

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 194

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Foreman W.R. Vogel for testing positive for a controlled substance in connection with a drug screening required under Federal CDL Regulations was unjust, unwarranted, excessive and cannot stand (Carrier's File MW-FTW-09-07-LM-091).
2. As a consequence of violation referenced in Part 1 above, Mr. W.R. Vogel shall be granted the remedy in accordance with Rule 30 of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

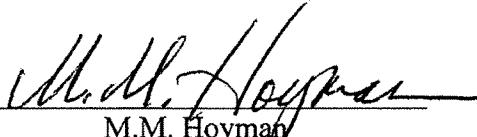
The Claimant began service with the carrier in August 1981 and at the time of the events leading to this grievance was a foreman for the Carrier. On December 1, 2005 the claimant completed the Carrier's Drug and Alcohol Rehabilitation Service (DARS) and returned to service. As part of his completion in the DARS program, the claimant had to remain free of all prohibited substances. Any failure to stay clean from such substances is grounds to dismiss the Claimant. In the years following the Claimant's return to service he underwent drug testing on two fronts. First, he was subject to random drug testing by the Carrier. Second, under Federal CDL regulations due to a high blood pressure condition, he was subject to a yearly physical that included a drug screening test.

On February 6, 2009 the Claimant completed the federally required physical and drug screening. On February 19, 2009, the Claimant's supervisor Mr. Chestney was informed that the Claimant's test came back positive for cocaine. The Claimant requested the split sample test be performed on the urine sample at his own expense. The split sample test was conducted on March 3, 2009 and the results of the first test were confirmed. In response to this finding, the Carrier carried out a formal investigation of the matter. On April 17, 2009 the Carrier's investigation was closed and it dismissed the Claimant from service.

It is the Organization's position that the test results were a false positive because the Claimant maintains he had complied with the DARS program guidelines and was clean of banned substances. In evidence of this false positive the Organization notes that the Claimant picked the day for his own physical, and that it would seem unusual for the claimant to pick a day where he knew he would test positive for a banned substance. It was also noted that the claimant had previously been subject to 6-8 tests per year before the incident where he had never tested positive. Finally, the Organization suggests that the false positive may have been connected to the Claimant's use of allowed, medically prescribed substances.

The Board has reviewed the record carefully. In considering why a false positive may have occurred, it seems unusual that the split sample test would again create a false positive if the test was detecting legal and medically prescribed drugs instead of cocaine. The Organization even states in its brief that it "...was unable to confirm that any of the prescription medication taken by the Claimant would produce the false positive..." (see Organization Brief, Page 8). Additionally, although the Organization maintains the results were a false positive there is no evidence in the record of how that result could have otherwise come about. For example, there were no charges or evidence of a tainted urine sample, or of a broken chain of custody of the sample. For all these reasons, we do not find any material evidence for how the drug test administered at the CDL required yearly physical could have been incorrect in its finding that the Claimant tested positive for cocaine.

The claim is denied.


M.M. Hoyman
Chairperson and Neutral Member

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T. Kreke
Employee Member


D.L. Kerby
Carrier Member

Award Date: June 30, 2011