

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.

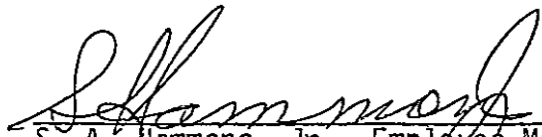
There was sufficient evidence adduced to support the Carrier's conclusion that the Claimant was guilty of the charges placed against him. Despite the Claimant's request for a retest, which was honored, the second test tested positive for marijuana metabolism.

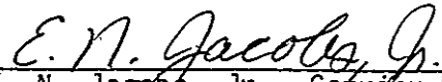
The Claimant's personal test at the Ohio Medical College at Toledo on August 16, administered some 26 days after the original test, can hold no relevancy to disparaging the tests held under FRA regulations. The Claimant's test was untimely taken and such test was administered contrary to the FRA regulations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

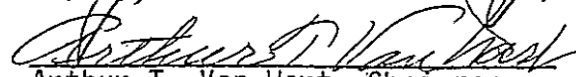
The FRA's regulations governing the collection and analysis of urine specimens were designed to assure accuracy, impartiality, consistency and confidence in the methodology employed in the testing process. Most, if not all, the Union's had input in the FRA's regulations. The Carrier has followed the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