Award No. 316
Case No. 316

Special Board of Adjustment No. 910

PARTIES TO
DISPUTE: United Transportation Union
and
Consolidated Rail Corporation

STATEMENT OF
CLAIM:

Claim by Trainman M. J. Beik for "pay for all time lost, reinstatement to service with seniority and vacation rights unimpaired and payment of productive allowance and short crew money for each day lost."

FINDINGS:

Petitioner challenges the validity of the dismissal of an employee who, according to Carrier, tested positive for cannabinoids and cocaine on January 7, 1988. By that late date, and indeed well before that time, that employee (the claimant herein) was certainly aware, or should have been aware, of Carrier's concern about the drug problem and of the policy that it would follow in dealing with the problem.

We have had frequent occasion, unfortunately, to consider Carrier's drug policy and have upheld it as a reasonable exercise of managerial discretion to meet a horrendous condition that cannot be tolerated anywhere and

surely not in an industry involving train movements and heavy equipment. The policy has not been administered in an uneven or disparate manner.

Claimant was employed by Conrail on June 11, 1971 and has been in a furlough status most of the five years immediately preceding his discharge. On May 4, 1987, he was required to take a return to service physical examination. According to Carrier, a drug screen analysis conducted as part of that examination was positive for cannabinoids. On that account, claimant was disqualified from service pending further examination. He was also advised by Carrier's Medical Director's letter of May 11, 1987 as follows:

> "In accordance with Company policy, you are instructed to rid your system of Cannabinoids and other prohibited drugs and to provide a negative urine sample within 45 days of the date of this letter (June 25, 1987) at a medical facility to which you have been referred by the Company. If you fail to comply with these instructions, you may be subject to dismissal.
>
> I strongly recommend that you contact the Conrail Employee Counselor, who is: [Name and Address]. I also encourage you to seriously consider and follow the recommendations that the counselor may make on your behalf. Should you enter a counselor-approved educational or treatment program, the time period within which you must provide a negative urine sample can be extended to 45 days after you complete or leave the initial phase of the program, or 125 days from the date of this letter, whichever comes first."

Claimant resorted to self-help and provided a negative drug screen on June 24, 1987. He was congratulated by

Carrier letter of June 25, but warned that he would be required to undergo periodic unannounced testing for a three year period and would be subject to dismissal if he should again test positive.

On December 18, 1987, claimant was again recalled from furlough and required to take a return urinalysis. He took the physical on January 7, 1988. Carrier maintains that his urine sample on that date tested positive for cannabinoids and cocaine.

On that basis, claimant was charged with failure to comply with the Conrail Drug Testing Policy and to refrain from the use of prohibited drugs. A hearing was held on the charges on February 24, 1988 in claimant's absence. The hearing was scheduled to begin at 10 a.m. and when claimant failed to appear or call by 11:45 a.m., the hearing officer proceeded with the hearing over the Organization's objection and request for a further postponement. Claimant had been duly notified of the hearing's time, place and nature and no further delay was warranted. The objection was properly denied.

Carrier's notice of discipline dated March 8, 1988, informed claimant that he had been dismissed for failure to comply with Carrier's Drug Policy in that he did not refrain

from the use of prohibited drugs "as evidenced by the urine sample provided on January 7, 1988, testing positive."

It is Petitioner's position that the decision to discharge claimant must be reversed because of procedural and substantive defects. It's first point--that the notice of charges served on claimant betray prejudgment--clearly lacks merit. The notice fairly advised claimant of the accusations against him that he would have to meet in the hearing process.

Petitioner's second contention is that the transcript of the hearing contained garbled questions and testimony and was erroneous in a number of respects. We agree with Petitioner that all due effort should be made to have an accurate transcript prepared. There is no evidence that Carrier was at fault in the matter or that claimant was prejudiced by any omission or incoherent statement. The objection will be overruled.

Contrary to Petitioner's third point, Carrier was not in error in having Assistant Superintendent Newcomer testify regarding identification of formal documents and procedural matters. On the other hand, there is merit in Petitioner's contention that some more appropriate witness should have been made available to testify regarding the tests given claimant as well as the processing and analysis of the

specimen. Knowing the difficulty involved in bringing in a physician in this type of proceeding, the calling of a doctor may not have been necessary. However, a registered nurse who handled the test or a responsible technician or other competent witness familiar with the case should have been called to present evidence and to be subject to cross examination.

On balance, it would seem important to follow that procedure in so important a situation as the dismissal of an employee with substantial service, particularly when he was called in for the tests in question while on furlough. Manifestly, Mr. Newcomer had no first-hand knowledge of the tests and analyses performed here. While there is some measure of expense and time involved in bringing in witnesses, a realistic weighing of the respective interests involved in a discharge case of this nature persuades the Board that competent witnesses should have been called in this case.

The fact that claimant was subjected to testing while on furlough was not unreasonable on its face. The evidence does not clearly show that he was not subject to duty at the times in question or might have been called for assignment soon thereafter. Moreover, this is not a Rule G case and Carrier should have some latitude in giving tests to make reasonably

certain that trainmen being considered for duty are not using cocaine. This is not to say that in an appropriate case, we might not hold that it would be improper to test an employee on furlough.

Carrier's findings that claimant had tested positive for cocaine is supported by reports and analysis by such reputable authorities as Oakwood Industrial Clinic (Lincoln Park, Michigan) and Roche Laboratories (Raritan, NJ) as well as drug memoranda of Carrier's Medical Director, Dr. Hawryluk. In view of that credible and substantial evidence, we will deny the claim for back pay.

Carrier will, however, be required to reinstate claimant to its service with seniority unimpaired in the light of the shortcomings we have mentioned with respect to presenting competent witnesses for examination and, perhaps more important, cross-examination purposes. All other relief sought by the present claim will be denied.

AWARD: Claimant reinstated to Carrier's service with seniority rights unimpaired but without back pay. To be effective within 30 days.

Adopted at Philadelphia, PA, April 11, , 1989

Harold Weston, Chairman

Carrier Member

Employee Member