

SPECIAL BOARD OF ADJUSTMENT NO. 957

-----  
SOUTHEASTERN PENNSYLVANIA :  
TRANSPORTATION AUTHORITY :  
"AUTHORITY" :

vs. :

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

AWARD NO. 30

STATEMENT OF CLAIM:

Claim of the Brotherhood (BMWE-88-3-F12) that:

(a) The dismissal of Track General Helper R. Jones for violation of SEPTA Order No. 85-1 is in violation of the Railway Labor Act and the current collective bargaining agreement.

(b) The dismissal of Claimant Jones violated the guidelines set forth in the decision of the United States District Court of Eastern Pennsylvania in the case involving Union's (et al) vs. SEPTA, rendered by The Honorable Judge Edmund V. Ludwig on January 19, 1988.

REMEDY:

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

OPINION OF THE BOARD

Claimant, R. Jones, was discharged on February 8, 1988 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 as follows. On February 4, 1988, Claimant, a Track General Helper, having successfully completed initial testing requirements for the position of Construction Equipment Operator, was required to undergo a physical examination in order to qualify for the I.C.C. license which is a requirement of the position. The specific requirements mandated by the Department of Transportation, as they pertain to the physical examination, are as follows:

(12) Has no current clinical diagnosis of a drug dependence of a drug or other substance identified in the Drug Enforcement Administration's Schedule 1-Controlled Substances, an amphetamine, narcotic, or any other habit - forming drug; ...

In conjunction with these requirements, Claimant submitted to a physical examination which included a body fluids test. The results of this test, which was confirmed by Gas Chromatography/Mass Spectrometry, revealed the presence of cocaine metabolite in Claimant's urine. Claimant was subsequently terminated for violation of Industrial Relations Order No. 85-1.

Order No. 85-1 was unilaterally promulgated by the Authority on September 20, 1985. The order, which was applicable systemwide, 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 quantitative trace of such material in his/her system shall be discharged from Authority service.

The Authority contends that Claimant was properly given a body fluids test on February 8, 1988, as such test was required for his I.C.C. license, and in these circumstances body fluids tests have been administered for many years. The Authority further maintains that the Claimant was therefore properly discharged for violation of 85-1 once the test results proved positive.

The Organization raises numerous arguments on behalf of the Claimant, including the alleged impropriety of 85-1. The Organization questions whether a body fluids test was required for an I.C.C. license, and maintains that even if it was, and Claimant was properly given a test, the only consequence of a verified positive test result should be that Claimant remains in his current position and does not get promoted to the one requiring an I.C.C. license.

In Award No. 17, issued on October 7, 1988, 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 determined in executive session on October

7, 1988 that the claim would be sustained in part. The Board's reasoning was as follows.

The Board was persuaded that the Authority could properly administer a body fluids test to Claimant as part of his I.C.C. physical. Although the Organization questions whether the body fluids test is required under the language of I.C.C. regulations, it appears that body fluids tests have been given in conjunction with I.C.C. physicals for an extended period of time. Accordingly, through their practice, the parties have determined that a body fluids test is an appropriate part of an I.C.C. physical for employees in this bargaining unit. The Board therefore found that the test results were properly considered by the Authority.

The Board was further satisfied that the testing procedures used in Claimant's body fluids test were adequate, that the results accurately showed that the Claimant had traces of a controlled substance within his system, and the trace was a result of use by the Claimant rather than other reasons. 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 found that the Authority could not properly discharge Claimant. The Authority could, however, properly remove the Claimant from work until such time as he tested negative.

Accordingly, the Board determined that Claimant should be

reinstated, providing that he take a return to work physical that includes a body fluids test, and that the test results prove negative. Should the Claimant again test positive, it would raise the question as to whether Claimant had an uncontrolled substance abuse problem requiring rehabilitation. The parties were therefore directed by the Board to determine whether a second positive test result should require the Claimant or any other employee to undergo rehabilitation before returning to work. If the parties cannot decide, the matter will be referred back to the Board for determination.

The Board further determined on October 7, 1988 that should the Claimant test negative in his return to work body fluids test, he should be entitled to reinstatement without being required to establish that he has successfully completed a rehabilitation program. In Claimant's case, unlike the situation involved in Award 17, Claimant does not have a verified history of controlled substance abuse which required rehabilitation. Accordingly, the Board did not direct renewed rehabilitation prior to Claimant's returning to work. Given the serious nature of any use of controlled substances, no matter whether off work or however infrequent, the Board did, however, direct the Claimant to complete a program of drug counselling in order to maintain his employment with the Authority. The type of drug counselling to be required of Claimant was a matter to be mutually agreed upon between the Authority and Organization. If the parties cannot agree, the matter will be referred back to the


Board for determination. Successful completion of the drug counselling program shall be determined by the standards of the program itself.


Finally, the Board has determined that the Claimant was not entitled to back pay from the period of his termination until fulfilling the conditions for reinstatement set forth in this Award. Claimant had not tested negative or undergone drug counselling. In these circumstances, it is unclear that Claimant has ever been in condition to return to work, and in light of his use of controlled substances, the Board does not believe that he is entitled to back pay.

AWARD

Claim sustained consistent with this Opinion.

  
R. B. BIRNBRAUER,  
Authority Member

  
W. E. LA RUE,  
Organization Member

  
S. E. BUCHHEIT,  
Neutral Member