

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31487
Docket No. MW-31856
96-3-94-3-156

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Of Maintenance Of Way Employes
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(National Railroad Passenger Corporation
((AMTRAK)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. W. Philips for alleged violation of National Railroad Passenger Corporation Rules of Conduct Rules "L" and "G", in connection with a positive drug screen on March 1, 1993, was arbitrary, capricious, based on unproven charges and without just cause (System File NEC-BMWE-SD-3237D AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Philips shall be reinstated to service, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute received notice of the hearing thereon.

On January 9, 1992, Claimant signed a Rule G Waiver, after refusing to submit to a drug screen. Under the waiver, Claimant agreed, among other things, to be subject to subsequent drug screens and that any future positive drug screen would result in his dismissal. On March 1, 1993, following a furlough, Claimant was administered a return-to-duty physical examination which included a drug screen. Claimant's drug test was positive for Phencyclidine (PCP). An Investigation was held on June 28, 1993, and, on July 13, 1993, Claimant was advised that he had been found guilty of violating Rules G and L and was dismissed from service.

The Organization contends that Claimant was denied a fair Hearing because Carrier initially prohibited Claimant's EAP Counsellor from testifying. The Organization further contends that Carrier failed to carry its burden of proving the charges. The Organization attacks the credibility of the drug test results. It relies on a written statement from a licensed psychologist indicating that drug screens by urinalysis are not 100 percent accurate. It further relies on testimony by Carrier's nurse who received Claimant's urine specimen that Claimant's behavior was normal, and on testimony from Claimant's EAP Counsellor that Claimant did not meet the profile of the typical PCP user and never exhibited any signs of PCP use. Furthermore, the Organization notes that Claimant testified that his daughter had given him a bottle to smell and that the bottle contained a strong-smelling substance which could have been PCP. Finally, the Organization finds support for its position in the results of a drug screen administered to Claimant when he entered a substance abuse program which showed Claimant to be negative for controlled substances.

Carrier contends that Claimant's Hearing was fair and impartial. Carrier further argues that it proved the charges against Claimant. Carrier relies on the results of the drug screen, noting that testing was performed by a NIDA-approved lab, that the entire chain of custody and calibration of equipment was properly documented and that further safeguards were taken to ensure accuracy. Carrier further observes that the drug screen was performed using the generally accepted methods; initially the lab used an EMIT test and confirmed the positive EMIT result through GCMS.

Carrier attacks the evidence on which the Organization relies. It attacks the substance abuse facility's drug screen for not using a GCMS test and for not documenting the chain of custody. It contends that the psychologist's statement is entitled to no weight because he spoke specifically to tests for cocaine and because he did not specify what types of urinalysis he intended to cover.

Carrier also contends that Claimant's defense should not be credited because Claimant never produced the bottle that he claimed his daughter asked him to smell, even though he admitted that the bottle still existed.

Initially we consider the Organization's contention that Claimant was denied a fair hearing. Carrier did, at first, prohibit the EAP Counsellor from testifying. Eventually, Carrier reversed its decision and the Counsellor did testify in support of Claimant. However, we are unable to find that Carrier's initial prohibition of the Counsellor's testimony represented a deliberate attempt to impede the hearing. On the contrary, the Counsellor testified that his superior voiced concern for the Counsellor's neutrality. We need not and do not rule on whether Carrier would have violated the Agreement had it persisted in forbidding the Counsellor from testifying. It is sufficient to indicate that Carrier's concerns with maintaining the neutrality of its EAP Counsellors were not unreasonable. We see no reason to infer a sinister motive on Carrier's part and, because the Counsellor did testify, we are unable to find that Claimant was denied a fair hearing.

We have reviewed the testimony of Carrier's nurse and the documentation provided by the testing lab. Carrier's and the lab's conduct of the drug screen cannot be faulted. The initial EMIT test came back positive for PCP metabolites in Claimant's urine. EMIT tests, however, are subject to false positives primarily due to problems of cross-reactivity. In an EMIT test, the lab combines an agent with the urine specimen. If the appropriate reaction takes place, the test indicates the presence of metabolites of the specified substance. However, other substances are also capable of reacting with the agent and producing a false positive. The confirmatory GCMS test eliminates the problem of cross-reactivity because it examines the molecular structure of the metabolites in the urine. Thus, the only concerns for false positives in a GCMS arise from faulty equipment or human error. The safeguards employed and documented by the lab greatly minimize the likelihood of such false positives occurring.

We do not find in the psychologist's written statement, any reason to discount the test in this case. The statement reads as follows:

"It is my experience that drug screens by urinalysis are not 100% accurate. In fact certain antibiotics often show up positive for cocaine."

The statement does not indicate the type of urinalysis to which the psychologist refers. The reference to antibiotics showing up positive for cocaine appears to be a reference to the cross-reactivity problems encountered with EMIT tests. The statement does not appear to refer to confirmatory GCMS tests and, consequently, cannot undermine the evidentiary value of the test used in the instant case.

We also find that the negative test results from the second urinalysis are not particularly helpful. We do not agree with Carrier that the failure to perform a GCMS test discredits the results. The purpose of a GCMS confirmatory test is to guard against the possibility that cross-reactivity led to a falsely positive EMIT. When the EMIT test is negative, there is no need to perform a confirmatory GCMS. However, we do observe that the second urine specimen was given on March 17, 1993, sixteen days after the first specimen which tested positive for PCP. This left ample time for any PCP which might have been in the Claimant's system to dissipate and not show up in his urine.

We note that the record before us is far from ideal. Both parties share the responsibility for this. Claimant raised the possibility that whatever substance was in the bottle that his daughter asked him to smell may have triggered the positive test result. However, because the GCMS eliminated the possibility of a cross-reactivity induced false positive, the substance in the bottle could only have triggered the positive test result if it had been PCP. Claimant testified that his daughter retained the bottle, but he never offered it for analysis to identify the substance it contained. Had Claimant done so, the possibility that he unknowingly inhaled PCP could have been determined with a considerable degree of certainty.

On the other hand, a simple procedure available to Carrier could have further reduced the likelihood of human error in the conduct of the GCMS. At the time Carrier obtained Claimant's urine specimen, it could have split the specimen, sending half to the lab for testing and retaining the other half for re-testing by another lab if a dispute arose as to the accuracy of the first lab's results. There is no evidence that Carrier split the sample to facilitate a retest.

Finally, we note that Claimant's test showed a concentration of PCP metabolites in his urine of 260 ng/ml. The cutoff for a positive result was 25 ng/ml. Unfortunately, neither party presented any expert testimony or other evidence concerning the significance of such a reading.

Although intuitively the discrepancy between the test results and the cutoff level strikes us as high, we note that urinalysis drug screens only provide the concentration of the byproducts of controlled substances in the urine. They differ from alcohol tests which provide the concentration of alcohol in the blood and which have cutoff levels that are correlated with impairment. The cutoff levels in drug screens usually are set to guard against false positives. Without expert testimony, we are unable to determine what significance, if any, should attach to the seemingly high concentration of PCP metabolites in Claimant's urine specimen.

Thus, the record contains evidence of a positive drug test with all appropriate safeguards that ensure the accuracy of the result. This evidence supports a strong inference that Claimant violated Rule G.

The record, however, also contains testimony from Carrier's nurse that Claimant's behavior was normal at the time he gave his urine sample; and testimony from the EAP counsellor that Claimant did not fit the profile of the typical PCP user and did not display abnormal strength, violent tendencies, mood swings, and flashbacks, which are typical signs of PCP use. The Counsellor conceded that not every PCP user fits the profile. He also testified that different people react to PCP differently and that the duration of the reaction varies depending on various individual factors, including the user's size. Lighter individuals discharge the PCP quicker than heavier individuals, but the effects are more extreme. PCP lingers longer in the system of heavier individuals, such as the Claimant who weighed 275 pounds, but its effects are not as extreme. Initially, the Counsellor testified that PCP would linger in a heavier person's system for two to three days; subsequently, he testified that if PCP had been used on March 1, it could still be in the person's system on March 17. Furthermore, he conceded that had Claimant used PCP two months prior to March 1, the residue could remain and show up as positive in his urine on March 1.

The testimony by Carrier's nurse and the EAP Counsellor together support a strong inference that Claimant did not use PCP in violation of Rule G. As with the inference supported by the drug test results, however, the evidence and inference are not foolproof.

Thus, we face two conflicting strong, but not ironclad, inferences. As an appellate body, we are in an inferior position to weigh the evidence and resolve the conflict between these inferences. In particular, we did not observe the Claimant's demeanor when he testified and denied using PCP.

Nor did we observe the nurse and the EAP Counsellor. The transcript shows that the Counsellor's testimony began with an emphatic opinion that the Claimant did not use PCP, but, as the testimony continued, that opinion hedged with concessions, such as the counsellor's agreement that the Claimant could have used PCP a considerable period of time before his drug screen and still have it show up positive on the test. Because we were not present to observe the testimony, we are significantly handicapped in our ability to evaluate it.

The Hearing Officer observed the testimony and received the evidence first hand. He wrote a detailed opinion in which he credited the test results more than he credited the testimony which suggested that the test results were inaccurate. As an appellate body, we must defer to the Hearing Officer's weighing of the conflicting evidence and inferences. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of May 1996.