PUBLIC LAW BOARD NUMBER 3530

Award Number: 107

Case Number: 107

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, H.E. Smith, 1435 Abbott St. N.W., Roanoke, VA 24017 was dismidded from service on December 29, 1988 for alleged failure to comply with instructions of the Carrier's Medical Director to keep his system free of prohibited drugs. Claim was filed in accordance with the Railway Labor Act and agreement provisions. Employes request he be reinstated with pay for all lost time with seniority and vacation rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on July 17, 1981.

The Carrier instituted a policy on February 12, 1985, modified on August 1, 1985, by which any employee testing positive for a controlled substance would be subject to dismissal unless he or she complied with the Carrier's instructions to retest at a Carrier-designated facility within 45 days and provided a negative sample at that time. Employees then testing negative would be subject to retesting for three years.

On April 12, 1988, the Carrier's Medical Director, Dr. G. W. Ford, advised Claimant that the urine sample, provided on April 7, 1988 as part of a return to work physical examination, had tested positive for cocaine.

Claimant was held out of service pending a negative sample, which he provided subsequently. By letter dated May 13, 1988, Dr. Ford advised Claimant that he was eligible to return to work. Dr. Ford also directed Claimant to remain drug free, advised him of the provision for periodic retesting for three years and cautioned him that a positive test would subject Claimant to dismissal.

On November 14, 1988, Claimant produced a urine sample as part of a return to work physical examination. After conducting two tests (enzyme immuno assay technique and gas chromatography/mass spectrometry), it was determined that Claimant tested positive for cocaine.

By letter dated November 23, 1988, Claimant was directed to attend a formal investigation on charges that he had failed to comply with Dr. Ford's instructions and with the Carrier's drug policy. That investigation was conducted December 13, 1988; and Claimant was dismissed on December 29, 1988 based on evidence adduced at that investigation.

Dr. Harold Klawans, whose professional achievements and activities are numerous, submitted a sworn statement on behalf of Claimant that of the 80 or more components (metabolites) identifiable in marijuana tests, only one (Delta 1 or Delta 9, depending on the nomenclature used) produces "central effects." Dr. Klawans stated this component has a behavioral effect on the brain of fairly short duration and is then distributed throughout the body, from which it is eliminated over a period of from three to six weeks. Dr. Klawans further explained that the components usually found in urine have no adverse behavioral effect.

The issue to be decided in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

The position of the Organization is that Claimant was unjustly dismissed both as to the merits of the case and as to matters of procedure.

On the merits, the Organization contends that the Carrier failed to carry its burden of proof in that no Carrier witness at the investigation could fully explain Claimant's urinalysis results. Based on Dr. Klawans' statement, the Organization contends further that Claimant's urinalysis should not be persuasive evidence against Claimant because it tests for components of marijuana that do not adversely influence behavior. The Organization also questions the reliability of the urinalysis in light of the fact that it was performed by a laboratory in the Carrier's employ and that some laboratories have had difficulty maintaining the integrity of their testing methods and chain of custody.

On the questions of procedure, the Organization contends that the Carrier's statements of drug policy (February 12 and August 1, 1985) deny an employee's right to due process because they permit drug testing without probable cause. The Organization maintains that the policy statements changed the Carrier's long-standing practice of basing its determinations of drug or alcohol use solely on human observation of impairment.

The position of Carrier is that Claimant was dismissed for just cause

under the Agreement.

Carrier maintains that its 1985 policy statements were intended to promote safe railway operations. The Carrier contends further that it has a well-established unilateral right to set standards and policies which constitute working conditions of employment. the Carrier asserts that it has the specific right to require employees to keep their systems free of prohibited substances.

On the merits, the Carrier maintains that Claimant clearly tested positive for prohibited drugs both in April and November 1988. By doing so at the November retest, Claimant was in violation of the drug policy and Dr. Ford's specific instructions of May 1988. The Carrier contends that dismissal is warranted in light of Claimant's failure to comply with the policy and instructions, as well as the seriousness of a pervasive drug problem.

After review of the entire record, the Board finds that the dismissal of Claimant was for just cause.

The Carrier has sustained its burden of showing that substantive credible evidence existed in the record that Claimant violated the Carrier's drug policy and Dr. Ford's specific instructions. Both the policy and Dr. Ford's instructions were lawful and well within the Carrier's unilateral right to formulate rules and policies dealing with maintaining a safe work environment and providing a safe transportation system for the public. In light to the seriousness of drug and alcohol abuse, especially in the

transportation industries, the Carrier has established and enforced reasonable safety rules and properly required Claimant to abide by them. He failed to do so and the Carrier enforced its rules without prejudice, caprice or discrimination.

There was no probative evidence presented to support the Organization's allegations that the urinalysis was faulty as to accuracy or identification.

AWARD

Claim denied.

Neutral Member

Carrier Member

Organization Member

Date: FEB. 22, 1990