

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 910

UNITED TRANSPORTATION UNION

and

CONSOLIDATED RAIL CORPORATION

AWARD NO. 442
Case No. 442
Docket No. CR-T-6313-D

STATEMENT OF CLAIM

Request of W. T. Hooper that the discipline of dismissal be rescinded, expunged from his record and that he be restored to service with seniority and vacation rights unimpaired and compensated for all time and expenses incurred inclusive of Health and Welfare premiums, Reduced Train Crew Allowance and Productivity Savings Sharing Allowance credit for Railroad Retirement payments for each month for all time lost in connection with the following charge:

Failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated September 8, 1987, and subsequent letter dated September 28, 1987, from Medical Director G. R. Gebus, in that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on June 23, 1989, testing positive.

During a routine physical examination on September 1, 1987, the Claimant was tested for drugs. The Carrier was

advised by the testing laboratory that the Claimant's urine specimen was positive for cannabinoids (marijuana). Under the Carrier's Drug Testing Policy, the Claimant was medically disqualified from service. In keeping with the Policy, the Claimant was given the opportunity to provide a negative urine sample within 45 days. The Claimant did so shortly after the original drug test. Further under the Policy, the Claimant was restored to duty and advised that, during the first three years following his return to work, he would be required at times in the Company's option to undergo a further drug test to demonstrate that he was free of drugs.

On June 29, 1989 (within the three-year period), the Carrier had occasion to test the Claimant. The test results were again positive for cannabinoids. Based on this, the Carrier required the Claimant to attend an investigative hearing on his alleged "failure to comply" with the Drug Testing Policy. During the investigative hearing, the drug test results were placed in the record. As a consequence, the Claimant was dismissed from service.

This Board has been required on frequent occasions to review employee dismissals which result from the operation of the Carrier's Drug Testing Policy. At this point, the Board

need not discuss the propriety of the Carrier's Drug Testing Policy, which has been upheld in many other Awards. In addition, numerous Awards have also supported the efficacy of the drug tests themselves, performed for the Carrier by a highly reputable concern. In other instances, as here, the initial results of a drug test, if positive, are further checked by additional testing which is generally held to be virtually free of error.

The Policy calls for dismissal in the event an employee is tested positive for drugs during the three-year period following his return to service after providing an initial negative result.

The Organization's submission faults the Carrier for failing to provide a witness directly involved in the drug testing procedure in order to respond to technical questions involved in the process. As stated by the Organization:

To simply send a messenger to admit laboratory documents, with such a serious matter at stake, is evidence beyond any doubt that the Carrier had prejudged the Claimant guilty and the investigation was a mere formality necessary before dismissing the claimant.

The Organization cites two Awards of this Board -- No. 316 (Weston) and No. 372 (Peterson) -- which set aside dismissals based on the Carrier's failure to provide such expert

witness. In contrast with these Awards, the Carrier refers to consideration of this same point in Public Law Board No. 4291, Award No. 5 (Hays) and Public Law Board No. 3514, Award No. 314 (Muessig), both of which were denial awards. Public Law Board No. 31, Award No. 314 states in part as follows:

These are difficult cases for all concerned, particularly for the Organization. It has forcefully and with skill advanced its many concerns with respect to the application of the Carrier's Drug Policy. In this case, the Carrier introduced the results of the Claimant's urinalysis test, however, the medical experts responsible for the test were not present at the hearing to be challenged by the Organization. Under certain circumstances, the Organization arguments could lead to a sustainable claim. However, we have a testing process here that includes the use of a highly reputable laboratory and withstands vigorous scrutiny. Accordingly, because the key data, in this case the results of the urine test, came about from this process, it can be reasonably judged to be a medical fact. Therefore, the unavailability of a Carrier medical person for cross-examination with respect to the established medical fact does not make the hearing an unfair one. The Board has carefully considered these contentions. We understand the points raised by the Organization and we do recognize that they are not without merit in certain situations. In this case, we conclude that the claim must be denied.

In the instance here under review, the Board notes that no question was raised during the investigative hearing, when it would have been appropriate to ask for additional technical testimony. Further, the Claimant offered no convincing testimony that the tests administered to him were improperly performed or were at fault in their results.

In accepting reinstatement under the Drug Testing Policy, the Claimant was fully aware that his standing was at risk during the three-year period. As stated in this Board's Award No. 370 (Peterson):

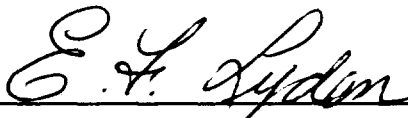
It being evident that the Claimant failed in his obligation to remain free of the use of prohibited drugs in keeping with his conditional reinstatement to service under the Carrier's substance abuse policies and procedures, and the Carrier having a responsibility to provide a safe working environment free of employees who are dependent upon drugs which may impair sensory, mental or physical functions, the Board must conclude that the Carrier had just cause to discharge the Claimant from all its service.

A W A R D

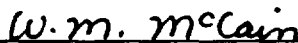
Claim denied.



HERBERT L. MARX, JR., Chairman and Neutral Member



E. F. LYDEN, Employee Member



W. M. McCAIN, Carrier Member

NEW YORK, NY

DATED: October 23, 1990