

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS
and
NORFOLK AND WESTERN RAILWAY COMPANY

Case No. 1

Statement of Claim:

- (1) The Norfolk and Western Railway Company violated Section A-1 of the Schedule Agreement as amended May 15, 1983, but not limited thereto, when it arbitrarily and capriciously dismissed Machinist W.R. Overstreet from all service with the carrier following investigation held April 8, 1986.
- (2) Accordingly, the decision should be reversed, Machinist Overstreet made whole for all losses, restored to service with seniority, rights, and benefits unimpaired, and his service record cleared of any reference to the charge.

Findings:

Claimant W.R. Overstreet was employed as a machinist by the Carrier, Norfolk and Western Railway Company, at its East End Shop in Roanoke, Virginia. Claimant had about fourteen years' seniority. In December 1985, Claimant was recalled to service from a furlough and told to report for a physical examination, including a urinalysis test. The urinalysis results were positive for marijuana, and Claimant was removed from service on January 3, 1986. By letter dated January 9, 1986, Claimant was instructed to supply a negative sample within 45 days or enter Carrier's counseling program. On February 24, 1986, Claimant was notified to attend an investigation to determine your responsibility in connection with your failure to comply with the instructions of the Carrier's Medical Director, Dr. George W. Ford, and Company policy as stated in his letter dated January 9, 1986 addressed to you in that you did not provide a negative urine sample or enter Carrier's D.A.R.S. program within 45 days of Dr. Ford's January 9, 1986 letter.

After a postponement, the investigation was held April 3, 1986. As a result of the investigation, Claimant was dismissed from service.

The Organization subsequently filed a claim on Claimant's behalf, challenging his dismissal.

The Organization contends that Claimant did not receive a fair and impartial investigation. The Organization argues that the record does not contain any probative evidence that supports a finding of guilt; Carrier's case is unjustly based on hearsay. The report that showed a positive result for marijuana was a form letter that did not contain any data or proof to support Carrier's decision to remove Claimant from service. Carrier did not offer any credible evidence to support its finding of guilt. The Organization asserts that the NRAB has held that a guilt finding cannot be based on hearsay.

The Organization also challenges Carrier's use of reports that were not made a part of the record at the investigation. Carrier did not meet its burden of proof at the investigation, then subsequently added test reports to support its case. The Organization argues that because only evidence produced at an investigation may be considered, these reports should not be given any weight. In addition, the Organization contends that Claimant was not given an opportunity to face his accusers, specifically, the persons who performed the drug tests. The NRAB repeatedly has held that an accused employee has the right to face his or her accusers. The Organization claims that Carrier denied Claimant this right.

The Organization next charges that Carrier altered Rule G's historical application when it unilaterally implemented its drug policy in 1985. Rule G charges historically were based on "probable cause" resulting from observation of suspect physical manifestations. In this case, Carrier had no probable cause to charge Claimant; Claimant was not "under the influence," and the charging officer

admitted that Claimant was performing competently after returning from furlough. The Organization contends that Carrier is attempting to use its unilaterally imposed policy and discipline procedure to change rules and working conditions embodied in the controlling agreement. The Organization thus asserts that this attempt violates the Railway Labor Act.

The Organization finally contends that there is no evidence to support Carrier's action in this case. Carrier's decision to discipline Claimant is arbitrary and capricious. The Organization therefore contends that the claim should be sustained.

The Carrier asserts that Claimant properly was dismissed from service for failing to comply with the instructions of Carrier's Medical Director. The record establishes that Claimant did not submit a negative sample within 45 days, as instructed by the Medical Director; Carrier asserts that Claimant therefore is guilty as charged. Carrier further argues that failure to comply with Carrier's medical policy governing drugs has been held to be a dismissable offense. In this case, Claimant was duly informed of Carrier's policy, was unable to furnish a negative sample within the required 45-day period, and did not enter Carrier's DARS program. The Carrier asserts that this is substantial evidence in support of a finding of guilt.

Carrier next asserts that implementation of its drug policy is based on Carrier's managerial right to set and enforce medical standards for its employees, a right that the Board repeatedly has recognized. Moreover, the federal courts have recognized that Carrier's drug policy is legitimate and necessary.

Carrier also argues that probable cause is irrelevant in this matter because impairment was not at issue. Carrier maintains that Claimant was tested pursuant to Carrier's medical standards, and this dispute is based solely on whether Claimant failed or refused to obey the Medical Director's instructions. Carrier points out, moreover, that physicians' reports, without supporting test results or other evidence, often are introduced into evidence during investigations; the introduction of test results would not have added to Claimant's case. Carrier also contends that it publicized its drug policy to employees in several ways. Carrier points out that even if Claimant were not acquainted with every aspect of the policy, Claimant admittedly received a summary of the policy from Carrier's physician. Claimant therefore knew both the requirements of the policy and what he was required to do in order to comply.

Carrier goes on to contend that the negative test submitted by Claimant during the investigation was performed after the time limit set by Carrier's Medical Director; in addition, the test was not performed at a medical facility designated by Carrier. Carrier therefore contends that the record supports its finding of guilt.

Carrier contends that the assessed discipline was justified and reasonable. The record establishes that Claimant received a fair and impartial hearing. Moreover, substantial evidence supports Carrier's finding of guilt; the assessed discipline thus was neither harsh nor excessive. Carrier argues that even if the dismissal is reversed, Claimant is not entitled to the requested remedy; a reversal of the dismissal still means that Claimant was removed from service until he demonstrates that he is free of the prohibited substance. Carrier therefore contends that the claim should be denied in its entirety.

This Board has reviewed the evidence and testimony in the record; and we find that the Claimant was afforded a fair and impartial hearing, and all of his procedural rights were protected throughout the disciplinary procedure. Hence, the procedural claims of the Organization are without merit and are hereby denied.

With respect to the substantive issues, this Board finds that there is sufficient evidence in the record to support the finding that the Claimant was guilty of the offense of failing to comply with the Carrier's instructions. When the Claimant was recalled to service from furlough, he was, in accordance with the Carrier's policy, ordered to take a physical examination, which included a urinalysis. The urinalysis results were positive for marijuana, and the Claimant was properly notified, again in accordance with Carrier policy, that he must supply a negative urine sample within 45 days or enter the Carrier's counseling program. The Claimant brought in a second urinalysis within the period, but it was also positive for marijuana. The Claimant did not enter the Carrier's DARS counseling program within the 45-day period.

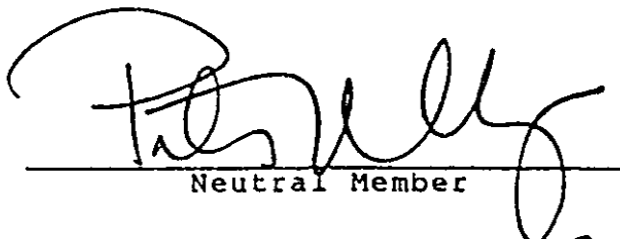
Hence, based upon the above facts, Claimant failed to fulfill the requirements for returning to work set down by the Carrier, which apply to every employee of the Carrier, including officers. The Claimant was aware of the consequences of his noncompliance. Therefore, this Board must find that the Claimant was properly found guilty of the charges.

Once this Board finds that a claimant was properly found guilty of the charges, we next turn our attention to the nature of the discipline. This Board will normally not set aside discipline unless

we find that a carrier acted unreasonably, arbitrarily, or capriciously. In this case, the Claimant was found guilty of a serious offense, which, in most cases, warrants discharge. The action taken by the Carrier in this case was not unreasonable. Hence, the claim must be denied.

Award:

Claim denied.



Neutral Member



Carrier Member



Organization Member

Date: November 24, 1982