

PUBLIC LAW BOARD NO. 1760

Award No. 121

Case No. 121

Docket No. MW-DECR-90-4

Parties to Dispute Brotherhood of Maintenance of Way Employees
 and
 Norfolk and Western Railway Company
 (Former Wabash)

Statement

of Claim: Claim on behalf of D. E. Walker for reinstatement and pay for time lost as a result of his dismissal for failure to comply with instructions of Carrier's Medical Director on company policy.

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

The Claimant, Trackman D. E. Walker, who had been absent from work for approximately one year because of a personal injury underwent a return-to-work physical examination on November 15, 1989. The results of that examination which included a drug screen urinalysis revealed a positive test for marijuana.

Said test was had pursuant to the announced policy of February 12, 1985 to all employees to the effect that all company physicals would include a drug screen analysis and that the Company medical policy forbade "the active employment of those who depend on or use drugs which impair sensory, mental or physical functions." Carrier on November 21, 1989 wrote a letter instructing Claimant to present a negative sample within 45 days or enroll in Carrier's Drug and Alcohol Rehabilitation Program (DARS). Said policy had been modified on August 1, 1985 to the extent that an employee testing positive for a prohibitive drug will be issued a letter requiring him to void a negative sample within 45 days or face dismissal.

The Organization had legally tested Carrier's right to establish such policy and the Carrier's right was upheld in court.

Claimant neither entered the DARS Program nor submitted a negative urine sample by the January 5, 1990 deadline. Therefore, on January 17, 1990 he was notified to attend a formal investigation on the charge:

"...in connection with your failure to follow instructions of NS Medical Director, Dr. J. P. Salb, in that you did not

provide a negative urine sample within 45 days as instructed in his letter of November 21, 1989."

The Carrier concluded from the evidence adduced that Claimant was culpable. He was dismissed from Carrier's service under date of February 13, 1990.

The Union alleged that the charging officer, Roadmaster Benton, was not present when the drug screen was taken, that he did not have knowledge as to how it was done, that he merely presented forms that were supposedly the procedure that Smith/Kline Bioscience Laboratory followed when handling samples. However, by Benton's own testimony he could not testify that the procedure was followed.

Carrier alleged that the real issue is the Claimant's failure to timely take action as instructed by the Medical Director on November 21. He failed to timely take the retest. The results of any subsequent test are really not here at issue. Nothing was submitted to differ with Carrier facts or support such employee allegations.

The Employees argued at the hearing (T-23) that the test was invalid.

"I just don't believe the test could have been 100% you know, 100% sure. I mean, there have been mistakes made that have been documented in the rail magazines and stuff. What happened, it could have been a mistake."

The Claimant also argued the fact that he was late due to a "flu" that he and his family suffered.

The Board finds there were no procedural violations. Claimant was accorded the due process to which he was entitled.

There was sufficient, competent and clear evidence adduced, including the Claimant's admission, to support Carrier's conclusion as to the Claimant's culpability of the charges placed against him. The record reflects that the Claimant laid off from a personal injury. About one year later, as a result of the following sequence, Claimant was required to undertake a belated return-to-work physical examination which included the drug screen urinalysis. The Claimant was released for full duty on January 20, 1989 (T-27). The Division Engineer, on September 29, and again on October 30, advised the Claimant that he had failed to take a return to service examination. The Claimant was advised to either furnish documentation from a doctor to substantiate his alleged continued disability or a reason

for his failure to comply with those instructions. He was instructed on October 30, to take a return-to-duty physical examination within 10 days from the receipt of that letter. Hence, the occurrence of the November 15, 1989 examination which included a drug screen that documented a positive test for marijuana. No challenge thereto was raised by or on behalf of the Claimant from the November 21, 1989 notification date of his test results until the date of this investigation wherein at T-22 the Claimant sought to raise a challenge, as quoted hereinabove. Unfortunately, while he did not believe the results of the test the fact was and remains that he was not able to show why or how the test results were inaccurate.

The record demonstrated that said test was given on November 13, 1989. The Claimant was advised of the positive results on November 21, 1989. The Claimant had 45 days within which to produce a negative urine sample or have entered the DARS Program. A copy of the test results were sent to the Claimant (T-3 and T-10). The results entered into the investigation at T-11. Rule G was also read into the record (T-12). The testing procedures and methodology, a six page document was entered as Exhibit C, spelled out in "Drug Screen and Toxicology Processing of Drug Screening Specimen". Each in a 3 page document. It was noted that no challenge whatsoever was raised either to the procedures or to the methodology until February 1, at the investigation. The test results were only challenged by the Claimant at T-22. However, he offered no rationale therefor or produced any proof to the contrary. The Claimant said he was not sure when the 45 day period was up. He said that he came in late 5 days. The record indicates, however, that he was either late by 10 or 14 days depending on calculation from November 21, to January 19.

The Union forcibly and skillfully argued the alleged errors in the Carrier's application of its drug policy but did not produce evidence to the contrary of what was in the record. The Board is governed by the established record. As pointed out by Award No. 313 of PLB 314 (Muessig):

"The medical facts relevant in this case was the urine in content. It was objective data produced by qualified persons following recognized procedures by a reputable or recognized laboratory."

The record set forth in Exhibit C, including the chain of custody, which included the handling at the laboratory and the methodology for checking thereon, minimizes the possibility of error and the sealing process

utilized by Smith-Kline Laboratories, a reliable laboratory, appears to be sound, safe and reliable.

Our Board has ruled on the issues raised herein before especially in our Award No. 85. There we noted that the Organization's views of the accuracy of the gas chromatography mass spectrometry (GC/MS) test used herein was, in effect, that it was sound, safe and remarkably accurate.

As pointed out in Public Law Board 4494 in Award No. 1:

"Certainly errors can occur during the testing process as the Organization aggressively argues before this Board. However, for such an assertion to hold there must be a showing of considerable merit as to why the test at issue is not reliable. In the case at hand, the Carrier tested Claimant's urine sample three times, the last of which was under the GS/MS method, a test recognized as being sophisticated and reliable. In view of all the foregoing we have no proper basis for setting this matter aside on the grounds that Carrier's test was false-positive."

Claimant did not stand charged with the fact of his failure as the result of his November 13, 1988 positive drug screen. Rather, the Claimant was charged with his failure to comply with the Medical Director's instructions which were in compliance with the Carrier's drug policy, well announced, stipulated, and articulated drug policy. The Claimant simply failed to submit a negative drug screen within forty-five days of the November 21, 1989 letter.

The Claimant's lack of indifference was displayed June 26 when released by a doctor to report to work and no return to work physical took place. It was only under the Carrier's insistent prodding that the Claimant did report for the return to work physical, several months later.

The Claimant's discipline record reflected that from September 30, 1981 up to January 31, 1989 he had discipline for 19 violations, 3 of which were safety rule violations. There were 14 for absences and 2 were for excessive absenteeism. With this poor record, the Board is unable to find any proper basis for concluding a change in the Carrier's conclusion of dismissal for the Claimant's failure to comply with instructions and with Company policy. Our conclusion is consistent with other awards rendered on this property. The claim must be denied.

Award: Claim denied.

Sol Hammons Jr. L. P. Miller, Jr.
S. Hammons, Jr. Employee Member L. P. Miller, Jr., Carrier Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued December 31, 1991.