PUBLIC LAW BOARD NO. 1760

Award No. 84

Case No. 84
Docket No. MW-STL-86-3

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

Statement of Claim: Claim on behalf of D. R. Duncan for reinstatement and back pay from the time of his dismissal as the result of an investigation held on May 15, 1986 and continued on May 29, 1986.

Findings: The Board has jurisdiction of this case.

The facts in this case are somewhat similar to that in our Award No. 83 the findings of which by reference are incorporated herein. Here, Claimant, Ballast Regulator Operator Duncan, refused to submit to a urinalysis test on April 7, 1986 unless he was given a copy of the results.

Carrier placed all Employees on notice, under date of February 12, 1985, that all Company physicals would include a drug screen urinalysis and that the Company's policy forbade employment of those who depend on or used mind altering drugs.

Claimant underwent a return to work physical examination in March 1985. The tests results of his drug screen urinalysis were positive for marijuana. He was held out of service and advised that he would have to submit to a negative drug screen before being permitted to return to work. Claimant submitted to a negative retest and was permitted to mark up on May 2, 1985.

Carrier, on August 1, 1985, notified all its Employees that Employees who had tested positive would then be required to provide a subsequent negative sample and would be required to undergo periodic retests for a definitive period of three years after their return to duty in order to monitor their compliance.

Claimant was given a letter from Dr. Ford on May 2, 1985, when he was given his MD-6 dated April 19, 1985 returning him to work, and was told therein that he would be called periodically for another physical examination that would include a drug screen.

On January 14, 1986 he was reminded of that May 2, 1985 letter by Dr. Ford. The Assistant to the Division Engineer, C. S. Christy, on April 7, 1986, called Claimant to his office and informed him that he would be taken to a clinic to void a urine sample for said testing. Claimant refused to submit to the test unless assured that he would receive a copy of the test results. Mr. Christy, because it was too

early for Dr. Ford's office to open, advised that he would find out whether Claimant could be given a copy of the results but reiterated his instructions that Claimant should now go to the hospital or be taken out of the service for failure to follow instructions. Those instructions were repeated. Claimant advised he understood this but that he would not obey the order without assurance that he would be given a copy of the test results. He was then removed from service.

As a result Claimant was given a formal investigation for failure to comply with instructions. Following the investigation he was dismissed from service as discipline therefor.

Claimant had been specifically placed on notice, on May 2, 1985, that he would be required to take a subsequent drug screen test periodically. He was reminded thereof on January 14, 1986. No timely objection had been taken to the March 1985 test or to the May 2, 1985 notification.

At test here is whether an employee who was required to and impliedly had agreed thereto, to take a retest of a drug screen can set conditions therefor, i.e., that he be given a copy of the results thereof as basis for taking the test. The answer is generally no. The Board does not, however, deem asking for a copy of the results as setting pre-conditions. Claimant was entitled to a copy of the test results. However, the record reveals that request was not the real reason for Claimant's refusal to take the test.

In reviewing the transcript, Questions/Answers 303-304-305-306-307-311-382 and 383, among others, of Claimant's testimony reflect the real reason for his refusal to take the urinalysis test on April 4, 1986. In essence, Claimant was afraid that he would show positive because of "passive inhalation." He testified he was lying in bed while his girlfriend and her friends smoked marijuana. Also, that he told that to Roadmaster W. O. Jackson on April 11. Also, PP 32-33 shows another area of "passive inhalation" that Claimant asserted affected him. On March 14, 1985 he rode with two friends in a pickup truck to a Union meeting. The two friends smoked two marijuana cigarettes on the way to the Union meeting and two at home after the meeting. Hence, when Claimant took the urinalysis test on March 15th he tested positive. Claimant alleged that 19 days later, April 4, 1985, he took a private drug screening test and that it was negative. The results thereof were introduced.

Claimant was accorded the due process to which entitled.

There was sufficient competent and probative evidence adduced to support Carrier's conclusions as to Claimant's culpability. Much testimony was given on irrelevant matters. Claimant's return to service positive drug screen in March 1985, his April 1985 negative drug screen, Dr. Ford's May 2, 1985 and January 14, 1986 letters, all became irrelevant and immaterial to argue due to the lack of timely

objections and appeal. Carrier's actions were properly guided by compliance with its articulated general policy and rules, as well as medical policy, governing the active employment of those who depend upon or use drugs which may impair sensory, mental or physical functions. Claimant failed to comply therewith. That Claimant later took and passed a private drug screen does to serve to alter the basis for Carrier's conclusion. See Award 14 of PLB 3845 (Herbert), on this property, with the same Organization. That Carrier uses a 20 nanogram level and not a 100 nanogram level as the cut-off for a positive reading provides no basis for reversal of discipline for failure to comply with a known policy, written and oral instructions to take a urinalysis drug screen. Claimant's failure to comply especially in light of his real reason given, therefor, causes the Board to conclude that Carrier's decision must be upheld. Claimant stands where he is as the direct result of his own actions. His incredible summary, if believed would indicate at the very least, that Claimant is an ardent fan of and apparently enjoys being in the company of those who promiscuously use marijuana and he suffers only from "passive inhalation" thereof. Hence, Claimant believes that he should control the time when he should be given a Carrier directed drug screen. He already changed one date and in fact was not available on several suggested subsequent dates for a retest. That rationale is not acceptable and serves to swear at the reasons for and purpose of Carrier's policy and rules against alcohol and drugs. This claim will be denied.

Award: Claim denied.

Sol Hammons, Jr., Employee Member J. Abbatello, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued June 9, 1988.