

PUBLIC LAW BOARD NUMBER 3530

Award Number: 113

Case Number: 113

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, D.A. Ratliff, 2527 Dock's Creek Rd., Kenova, WV 25530 was taken out of service for alleged failure to keep his system free of prohibited substances (marijuana). Claim was filed in accordance with the Railway Labor Act and agreement provisions. Employees request he be reinstated with pay for all lost time with seniority and vacation rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on October 20, 1978.

The Carrier instituted a policy on February 12, 1985 under which any employee testing positive for a controlled substance would be removed from service until 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.

On April 29, 1985, Claimant underwent a physical examination in connection with his promotion to foreman. At that time, his urine sample tested positive for marijuana and he was withheld from service. On June 25, 1985, Claimant was tested again and the results were negative for prohibited drugs. Claimant returned to service on July 2, 1985.

On August 1, 1985, the policy was modified and it further provided that employees testing negative within 45 days who were returned to duty would be subject to retesting for three years to be certain the employees were keeping their systems free of prohibited drugs. A subsequent positive test would subject the employee to dismissal. The policy was posted, mailed to employees and included in Carrier publications.

By letter dated January 17, 1986, Claimant was advised to keep his system drug free, reminded of the follow up testing provisions and cautioned that a subsequent positive test would subject him to dismissal.

By letter dated June 20, 1988, Claimant was directed to submit a follow up urine sample. On July 11, 1988, Claimant was retested and the analysis showed that he was positive for marijuana. On July 15, 1988, Claimant was held out of service and notified to attend a formal investigation on charges that he failed to comply with the instructions in the January 1986 letter. The investigation was rescheduled and eventually held on September 23, 1988.

At the investigation, the issue of the retest period was raised. Although Claimant was notified of the retest within the 3 year period (July 2, 1985 to 1988), he was not tested until 9 days after the three year period. On October 5, 1988, the Carrier, therefore, stated that it would not impose discipline, despite the evidence of marijuana use -- which was a violation of its drug policy and letter of instruction regarding remaining drug free. Instead, the Carrier directed Claimant to submit a negative sample in 10 days in order to return to work.

On October 18, 1988, Claimant submitted a diluted sample. On October 28, 1988, he tested positive for marijuana. On December 21, 1988, Claimant submitted a negative sample and was returned to work.

In relevant part, Rule 30 provides:

If the charge against the employee is not sustained it shall be stricken from the record and employee reinstated and paid for the assioned working hours actually lost, less the amount earned from time of suspension until reinstated.

The Organization commenced this claim on October 27, 1988, seeking back pay for time out of service from July 15 to October 5, 1988 and the clearing of these charges from Claimant's record.

The issue to be decided in this dispute is whether the Carrier violated Rule 30; and if so, what should the remedy be.

The position of the Organization is that the Carrier has violated Rule 30 because no discipline was assessed as a result of the formal investigation on September 23, 1988. The Organization argues that in consideration of this issue, only the limited time period of July to October 1988 should be examined. Finally, the Organization contends that "the Carrier cannot argue the fact that claimant is not entitled to these benefits...."

The position of the Carrier is that it has not violated Rule 30. The Carrier maintains that it has the right and obligation to protect employees and the public from employees impaired by prohibited drugs. To that end, the Carrier contends, it has established and enforces a drug policy, which

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has been upheld numerous times. The Carrier contends that Claimant knew of its drug policy and his own specific instructions to stay drug free. Nevertheless, Claimant did not remain drug free, as his several positive urinalyses prove. The Carrier maintains it had every right to dismiss Claimant in 1988, but did not do so only because of the question as to the retesting outside the three year period.

After review of the entire record, the Board finds that the Carrier did not violate Rule 30.

The Organization has failed to sustain its burden of proving that evidence in the record supports the finding of a violation of this rule. Quite the contrary is so. This case is simply one of a leniency reinstatement of a guilty employee. There is no question that the substantive credible evidence in the record proves Claimant repeatedly used marijuana in violation of the Carrier's drug policy, the specific letter of instruction to him, common sense and, dare we say, common decency. Each instance of drug use provided adequate basis for dismissal under the drug policy and Carrier rules, both of which have been found reasonable and enforceable by numerous awards. For Claimant to suggest that he is now entitled to back pay for some sort of wrongful treatment, when in fact, the Carrier returned him to service only after bending over backwards on the question of the timing of the retest is a display of arrogance. The Carrier has been more than reasonable in the enforcement of its rules and drug policy.

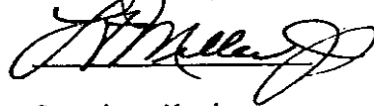
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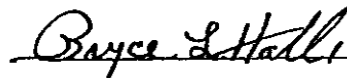
Claim denied.



Neutral Member



Carrier Member



Organization Member

Date: FEB. 22, 1990