

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 142

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of David N. Finney for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on January 14, 2004, in connection with his failure to comply with the Carrier's drug policy and failure to follow the instructions of the Medical Director as a result of providing a urine specimen on November 18, 2003, which tested positive for marijuana.

(Carrier File MW-ROAN-03-53-LM-387)

FINDINGS

Upon the whole record and all the evidence, after hearing, the Board finds that 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 a precedent in any other case.

OPINION

Claimant D. N. Finney began his service for the Carrier as a trackman on July 15, 1982. On February 7, 1992, he tested positive for a prohibited substance, and was given the opportunity to enter the Carrier's Drug and Alcohol Rehabilitation Services Program. He successfully completed that program and was reinstated to service. A letter dated September 2, 1992, from the Carrier's Medical Director reminded Claimant that use of prohibited drugs was a violation of company policy, that he would be subject to follow-up testing for a period of five years, and that another positive test result would subject him to dismissal and he would not be eligible for reinstatement under the Carrier's policy.

In September 2003, Claimant underwent surgery for carpal tunnel syndrome in both wrists. Because he was out of service for more than thirty days, he was required to submit to a return to work physical examination, including a drug screen urinalysis, which he did on November 18, 2003. The specimen tested positive for a metabolite of marijuana (THC) during the initial EMIT process, and that finding was confirmed by GC/MS testing.

As required under Carrier's Drug and Alcohol Policy when there is a positive drug test result, Carrier's Medical Review Officer made personal contact with Claimant on December 2, 2003, to determine if there were any factors that might have affected the test results. Claimant told the Medical Review Officer that he had been prescribed Loratab as a pain medication in connection with the surgery. Subsequently, the determination was made that Loratab would not cause a positive test result for THC, and the test results were reported to Claimant's supervisor.

Claimant was notified to attend a formal investigation on December 22, 2004, regarding the charge that he had violated the Carrier's drug policy and failed to follow the instructions of the Medical Director's September 2, 1992 letter to keep his system free of prohibited substances. After one postponement, the investigation was held on January 14, 2004, and Claimant was dismissed from service by letter dated January 30, 2004.

The Organization raised a procedural objection contending the formal investigation was not scheduled within 30 days of the Carrier's first knowledge of the offense, as required by the discipline rule in the collective bargaining agreement between the Parties. The Organization noted that the laboratory results were received by the Medical Review Officer on November 21, but the investigation was not originally scheduled to begin until December 22.

The Organization's objection is without merit for two reasons. First, it is normal and required procedure for Carrier's Medical Director to personally contact an employee who has tested positive for a prohibited substance in order to determine if there is a legitimate reason for the test result. Contacting an employee who tests positive is part of the protocol adopted by the Department of Transportation in order to give employees every opportunity to protect themselves from being improperly charged with using prohibited drugs. Additionally, it is universally accepted that Carrier Medical Officers are not responsible for actually filing charges against employees. Rather, they are required to notify an employee's supervisor when it is necessary to charge that employee with a violation of drug and alcohol policy. Therefore, it was proper for the Medical Director to wait to notify the Claimant's supervisor until he had a private discussion with the Claimant about the positive drug test, and there was no violation of the discipline rule because the investigation was properly scheduled within 30 days of the supervisor's first knowledge that Claimant tested positive for THC.

Regarding the merits of this case, there is no dispute that the laboratory results were positive for THC. The dispute in this matter arises from the Claimant's insistence that he did not use marijuana at any time prior to the return to work physical examination. He contends that the test results must be erroneous, and the Organization argues that no tests are 100% accurate. Claimant notes that if he were using illegal drugs he could and would have returned to work within 30 days of surgery to avoid the return to work physical examination, but he says he was not using drugs and was therefore unconcerned about the results of a drug test.

Claimant offers the explanation that his doctor prescribed Loratab for the pain associated with his carpal tunnel surgery, but he did not like the effects of the drug and his doctor advised him to take large doses of Ibuprofen as a substitute. He testified that he told the Medical Director about the Loratab during the December 2, 2003 discussion because it was the only thing he could think of that might explain the positive test. Conversely, he did not tell the Medical Director about the Ibuprofen at the time because he did not think the over the counter drug would have an effect on the test results. During and after the investigation, Claimant has produced extensive documentation regarding drug testing and the fact that Ibuprofen has been known to cause false positive test results for THC.

The Board has reviewed the extensive documentation produced by both parties in this case, and it is clear that Ibuprofen has, in the past, caused false positive test results for THC in EMIT testing. It is equally clear from the documentation presented that Ibuprofen will not cause a false positive test for THC in GC/MS testing. As noted in Third Division Award No. 31803, denying a similar case in which an Ibuprofen-containing medication was blamed for a false positive test for THC, the Third Division held:

. . . Furthermore, we find that Motrin could not have caused a false positive on the tests that Carrier employed. In particular, Motrin and other substances cause false positives in certain EMIT tests due to problems of cross-reactivity. That is, in an EMIT test, an agent is added to the urine to determine whether drug metabolites will react with the agent. The GC/MS confirmatory test avoids problems of cross-reactivity because it examines the molecular structure of the metabolites present in the urine specimen instead of relying on a chemical agent with which the metabolites may react. Accordingly, we must conclude that the claim must be denied.

Claimant appeared before the Board, and his insistence upon his innocence was compelling. Nevertheless, it is not the Board's place to determine if the Claimant was truthful and credible. Instead, this Board is charged with reviewing the record in order to determine whether the Carrier had a reasonable basis upon which to conclude that the Claimant violated its Drug and Alcohol Policy and the instructions given Claimant in the Medical Director's September 2, 1992 letter.

The standard under which this Board adjudicates cases is substantial evidence, not guilt beyond a reasonable doubt. We must assume that tests which are almost 100% accurate constitute substantial evidence, even though there is a very slight possibility that a testing error may have occurred. It is not enough for the Claimant and his representatives to merely say an error may have occurred in order to overcome the presumptive validity of the tests. If it were, there could be no reliance on the drug testing process. In order to disregard test results in favor of a declaration of innocence, some evidence of error in the testing procedure must be proven, and the record here is devoid of such evidence. Therefore, under the circumstances of this case, we are obligated to accept the test results as accurate and irrefutable proof that Claimant was guilty as charged.


The next consideration for the Board is whether dismissal was the appropriate penalty for the violation. After making a determination that Claimant had tested positive for marijuana use, the Carrier assessed the penalty of dismissal in accordance with its Drug and Alcohol Policy. Further, Claimant had been advised in the Medical Director's 1992 letter that any future positive tests would subject him to dismissal. Therefore, dismissal cannot be held to be excessive discipline in this case; it is consistent with Carrier's policy, and has been upheld as the appropriate measure of discipline in innumerable arbitration awards on the subject.

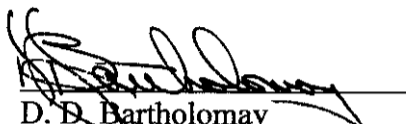
The Board takes notice of the fact that the Claimant had twenty-one years of service at the time of his dismissal. Unfortunately, given the precedent on this issue, his length of service does not mitigate the discipline assessed in this case

AWARD

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

The claim is denied.


Mark D. Selbert


D. D. Bartholomay
Organization Member


D. L. Kerby
Carrier Member

Issued at Saint Augustine, Florida on December 23, 2004