

**PARTIES TO DISPUTE**

International Brotherhood of Electrical Workers

and

Norfolk and Western Railway Company

**STATEMENT OF CLAIM**

"Claim of Mr. J.A. Gilbert for reinstatement as result of investigation held July 12, 1990, in connection with failure to comply with Medical Director's instructions and Company policy to keep his system free of prohibited drugs."

**FINDINGS**

The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted, that it has Jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

By letter dated February 12, 1985, Carrier placed all employees on notice that all Company physicals would include a drug screen urinalysis and that Company medical policy forbade "the active employment of those who depend on or use drugs which impair sensory, mental or physical functions." By letter dated August 1, 1985 the Carrier amended its policy. Employees who had tested positive but then provided a negative sample would be required to undergo periodic retests for three years after their return to duty in order to monitor their compliance.

In January 1989, the claimant underwent a physical examination which included a drug screen urinalysis. The test results were positive for cocaine. Dr. Salb, the Carrier's Medical Director, informed claimant of this fact in a February 7, 1989 letter which also advised that he must rid his system of prohibited drugs in order to be returned to service. Claimant complied with the Medical Director's instructions to rid his body of the drug and was returned to service by letter dated March 1, 1989. In the letter dated March 1, 1989, Dr. Salb also advised claimant that he would be subject to periodic retests for a period of three years and that the discovery of a prohibited drug in his system would result in his dismissal.

On June 14, 1990, claimant was required to submit to a further drug test. On that test, the claimant was again positive for cocaine on both the enzyme immunoassay (EMIT) screening test as well as the gas chromatography/mass spectrometry (GC/MS) confirmatory test. For his failure to comply with the Medical Director's instructions and company policy of which he had been previously advised, the claimant was summoned to a formal investigation by letter dated June 22, 1990.

Claimant requested a postponement of the investigation on one occasion. The hearing was finally held on July 12, 1990. At the investigation the claimant presented a laboratory report from Community Hospital Reference Laboratories in Roanoke, Virginia. The laboratory report purported to be the results of a drug screen urinalysis that the claimant had performed on June 22, 1990 indicating that his system was then clear of prohibited drugs.

As a result of evidence adduced at the investigation the Carrier by letter dated July 31, 1990 advised the

claimant that he had been adjudged guilty, as charged, and was dismissed from the Carrier's service. The Organization asserts that the Carrier's action was not justified. In particular, the Organization contends there were many discrepancies disclosed by a review of the transcript and that these raise serious doubts as to the integrity of the chain of custody process.

The Organization points to Transcript exhibit #7, the Chain of Custody Letter of January 23, 1989, wherein the claimant's drug screen results indicated positive for cocaine. That letter was initialed and signed by the claimant indicating that the sample was "drawn/collected, labeled, sealed and placed in a tamper-evident bag." The Chain of Custody Letter was placed in the bag under the protection of the tamper-evident seal and contained space for the donor to indicate medications which he might be taking.

The Organization observes however, that Transcript Exhibit the laboratory report submitted to the Carrier when the claimant allegedly tested positive on June 14, 1990, was signed by a laboratory employee rather than the claimant in the box labeled for donor signature. Also there was no space on Exhibit #4 to indicate whether other medications were taken which might affect the test result.

The Organization further notes that under the box labeled "reason for test", Transcript Exhibit #4 reads "random" although a different exhibit makes clear that the claimant's drug test of June 14, 1990, in fact, was directed by a letter from Dr. Salb dated June 6, 1990 to another Carrier official.

The Organization observes that the Hearing Officer expressed concern over the validity of a private drug test taken by the claimant on June 22, 1990 because of the lack of a Chain of Custody letter. However, the Hearing Officer showed no similar concern over the validity of the Carrier's Transcript Exhibit #4 despite the fact that it was neither signed nor initialed by the claimant and made no reference to him.

The Organization states that the Carrier also failed to verify the validity of the test in accordance with FRA regulations governing Screening and Confirmations. It argues that the test results of the June 14, 1990 screening were inconclusive without a "retest by another method." It also argues that upon notification of the investigation, the claimant, having nothing to hide, voluntarily underwent a drug test by a certified hospital and that the results were negative.

Finally the Organization, citing supporting Awards of other tribunals in this industry, contends that the Carrier failed to demonstrate the claimant's inability to perform his duties and that there was therefore no basis for him to be subjected to a drug test. Accordingly the Organization requests that the claim be sustained in its entirety.

The Board finds substantial credible evidence adduced at the investigation to support the Carrier's finding that the claimant failed to comply with the instructions of its Medical Director and Carrier policy to keep his system free of drugs. The claimant's dismissal, therefore was for Just cause under the Agreement. Examination of the Chain of Custody Letter shows clearly that Transcript exhibit #4 which the Organization has questioned, is but one of six pages in a multi-form report utilized by the clinical laboratory engaged by the Carrier for its drug testing program. Thus the exhibit apparently for reasons of privacy does not provide a complete identification of the specimen donor similar to the Transcript Exhibit #7 report indicating the 1989 test results.

The Board, having examined a copy of the appropriate page of the June 14, 1990 multi-page report containing what purports to be the claimant's signature and the names of his prescription or over-the-counter drugs during the previous 30 days, has no reason to believe it is not authentic. That copy, furnished by the drug testing laboratory to the Carrier's Medical Director was reviewed by the Board at an executive session and the entries on the form completely match those of Transcript Exhibit #4 in every other respect.

As to the independent test report offered by the claimant, the Board finds it to be of limited value in view of the 8-day time lapse between June 14, 1990 when the Carrier directed test proved positive and June 22, 1990 when the claimant's voluntary test resulted in a negative finding. As it is well established that the evidence of cocaine use dissipates over time the Board places little credence upon the value of the later test results in

determining the claimant's status on June 14, 1990. Further the test undertaken at the claimant's initiative was not performed by a NIDA certified laboratory and was not under the GC/MS method generally recognized as highly reliable. Finally the claimant's test report provides no assurance that the specimen examined was that of the claimant. In the absence of a reliable method to assure the integrity of the chain of custody little weight can be given to the claimant's independent test.

With respect to other contentions of the Organization the Board finds no procedural or substantive errors in the Carrier's handling of this dispute. The claimant was advised of the need to remain drug free for three years following the January 1989 test in which he tested positive for cocaine. He was also advised that employees who had tested positive but then provided a negative sample would be required to undergo periodic retests after their return to duty to monitor their compliance. The claimant was therefore on notice of the consequences of non-compliance with the Carrier's policy. He admitted at the investigation he understood the requirements of Dr. Salb's March 1, 1989 instructions. As the claimant was found guilty of failure to comply by substantial credible evidence the discipline assessed was Justified. Accordingly the claim will be denied.

### AWARD

The claim is denied.

T. R. Malloy, Carrier Member

T. W. Adams, Employee Member

Jack Warshaw

Chairman and Neutral Member

January 24, 1992

Bethesda, MD