

BEFORE PUBLIC LAW BOARD NO. 4234

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS
and
NORFOLK AND WESTERN RAILWAY COMPANY

Case No. 2

Statement of Claim:

- (1) The Norfolk and Western Railway Company violated Section A-1 of the Schedule Agreement as amended May 15, 1983, but not limited thereto, when it arbitrarily and capriciously dismissed Machinist C.D. Sexton from all service with the Carrier following investigation held October 30, 1985.
- (2) Accordingly, the decision should be reversed, Machinist Sexton restored to service, made whole for any and all losses with seniority, rights and benefits unimpaired, and his record cleared of the charge.

Findings:

Claimant C.D. Sexton was employed as a machinist by the Carrier, Norfolk and Western Railway Company, at its Portsmouth, Ohio locomotive facility; Claimant had about six years' service at the Portsmouth Shop. On April 2, 1985, Claimant underwent a physical examination, including a urinalysis test, as part of his recall to work from a furlough. As of April 3, 1985, Claimant returned to active service. On April 19, 1985, Claimant was notified that the drug test indicated the presence of marijuana; Claimant was removed from service that day. Pursuant to instructions that he submit an additional sample when he felt that his body was clear of drugs, or enter Carrier's counseling program. Claimant submitted a second sample on May 14, 1985. On June 3, Claimant was notified that this sample also tested positively.

By letter dated August 29, 1985, Claimant was instructed by Carrier's Medical Director to submit a negative sample within 45 days or be subject to dismissal. On October 22, 1985, Claimant was

instructed to attend a formal investigation

to determine your responsibility in connection with your failure to comply with the instructions of the Carrier's Medical Director, Dr. George W. Ford, and company policy as stated in his letter dated August 29, 1985, addressed to you, in that you did not provide a negative urine sample or enter the DARS program within 45 days of Dr. Ford's August 29, 1985 letter, copy of which is attached.

As a result of the hearing, Claimant was dismissed from service by letter dated November 25, 1985. The Organization subsequently filed a claim on Claimant's behalf, challenging his dismissal.

The Organization initially contends that Claimant did not receive a fair and impartial hearing. The Organization asserts that the discipline was imposed on the basis of hearsay evidence and unsupported allegations. Claimant received only unsigned form letters to explain why he was taken out of service. The Organization asserts that the NRAB consistently has held that such hearsay evidence alone does not support a finding of guilt. Carrier must have substantial and credible reasons for assessing discipline; the Organization argues that there is no credible evidence to support the Carrier's actions and finding of guilt.

The Organization further argues that Carrier's unilateral drug policy altered the historical application of Rule G, thus denying Claimant a fair and impartial hearing. In the past, Rule G actions always were based on probable cause. There was no probable cause in the instant case for Carrier's action; Claimant was not under the influence and was performing competent service. The Organization also contends that Carrier's drug policy violates the Railway Labor Act because it unilaterally altered the rules and working conditions provided in the governing agreement.

The Organization finally argues that Carrier has not met its burden of proof. The claim therefore should be sustained.

The Carrier argues that there is no basis for the Organization's assertion that there is no probative evidence of Claimant's guilt. Carrier points out that Claimant is charged with failing to follow the Medical Director's instructions, and Claimant admittedly did not comply with those instructions. Failure to so comply has been held to be a dismissable offense. Carrier contends that because of Claimant's admission, no further evidence is needed to prove Claimant's guilt.

Carrier also contends that the implementation of its drug policy is based on Carrier's managerial right to set and enforce medical standards for its employees. Carrier's argues that this right has been recognized in numerous Board awards and by federal courts. Moreover, public safety and public relations reasons support Carrier's right to implement its drug policy. Carrier argues that the sole issue before this Board is whether Claimant failed or refused to comply with instructions based on that policy. Carrier points out that if Claimant felt that the drug policy violated his rights, he should have complied with the instructions first, then filed a grievance.

Carrier goes on to argue that the assessed discipline was justified and reasonable. Carrier asserts that Claimant received a fair and impartial hearing. Substantial evidence was adduced at the hearing to support Carrier's finding of guilt. Moreover, the assessed discipline was neither harsh nor excessive. Carrier therefore contends that the claim should be denied in its entirety.

This Board has reviewed the evidence and testimony in the record;

and we find that the Claimant was afforded a fair and impartial hearing, and all of his procedural rights were protected throughout the disciplinary procedure. Hence, the procedural claims of the Organization are without merit.

With respect to the substantive issues, this Board finds that there is sufficient evidence in the record to support the finding that the Claimant was guilty of the offense of failing to comply with the Carrier's instructions. In April 1985, when the Claimant was recalled to work from a furlough, he was requested to go through a physical examination, which included a urinalysis. That urinalysis indicated the presence of marijuana, and the Claimant was removed from service and required to either provide a negative urinalysis or enter the DARS drug counseling program. The Claimant did not comply with the instructions and was later terminated.

Hence, based on the above facts, the Claimant failed to fulfill the requirements for returning to work set down by the Carrier, which apply to every employee of the Carrier, including officers. The Claimant was aware of the consequences of his noncompliance, and he still failed to comply. Therefore, this Board must find that the Claimant was properly found guilty of the charges against him.

Once this Board finds that a claimant was properly found guilty of the charges against him, we next turn our attention to the nature of the discipline imposed by a carrier. This Board will not set aside a carrier's imposition of discipline unless we find it to be unreasonable, arbitrary, or capricious.

The Claimant was found guilty of a serious offense, which, in most cases, warrants discharge. The action taken by the Carrier in

