

PUBLIC LAW BOARD NO. 3530

Award Number: 81
Case Number: 81

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant J. P. Smith, P. O. Box 84, Huddleston, VA 24104, was dismissed from service on November 5, 1986 for alleged test being positive for marijuana. Claim was filed by the Employees in accordance with Railway Labor Act and agreement provisions. Employees request reinstatement with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on August 13, 1973.

The Carrier instituted a policy on February 12, 1985, modified on August 1, 1985, by which any employee testing positive for a prohibited substance would be subject to dismissal unless he/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. Employees then testing negatively would be subject to retests for three years. The Carrier also

established the Drug and Alcohol Rehabilitation Service program to assist its employees.

In December 1984, Claimant tested positive for marijuana during a return-to-work physical examination. He was held out of service until early January 1985, when he submitted a negative urine sample. Claimant was then returned to work after receiving a letter from the Carrier's Medical Director Dr. George Ford. In his letter dated January 24, 1986, Dr. Ford instructed Claimant to remain free of prohibited drugs. Dr. Ford further advised Claimant that in keeping with the Carrier's policy, Claimant would be subject to periodic retesting during the next three years "to demonstrate that you are no longer using marijuana or other prohibited drugs." If he tested positive in the future, Claimant was advised and he understood, he would be subject to dismissal.

As part of the periodic retesting process, Dr. Ford directed Claimant to submit a urine sample for a follow-up urinalysis on April 7, 1986. Claimant had not exhibited any abnormal behavior that day nor had he had any apparent problems in performing his assignments. Claimant's sample tested positive. Claimant, on his own, had a urine sample tested by a non-Carrier designated laboratory on April 22, 1986 and that test was negative for marijuana.

By letter dated April 25, 1986, Claimant was directed to attend a formal investigation on charges that he failed to comply with Dr. Ford's instructions to remain drug free and with the Carrier's policy regarding

drug use. At the formal investigation on October 22, 1986, evidence was adduced which led to Claimant's dismissal by letter dated November 7, 1986.

Dr. Harold L. Klawans, whose professional achievements and activities are numerous, submitted a sworn statement on behalf of Claimant that of the 80 or more components identifiable in marijuana tests, only one (Delta 1 or Delta 9, depending on the nomenclature used) produces "central effects." Dr. Klawans stated this component has a behavioral effect on the brain of fairly short duration and is then distributed throughout the body from which it is eliminated over a period of time from three to six weeks. Dr. Klawans further explained that the components usually found in urine have no behavioral effect.

The issue to be decided in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

The position of the Organization is that Claimant was dismissed without just cause both as to the merits of the case and as to matters of procedure.

On the merits, the Organization maintains that the Carrier failed to carry its burden of proof because none of its witnesses at the investigation could explain the results of Claimant's urinalysis and no one had observed Claimant acting as if he were under the influence of drugs or alcohol on April 7, 1986. On the basis of Dr. Klawans' statement, the Organization contends that the Carrier's urinalysis should not be persuasive and is

invalid because it tests for components of marijuana that do not influence behavior. The Organization challenges the accuracy of the Carrier's urinalysis because it questions the chain of custody at the laboratory and asserts that Claimant's subsequent negative urinalysis raises a reasonable doubt as to the testing procedures.

On the questions of procedure, the Organization maintains that the Carrier's February 9 and August 1, 1985 policy statements deny due process because they allow drug testing without probable cause. Also, the Organization asserts that the policy statements changed the Carrier's long-standing practice of basing its determinations of drug or alcohol use solely on human observation of impairment.

The position of the Carrier is that Claimant was dismissed for just cause under the Agreement.

The Carrier contends that its 1985 policy statements are intended to promote safe railway operations. The Carrier maintains that it has a well-settled right to set standards and establish policies. Standards and policies are conditions of employment unilaterally applied in practice and the Carrier maintains that they are outside the collective bargaining process.

As to Claimant, the Carrier maintains that he clearly tested positive for marijuana as shown by two separate tests using different methodologies. By testing positive, Claimant violated the Carrier's drug policy. Further,

the Carrier contends that Claimant did not comply with Dr. Ford's instructions which were issued pursuant to lawful rules and standards. In light of the seriousness of the drug problem and Claimant's failure to comply with instructions, the Carrier contends that its punishment was warranted by Claimant's actions.

After review of the entire record, the Board finds that dismissal of Claimant was for just cause under the Agreement.

The Carrier has established through substantial, credible evidence on the record that Claimant violated the Carrier's lawful drug policy. Moreover, Claimant also failed to follow the instructions of the Carrier's Medical Director by not submitting a negative urine sample during a periodic retest. The Carrier has a well-settled right to formulate policy and rules, especially those which deal with its obligation to provide for the safety of employees and the public. The scourge of substance abuse is particularly evident in the transportation industries, and public safety demands that rules on drug and alcohol use be established and enforced. The Carrier has lawful and reasonable rules and instructed Claimant to abide by them. The evidence is that he did not, and that the Carrier enforced its rules without being arbitrary, capricious or discriminatory.

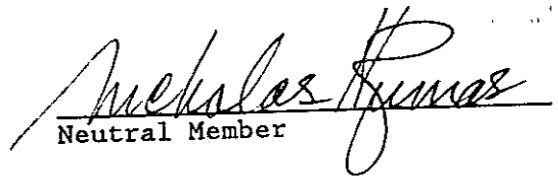
The Organization has presented no evidence to support its allegations that the Carrier-directed urinalysis was either inaccurate or misidentified. There is no substantial credible evidence in the record that Claimant's independent retest results proved he was drug free on April 7, 1986 as he

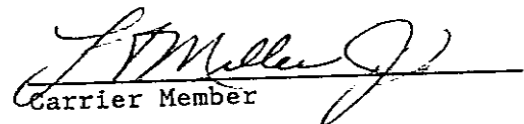
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was required.

AWARD

Claim denied.


Neutral Member


Carrier Member


Organization Member

Date: JUNE 12, 1989