

PUBLIC LAW BOARD NO. 1760

Award No. 152

Case No. 152
File MW-FTW-93-62

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Norfolk & Western Railway Company

Statement
of Claim: Claim on behalf of T. R. Zarate requesting reinstatement
and pay for time lost as a result of his dismissal for
failure to comply with the instructions of Carrier's
Director of Medical Services and Company policy.

Findings: This Board has jurisdiction of this case by reason of
the parties Agreement establishing the Board therefor.

Claimant was medically disqualified as a result of a
positive drug test. He contacted the DARS counselors and
successfully completed the program. The Claimant was
permitted to return to service. Dr. Salb, the Medical
Director, on July 26, 1990 when permitting his return to
service advised the Claimant against any prospective use of
drugs that would subject him to discharge.

The Carrier instituted its drug policy on February 12,
1985 which it modified in August to the effect that all
company physicals would include a drug screen urinalysis and
the Company medical policy forbade both the active
employment of those who depend on or use drugs which impairs
sensory, mental or physical functions. The policy
modification required any employee who tested positive for a
prohibitive substance to submit a negative retest to a
Carrier designated facility or seek help from the Company's
drug and alcoholic rehabilitation services (DARS) program
within 45 days of the letter informing the employee of the
positive test result. Compliance with those instructions
would return affected employees to service upon testing
negative. The policy was well disseminated. The Claimant
in early 1990 pursuant to a random screen test under
procedures enacted for employees driving trucks, proved
positive for a prohibitive substance. The Claimant
contacted DARS, enrolled in the program, successfully
completed it and after a negative test was returned to
service.

Only July 1, 1993, the Claimant was sent for a follow-
up drug screen pursuant to Dr. Salb's letter of September
26, 1990. That sample tested positive for marijuana.

He was held out of service pending an investigation. The investigation was held on the charge for failure to comply with the Company's policy and the instructions of the Carrier's Director of Medical Service.

The Claimant exerted an affirmative defense that he had taken an independent retest on August 16, 1993 and that test was negative for prohibitive substances. Also, that he asserted that he had requested through Dr. Salb's office a retest of his urine specimen. However, that retest also tested positive. Carrier found the Claimant guilty of failing to comply with the instructions. He was dismissed from service as discipline therefor.

Claimant was accorded the due process to which entitled under his discipline rule.

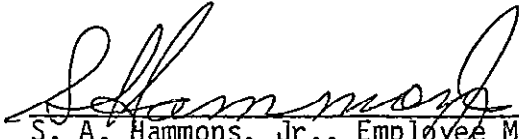
There was sufficient evidence adduced to support the Carrier's conclusion that the Claimant was guilty of the charges placed against him. Despite the Claimant's request for a retest, which was honored, the second test tested positive for marijuana metabolism.


The Claimant's personal test at the Ohio Medical College at Toledo on August 16, administered some 26 days after the original test, can hold no relevancy to disparaging the tests held under FRA regulations. The Claimant's test was untimely taken and such test was administered contrary to the FRA regulations by an unauthorized agency.

The FRA's regulations governing the collection and analysis of urine specimens were designed to assure accuracy, impartiality, consistency and confidence in the methodology employed in the testing process. Most, if not all, the Union's had input in the FRA's regulations. The Carrier has followed the FRA regulations to the letter.

The Carrier's testing methods have been tested in the crucible of arbitration and litigation and have not been found wanting. Arbitral authority along with others, including the BMWE's magazine, have recognized the validity of the GG/MS (Gaschromotography/massspectromarty testing). Passive inhalation is a proper and valid defense. However, the defense is an affirmative defense and it requires more than merely assertions. This claim is denied.

Award: Claim denied.


S. A. Hammons, Jr., Employee Member


E. N. Jacobs, Jr., Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued July 30, 1994.