

SPECIAL BOARD OF ADJUSTMENT NO. 957

SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY :
"AUTHORITY" :
:

AND :

BROTHERHOOD OF MAINTENANCE :
OF WAY EMPLOYES :
"ORGANIZATION" :
:

AWARD NO. 16

STATEMENT OF CLAIM

Claim of the Brotherhood (BMWE-86-10-F11) that:

The dismissal of Structural Welder J. Steelman was arbitrary and capricious and without just and sufficient cause.

REMEDY:

The Claimant shall be reinstated without loss of compensation and without loss of seniority and other contractual benefits and privileges the Claimant enjoyed prior to his dismissal.

OPINION OF THE BOARD

Claimant, J. Steelman, was discharged on November 5, 1986 for being in violation of Industrial Relations Order #85-1, ("85-1") which concerns the use of, and testing for, intoxicants and/or controlled substances.

The basic facts are not complex. Claimant voluntarily underwent treatment for substance abuse at Eagleville Hospital. Authority approved Claimant's return to duty on August 23, 1986, but informed Claimant that he would have to undergo follow-up body fluids examinations. No protest was made of this testing

requirement. On October 22, Claimant underwent a physical examination which included a body fluids test. The results of this examination revealed the presence of a controlled substance (marijuana metabolite) in Claimant's system. These results were confirmed by Gas Chromatography/Mass Spectrometry. As a result of these findings, Claimant was interviewed by his foreman on October 28, 1986. During this interview, Claimant made admissions that he had smoked marijuana prior to the test in question and prior to other body fluids tests. Claimant was subsequently terminated for violation of Industrial Relations Order #85-1.

The Organization filed a timely claim on behalf of Claimant. It is in dispute whether the Organization processed the claim to the third step of the grievance procedure in a timely fashion. In the third step answer, the Authority maintained that the claim was untimely.

Industrial Relations Order #85-1 was unilaterally promulgated by the Authority on September 20, 1985. The Order, which was applicable system wide, states in relevant part:

In accordance with Public Policy and a major commitment of the Authority's Mission to ensure the safety of employees, the public, and passengers, this Order supplements the current Rule Books, Orders, or Labor Agreements governing the use of intoxicants and/or drugs.

Because of the unpredictable residual effects of certain intoxicants and/or controlled substances, the presence of intoxicants or controlled substances in employees off-duty but subject to duty or reporting for duty; on the Authority property or in recognizable uniform; or in possession of, while on duty; is strictly prohibited and is a dischargeable offense.

Any employee suspected of being in violation of this Order may be required to take a blood/urinalysis or other toxicological test(s).

An employee found to be under the influence of, or, so tested, whose test(s) results show a qualitative and/or qualitative trace of such material in his/her system shall be discharged from Authority service.

The Authority initially maintains that the claim is not arbitrable, as the Organization's appeal to the third step was untimely. The Authority further asserts that should the merits of this matter be considered, it is apparent that the Claimant tested positive for marijuana use, and that he subsequently admitted his involvement with marijuana. The Authority concludes that Claimant's use of marijuana violated 85-1, and by the provisions of that Order and consistent with arbitrable precedent, Claimant's discharge was proper.

The Organization raises numerous defenses on behalf of the Claimant. It is contended that the Claimant was harassed, as there is no testing provided for under the Labor Agreement, and Claimant's own return to work after previous treatment for substance abuse did not provide for follow-up testing. Claimant's test therefore amounted to random testing without probable cause, which courts have determined is improper. Moreover, Claimant was improperly denied a confirmation test which he requested, and the Authority failed to produce the test results it now relies upon and further failed to produce proper chain of custody evidence. Moreover, according to the Authority, the entire policy that Claimant was tested under, 85-1, is

illegal and improper.

The Board has initially determined that the claim should not be denied due to a lack of timeliness. Although the Authority has maintained that it did not receive the third step appeal until long after expiration of the contractually mandated time limits, the appeal itself is dated within the time limits. There was no testimony in the record or at the hearing before the Board concerning this matter. In these circumstances, the Board finds that the evidence lacks sufficient conclusiveness upon which to base a determination that the claim be denied for lack of timeliness. Accordingly, the Board will proceed to determine the merits of the Claimant's discharge pursuant to 85-1.

In Award No. 17, also issued this day, the Board set forth guidelines concerning how it will consider certain cases arising under 85-1. Applying those principles to the facts of this case, the Board finds that the claim must be sustained in part.

Claimant had a prior history of substance abuse, and had received rehabilitative treatment within a year of his discharge. The Authority therefore had proper grounds to administer a body fluids test on October 22, 1986. Moreover, while the Organization questions the propriety of the test along with the validity of the test results, the uncontradicted evidence is that the Claimant made admissions at his interview on October 28, 1986 concerning his renewed use of controlled substances. There is no evidence, however, that the Claimant was under the influence of controlled substances while at work or reporting for work.

In these circumstances, the Board finds that the Authority could not properly discharge Claimant. The Authority could, however, properly remove the Claimant from work until such time as he underwent additional rehabilitation and tested negative, as the evidence establishes that the Claimant was again using controlled substances.

Accordingly, within 60 days of the date of this decision, Claimant shall notify the Authority whether he will self refer to a proper rehabilitation program. If Claimant re-enters rehabilitation and successfully completes the program, the Authority shall reinstate him contingent upon his testing negative for a body fluids test administered at the time of his return to work physical.

AWARD

Claim sustained in part consistent with this Opinion.

R. B. Birnbrauer 10/7/88
R. B. BIRNBRAUER
Authority Member

W. E. Larue
W. E. LARUE
Organization Member

S. E. Buchheit
S. E. BUCHHEIT
Neutral Member