BEFORE PUBLIC LAW BOARD NO. 7007

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD

Case No. 5

STATEMENT OF CLAIM:

(a) Carrier's dismissal of Claimant John Morrell 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 Morrell 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 the in the Schedule Agreement and his record cleared of the charge.

FINDINGS:

By letter dated December 7, 2006, the Claimant was directed to attend a formal hearing and investigation in connection with charges that the Claimant violated the Carrier Rules and its Drug and Alcohol Policy in that during a random drug and alcohol test, the Claimant provided a urine specimen that tested positive for cocaine metabolites, the second such positive test result for the Claimant within ten years. After a postponement, the investigation was conducted on December 28, 2006. By letter dated January 5, 2007, 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 addresses the Organization's procedural objection that it did not receive certain materials in advance of the investigation pursuant to the discovery requirement set forth in Rule 15. The Carrier asserts that the transcript demonstrates that this did not disadvantage the Claimant. The letter was co-signed by the Claimant and the Organization, and it could not have been a surprise. The Carrier argues that the charges clearly articulated the nature of the offense, and this issue is, at best, administrative in nature and did not prejudice the Claimant's case. The Carrier emphasizes that Rule 15 does not contain any inference that a discovery misstep constitutes a fatal flaw, and the Organization did not argue that the case should have been dismissed for that reason. The Carrier points out that the Organization is prohibited from raising new arguments before this Board.

Turning to the merits of this dispute, the Carrier contends that the Claimant was not eligible to engage in a third known Rule G Waiver Agreement. The Carrier maintains that it followed all required protocol in the administration of its Drug and Alcohol testing procedures and the adopted rules comprising the parties' agreement.

The Carrier maintains that the June 1, 2001, conditional reinstatement, involving a predecessor carrier, was enacted with the Claimant's agreement, and it encapsulated the terms and conditions of the self-invoking Rule G Waiver. The Carrier emphasizes that the terms of the Bypass Agreement prohibited the Claimant from entering into yet another Rule G Waiver Agreement before at least June 1, 2011.

The Carrier then asserts that the Claimant put forth a hollow defense. The Carrier insists that, contrary to the Organization's position, the June 1, 2001, correspondence

mirrors that of the Rule G Waiver form, and this earlier case arose following an actual Rule G violation. The Carrier insists that the applicable provisions of the Bypass and Transition Agreements clearly and dispositively establish that the Claimant is not eligible for a Rule G Waiver in connection with the instant matter.

The Carrier goes on to contend that the other aspect of the Claimant's defense fairs no better. The Carrier points out that after the initial "dilute negative" test results, the Claimant needed to re-test "immediately" or "as soon as possible." The Carrier asserts that this means the "next scheduled shift." The Carrier vigorously disagrees with the Organization's argument that the Carrier had no basis to disturb the Claimant because the Claimant was on vacation and therefore inactive. The Carrier maintains that the Claimant cannot be considered to have been on vacation because the Claimant had unscheduled himself from work for the expressed reason of having to deal with a phone outage at his residence. Moreover, merely claiming a vacation day, on a day-to-day basis, does not provide shelter from complying with instructions relating to the Drug and Alcohol Policy. The Carrier insists that marking off with the Radio Room is far different from an expressly scheduled and approved day off. The Carrier additionally points out that the Drug and Alcohol Policy expressly states that an employee may be excused from an immediate re-test only in the event of a family or medical emergency. The Carrier argues that the Claimant's own testimony establishes that if his phone indeed was inoperative, he knew about the problem well before November 29. The Carrier asserts that the Board can draw its own conclusion as to whether the Claimant used the phone outage as a convenient subterfuge for ridding his system of cocaine.

The Carrier maintains that the Claimant is a repeat drug user whose actions fall outside of the policies and provisions that would provide an opportunity for him to continue his employment under yet another Rule G Waiver Agreement. The Carrier argues that its decision to discharge the Claimant cannot be deemed arbitrary, capricious, or excessive, so the Board has no power to modify the discipline. The Carrier further asserts that this there is no basis for leniency in that the Claimant has been employed in one of the most safety-sensitive areas of the railroad, and he has had at least two "bites of the apple" concerning prohibited drug use. The Carrier insists that to return the Claimant to service would impose an egregious danger upon the Claimant's co-workers and liability upon the Carrier.

The Carrier asserts that if the Board should have any reason to consider a modification, the Claimant cannot be entitled to back pay due to the serious nature of his offense and the undue liability such an award places upon the Carrier. In addition, any outside wages earned by the Claimant during the period of dismissal from service also should be deducted from any such award.

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

The Organization initially contends that the Claimant should have been offered a waiver following this latest positive test because this is the first such test result that Claimant has incurred since he became employed by the Carrier. Responding to the Carrier's assertion that the Claimant was not eligible for a Rule G Waiver because of a positive test in 2001, the Organization points to Side Letter #2, which provides that no

discipline imposed by the predecessor carrier shall be used commencing July 1, 2003.

The Organization argues that in 2001, the Claimant was reinstated to work following an appeal determination that he had been improperly dismissed. The Claimant's reinstatement was pursuant to an agreement between the parties with a conditional return-to-work agreement. The Organization maintains that there was no Rule G Waiver at that time, and any "similarity" to a waiver is irrelevant. The Organization insists that because this earlier return-to-work agreement was not a Rule G Waiver and involved a former employer, it should be given no consideration here.

The Organization contends that because there was no previous Waiver Agreement involving the Claimant and this is the first instance that the Carrier has charged the Claimant with violating its rules and policies, the Claimant should be offered the opportunity to sign a Rule G Waiver, enter the EAP, and return to duty with all rights and benefits unimpaired.

The Organization additionally maintains that in connection with the hearing, the Carrier violated Rule 15 by failing to provide the Organization with certain documents at least five days prior to the hearing. The Organization maintains that the Charging Officer did not have possession of these documents until a break in the hearing, and the Charging Officer thereafter was allowed to present them. The Organization insists that given the fact that the Carrier postponed the originally scheduled hearing because it did not have the litigation package to present at the hearing, there was ample time for the Carrier to insure that the other documents were presented to the Organization, but the Carrier failed to do so.

The Organization goes on to argue that it is improper for the Carrier to call on employees during their off-duty hours and order them to take any kind of test. The Organization insists that the Carrier has no authority to order any employee to take a drug test while on their off hours. The Organization points out that the Claimant was off work with permission and receiving vacation pay, yet he nevertheless did not refuse this order because he "does what he is told." The Organization insists that there is no written policy allowing the Carrier to call employees in on their off days in order to submit to drug and alcohol testing. The Organization insists that the evidence in the record supports the reasons why the Claimant was off work, and the Hearing Officer did not question those reasons. Moreover, the Claimant did not know that he was to be subjected to a re-test until Trowbridge spoke to him.

The Organization maintains that under the circumstances, the Claimant should have been offered a Rule G Waiver. 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 testing positive in November of 2006 for cocaine metabolites as part of the random drug testing procedures at the Carrier. The record reveals that the Claimant had previously entered into a Rule G Waiver Agreement while employed at Amtrak back in 1990. The Claimant was subsequently terminated for a second Rule G offense in 2001.

At that time, the Claimant entered into a conditional reinstatement that contained conditions similar to a Rule G Waiver Agreement. That Agreement, dated June 4, 2001, involved Amtrak reinstating the Claimant with no back pay as long as he contacted Amtrak's EAP counselor and adhered to a program; submitted to a return-to-duty physical examination, including a drug screen; and submitted and passed unannounced drug tests for a period of two years' active service and thereafter any future drug test administered by or through the Company, with the understanding that failure to adhere to any of the conditions would result in the reinstatement of the Claimant's dismissal. The Claimant and his Organization representative signed off on that Agreement on June 11, 2001.

Although the Organization argues that that Agreement was between Amtrak and the Claimant and the Union and that the Claimant is now employed by a different Carrier, this Board rejects that argument. The record also contains a Letter Agreement between the parties entitled "Side Letter No. 2," which was entered into on May 14, 2003. That record indeed does state that the parties agreed that the previous discipline records from Amtrak would not be used or considered commencing July 1, 2003. The letter also contains, however, an exception that is relevant here. That exception is contained in Paragraph 1, and it states the following:

> Employees with a previous Rule G violation that resulted in a Waiver Agreement and probationary period that is still in effect on July 1, 2003, will be considered still bound by the terms of such arrangement when employed on MBCR. This will include, but not be limited to, obligations of on-going participation in EAP counseling, follow-up/random testing, and/or any other condition agreed to in conjunction with the

> Waiver Agreement. Upon completing the probationary requirements, the provisions of the Rule G Bypass and Prevention Program Companion Agreements will apply.

Consequently, it is clear from this record that the Organization and the Carrier agreed that Rule G cases would be an exception to the rule that previous disciplinary records would not carry over to the new Carrier. The Claimant in this case is a three-time Rule G violator. He was clearly guilty of Rule G violations in 1990, 2001, and now in 2006. The Board should note that the Organization really did not challenge the findings on this current drug test, but only argued that it was inappropriate for the Claimant to be required to take the test when he was off on "vacation." This Board rejects that argument by the Organization because the record clearly reveals that the Claimant began his "vacation" only when he was asked to take the random drug test.

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.

This is the third Rule G violation for this Claimant. He was given every opportunity to reform his behavior, both in 1990 and in 2001, and he has failed to do so. This Board recognizes that he is a long-term employee; however, he is involved in safety-sensitive work and he has been unable to correct his wrongful behavior with respect to drugs. 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

DATED: Dec 11, 2007

CARRIER MEMBER

DATED: January 3, 2008