

chain
of
Custody

SPECIAL BOARD OF ADJUSTMENT NO. 910

UNITED TRANSPORTATION UNION
as the Representative of
J. K JOHNSON
vs.

Docket No. CRT-11811D

CONSOLIDATED RAIL CORPORATION

CASE NO. 914

STATEMENT OF CLAIM:

Appeal of "Dismissed in all capacities" assessed Trainman J. K. Johnson (679468) in connection with the following subject, quoted from Form G-32 Notice of Discipline, dated October 7, 1997:

"Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated October 20, 1994 and subsequent letter dated November 17, 1994 from former Medical Director, T. Nowosiwsky, MD, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample you provided on July 3, 1997 at approximately 1:50 p.m. at Rose Lake Yard, E. St. Louis, IL which tested positive."

Plus claim for all lost earnings, if any, and that his record be cleared of all reference to this charge.

Based on the whole record and all the evidence adduced at the hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act as amended; that this Board is duly constituted by agreement and has jurisdiction over the parties and the subject matter; and that the parties were given due notice of this hearing.

DISCUSSION AND FINDINGS

Appellant is a promoted Conductor who entered the service of the Pennsylvania Railroad on July 21, 1967. On July 3, 1997, when Appellant was working as a long pool Conductor, a random drug test was performed by the collection of a urine sample. Appellant's urine sample tested positive for metabolites of cannabinoids at the MedTox Laboratories in St. Louis. The test results were sent to the wrong carrier in error. They were reported to the Conrail Medical Director on July 9, 1997. After the error was discovered by the Canadian carrier to whom the report had mistakenly been sent, the Canadian carrier forwarded the results to CONRAIL'S Medical Department on July 17, 1997. On July 18, 1997, the Carrier discussed the test results with Appellant and with the Division superintendent and informed Appellant that he would be removed from service. She also informed Appellant that he could send the second half of the split sample that had been taken to a second laboratory for confirmation. On July 21, 1997, Appellant was sent notice by the Medical Director verifying the positive test result and notifying Appellant that his supervisor would be informed about the positive test. At his request, Appellant received a written list of laboratories from the Medical Director on July 24, 1997 and made his selection of a laboratory that day. Appellant was sent a letter dated July 29, 1997 to attend a formal investigation on August 5, 1997. On August 26, 1997, the split sample was forwarded to Quest Diagnostics for testing. The results of the test on the split sample which were reported as positive were sent to CONRAIL on August 27, 1997.

The Carrier's only witness in the Investigation was the Senior Trainmaster from Big Four Yard, Mr. DeLuca. The witness was unable to provide any first-hand information. Basically, the

witness authenticated documents that had been provided to him by the Medical Department. When questioned about the chain of custody, he could not answer questions about the delay in reporting the results of the test to Appellant. He had no information about the delay in forwarding the split sample to a laboratory chosen by Appellant. He was similarly uninformed about the different accession codes that appeared on the two laboratory reports but, after a recess in which he contacted the Medical Department, he said that the Medical Department informed him that there was a typographical error in the date typed on the split sample by the laboratory so that it read 8-3-97 rather than the correct 7-3-97. The witness acknowledged that he did not know if the fact that the letters in the number code that differed in the two samples could possibly identify two different specimens from two different people only one of which was provided by Appellant on July 3, 1997.

The record indicates that Appellant tested positive for prohibited drugs on October 17, 1994. He was disqualified from service and instructed to rid his system of prohibited drugs and to provide a negative urine sample by February 22, 1995. He was also advised that the Carrier's medical policy forbids the active employment of persons who are dependent upon or use unauthorized drugs. After providing a negative sample, he was qualified to return to service by the Medical Director and informed that during the first three years following his return to work he would be required from time to time to report to a medical facility for further testing in order to demonstrate that he no longer was using cannabinoids or any other prohibited drug. Appellant denies using any prohibited drugs since that time.

The Carrier contends that Appellant failed to follow instructions given in the Medical Director's letter dated October 20, 1994 when he tested positive for cannabinoids on July 3,

1997. Therefore, Appellant was dismissed in accordance with Conrail's Drug and Alcohol Policy. The Carrier asserts that dismissal is the appropriate discipline for an employee's refusal to obey a properly authorized and communicated instruction. It urges that there are no mitigating circumstances and no reason for the Board to disturb the dismissal.

The Organization asserts that Appellant's rights to a fair and impartial investigation were violated. It contends that notice of the investigation was not timely as required by Rule 93 (d) because it was sent on July 29, 1997 after the superintendent received notice of the positive test results on July 18, 1997. The Organization calculates this lapse of time as 12 days when the Rule requires notice within 10 days.

As its second point, the Organization claims that the Carrier violated Rule 93 (e)(2) when it failed to provide proper witnesses to verify chain of custody. In addition, says the Organization, the Carrier also violated the Code of Federal Regulations, Part 40, Procedures for Transportation Workplace Drug Testing Programs, Final Rule 40.29 that reads in pertinent part as follows:

A Laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against an employee when that proceeding is based on positive urinalysis results reported by the laboratory.

The Organization stresses that "this case of all cases needed proper chain of custody proof." It argues that there were so many perforations in the chain of custody that the Carrier witness could not answer that the Organization objected. But the Carrier, after noting the objection, continued on without making any attempt to produce the witnesses.

The Organization requests that the appeal be sustained.

The Carrier argues in rebuttal that the Organization made no request for a witness from the Medical Department until the closing statement during the Investigation. But such a witness would not, in any event have changed the test results, it argues. Finally, the Carrier contends that even if the Board should sustain the appeal, there would be no monetary payment due Appellant because Appellant failed to meet the Carrier's medical standards to remain in service and is not therefore entitled to any lost wages.

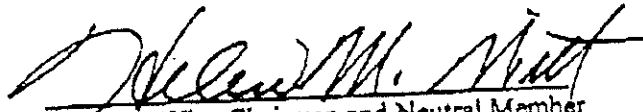
The Board finds that there is insufficient reliable evidence to support a finding that Appellant provided a positive sample to a laboratory that was verified in a split-sample test by a second laboratory. The record is totally inadequate to prove the facts relied on by the Carrier when the decision to discharge was made. There was no testimony from anyone with any first-hand knowledge of the specific tests at issue and nothing but hearsay evidence, sometimes third-hand, to explain a series of potentially fatal errors in labeling, dating, forwarding and reporting the results of tests on the sample that Appellant was asked to provide on July 3, 1997. This is not the quality of evidence on which the Board can rely to determine that chain of custody standards were complied with. Therefore, there is no sound basis for terminating the employment of an employee with 30 years of service.*

Because there is insufficient evidence of Appellant's rule violation, the discipline of dismissed in all capacities cannot be upheld. Furthermore, there is no finding here that Appellant failed to meet the Carrier's medical standards to remain in service. As the discipline will not be upheld, there is no need to reach the issue whether notice of the investigation was timely sent.

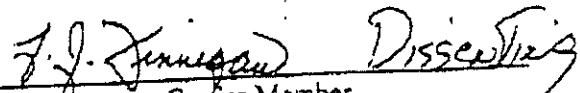
AWARD

The appeal is sustained. Appellant will be restored to his employment without loss of seniority and made whole for earnings and benefits lost.

DATED: 9/22/00 2000
PITTSBURGH, PA


Helen M. Witt, Chairman and Neutral Member


B. Wigent, Organization Member


L. J. Finnegan, Carrier Member