

PUBLIC LAW BOARD NO. 3530

Award Number: 88

Case Number: 88

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant M. S. Queensberry, P. O. Box 68, Meherrin, VA 23954, was dismissed from service on April 30, 1987 for alleged positive results for marijuana. Claim was filed in accordance with Railway Labor Act and other 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 May 12, 1980.

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

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

In May 1985, Claimant tested positive for marijuana during a return-to-work physical examination. He was held out of service until July when a negative urine sample was submitted. Claimant was returned to work thereafter, and in so doing, Dr. George Ford, the Carrier's Medical Director, instructed Claimant by letter dated January 30, 1986 to remain free of prohibited drugs. Dr. Ford advised Claimant that he would be subject to periodic retesting for three years "to demonstrate that you are no longer using marijuana or other prohibited drugs." If he tested positive for drugs in the future, Claimant would be subject to dismissal.

Pursuant to his letter of January 30, 1986, on April 24, 1987, Dr. Ford directed Claimant to submit a urine sample for a follow-up urinalysis. Claimant's sample tested positive for marijuana.

By letter dated May 6, 1987, 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. The formal investigation was conducted on May 21, 1987, and Claimant was dismissed based on evidence adduced at the investigation by letter dated June 8, 1987.

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 in that none of its witnesses at the investigation could explain the results of Claimant's urinalysis. The Organization submitted Dr. Klawans' statement and 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 also suggests that the results produced by a drug testing laboratory in the employ of the Carrier are suspect and that some drug testing laboratories have had difficulty maintaining the integrity of their testing methods and of their chain of custody.

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.

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

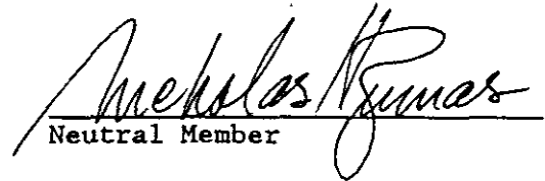
The Carrier has established through substantial, credible evidence on the record that Claimant violated the Carrier's lawful drug policy. Moreover, Claimant also failed to follow the instructions of the Carrier's medical director by not submitting a negative urine sample during a periodic retest. The 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.

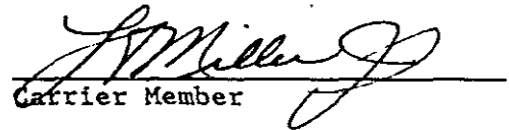
The Organization has presented no evidence to support its veiled allegations that the urinalysis was either inaccurate or misidentified. Nor has it proven that there is any reasonable question of the veracity of the urinalysis based on the laboratory's receiving payment from the Carrier. While any of these defects might afflict some drug tests, none is present in this instance.

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AWARD

Claim denied.


Neutral Member


Carrier Member


Organization Member

Date: JUNE 12, 1989