testing was being done under the Carrier's own authority. The Carrier emphasizes that the MED-1 Form referenced by the Organization is a non-DOT form, used exclusively for collections and testing done under the Carrier's own authority.

The Carrier therefore asserts that the Organization is misdirected in its efforts to negate the test because it was outside the bounds of the FRA regulations. The Carrier insists that the test was fully within the Carrier's own authority, as set forth in its Drug and Alcohol Policy.

The Carrier goes on to address the Organization's argument that because the Carrier chose to frame the charge within the context of a "reasonable cause" cause test,

the Carrier must establish, but failed to do so, that a factual basis exists to justify such testing. The Carrier points out that in making this argument, the Organization again seeks to establish that the Carrier failed to fulfill the requirements of the FRA regulations for administering reasonable-cause testing. The Carrier insists that these regulations are not applicable to this matter because the testing at issue was not done under such federal authority.

The Carrier maintains that in connection with the incidents at issue, the Claimant, as the foreman of his gang, was responsible for directing the activities of all the employees under his supervision. The Carrier emphasizes, however, that the Claimant failed to consult the train schedule to determine the whereabouts of a scheduled commuter train, failed to administer a complete and articulate job briefing to his gang that described all the safety procedures in place, failed to secure foul authority from the train dispatcher before discussing safety procedures during such job briefing, and allowed an employee under his jurisdiction to operate a bucket loader through a gate and adjacent to the main line, where it was struck by a train operating at a speed of sixty miles per hour. The Carrier points out that this accident resulted in more than \$350,000.00 in damages, and it is fortunate that no one was fatally injured.

The Carrier argues that under these circumstances, the Carrier was totally within its rights to test the Claimant under its own authority, as set forth in the Drug and Alcohol Policy. The Carrier asserts that the incident at issue was an FRA Reportable Incident, and the Claimant's supervisor correctly concluded that the Claimant bore primary responsibility for the incident, and that the Claimant had violated multiple rules in

connection with this incident. The Carrier contends that on this record, it simply is inconceivable that the Organization would argue that Carrier has not established a sufficient factual basis for the administration of a drug and alcohol test of the Claimant.

As for any suggestion that the Claimant should have been afforded a waiver under the Rule G Prevention Program Companion Agreement, the Carrier asserts that there is no support for the Organization's contention that the Claimant's involvement in the incident did not include significant rule violations. The Carrier also points to the Organization's novel theory that the Carrier may not consider these significant rule violations within the context of the Companion Agreement because these violations still are under appeal. The Carrier insists that the Companion Agreement neither states nor implies that non-eligibility is dependent upon the finality of the appeal process. The Carrier emphasizes that the Companion Agreement expressly provides that safety is the paramount concern. The Carrier argues that it is more than a bit incongruous for the Organization to contend that the Companion Agreement should be interpreted to allow a proven drug user to return to a safety-sensitive position without the control process established under a Rule G Waiver.

The Carrier argues that there is no merit to the Organization's assertion that the Claimant was entitled to utilize the provisions of the Companion Agreement. The Carrier insists that the Companion Agreement, by its very terms, excluded the Claimant from its coverage.

The Carrier contends that the Claimant properly was found guilty of the charges, and this finding was supported by substantial, credible evidence. The Claimant never has

denied using illegal drugs, and neither the Claimant nor the Organization has challenged the validity of the test results or the integrity of the testing procedures. The Carrier emphasizes that the Claimant was afforded a fair and impartial investigation, as well as all procedural due process to which he was entitled under the collective bargaining agreement.

The Carrier maintains that the only remaining issue is whether the discipline imposed was proper under the circumstances, and the Carrier insists that it was. The Carrier emphasizes that the investigation into the accident revealed significant lapses in the Claimant's judgment and the execution of his responsibilities as a Foreman. The Claimant was assessed significant discipline because of his rule violations. The Carrier asserts that as if the Claimant's negligent and unsafe actions were not enough, post-incident reasonable cause testing determined that the Claimant had illegal drugs in his system. The Carrier contends that in light of the events that preceded the testing, there can be no rationale for a finding that the penalty of permanent dismissal was arbitrary, excessive, or an abuse of managerial discretion. The Carrier emphasizes that it has been widely and uniformly held that the use of illegal drugs, standing alone, warrants permanent dismissal.

The Carrier insists that the Claimant knew, or should have known, that when he used illegal drugs, he placed his employment in peril. Moreover, the Organization has not contested the finding of illegal drugs in the Claimant's system, and the Claimant never denied his use of such drugs. The Carrier maintains that the Organization's technical and procedural arguments are without merit, so the discipline assessed against

the Claimant for his proven violation of the Carrier's rules and policies must not be disturbed.

The Carrier then points out that in the unlikely event that the Claimant ultimately is awarded any pay, such an award should include only actual damages, if any, sustained by the Claimant. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant should not have been dismissed because he was not guilty of any serious rule violations. The Organization asserts that the Claimant should have been afforded the opportunity to sign a Rule G waiver, as is provided to any other first-time offender.

The Organization argues that in cases such as this one, the Carrier must be very specific about what happened. In the Claimant's case, however, the MED-1 form shows that the testing was "post accident," while the Carrier asserted that it was reasonable cause testing in the Notice of Charge. The Organization emphasizes that the Carrier cannot have it both ways and then dismiss the employee.

The Organization points out that under the governing federal regulations, reasonable cause testing may be done in the event of an accident/incident or because of a rule violation. In the Claimant's case, the Carrier chose to use the accident/incident category. The Organization maintains that it objected to this because there was no indication that the a trained supervisory employee had a reasonable belief, based on specific facts, that the Claimant's acts or omissions caused or contributed to the occurrence or severity of the accident/incident. The Organization emphasizes that there

is no evidence as to who specifically gave the order to test the Claimant. The Organization argues that the Carrier apparently used the wrong section of the policy to charge the Claimant. The "post accident" designation, which someone did check off on the MED-1 form, may have been more appropriate under the circumstances. The Organization asserts that the Carrier did not choose to charge the Claimant under that section; even if the Carrier had, there was no evidence of any written report that set forth the facts upon which the post-accident testing was based.

The Organization goes on to maintain that the Carrier should not have found the Claimant guilty of violating the RWP Rules, which prevented the Claimant from being offered a Rule G waiver in this case. The Organization insists that the Claimant never gave specific permission for the bucket loader operator to foul the main track. The Organization points out that the Claimant did hold a job briefing on the date in question, but he had not yet held the safety briefing because he had not obtained clearance for foul time from the dispatcher. The Organization asserts that the entire incident was a serious case of miscommunication that, thankfully, ended without any injury.

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 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 violating the MBCR Drug and Alcohol Policy when he tested positive for

marijuana metabolites on January 26, 2006. The record reveals that the Claimant was the Foreman of a gang who gave an order to employees that he supervised to operate a bucket loader to a worksite, thereby fouling the main line. A train came around a curve and struck the bucket loader. The Claimant was responsible for that accident; and, as a result, the Claimant was tested pursuant to Carrier rules. Although the Organization makes some procedural objections to the testing process, this Board finds that the testing was done properly and that all of the rights of the Claimant were preserved. We find that there was appropriate cause for the testing, the accident had occurred, and the Carrier's rules require testing after such accidents. The Claimant in this case tested positive for drugs, which placed him in violation of Carrier rules.

The Carrier's Drug and Alcohol Policy states the following:

1. No employee (covered and non-covered service) shall use, possess, or be impaired by alcohol or have any controlled substance in his/her system while subject to, reporting for, or on-duty; while in the workplace; while in recognizable MBCR uniforms; while operating any MBCR vehicle at any time; or while conducting business for or representing MBCR.

The Carrier also has a zero-tolerance for drug use, and employees are prohibited from reporting for duty with mood-changing substances and narcotics in their system.

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 Organization takes the position that the Claimant should have been allowed a

Rule G Waiver and an opportunity to go into a rehab program and return to work. This Board finds that that might be the case had a Rule G violation been the only wrongdoing on the Claimant's part. In this case, the Claimant was guilty of several other rule violations, and they were significant. Consequently, the Carrier properly found that the Claimant was not eligible for the Rule G program.

It is fundamental that employees, particularly Foremen who hold supervisory positions, must abide by safety rules and avoid drug and alcohol use which might impact their work performance. In this case, the Claimant failed to live up to the rules, and this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim must be denied.

AWARD:

The claim is denied.


PETER R. MEYERS
Neutral Member
ORGANIZATION MEMBER
CARRIER MEMBER

DATED: December 11, 2007

DATED: January 3, 2008