

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 596

Docket No. 596

U. P. File No. 920487

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Union Pacific Railroad Company
 (Former Missouri Pacific)

Statement

of Claim: (1) Carrier violated the Agreement, especially Rule 12, when D. H. Smith (SSN 459-90-1007) was dismissed from service on June 12, 1992.

(2) Claim in behalf of Mr. Smith for wage loss suffered beginning June 12, 1992, until reinstated with seniority, vacation and all other rights unimpaired.

Findings: The Board has jurisdiction by reason of the parties Agreement establishing this Board therefor.

The Claimant, Machine Operator D. H. Smith, following a formal investigation held, on May 19, 1992, on the charge:

"You were allegedly insubordinate when you failed to comply with instructions given you by Rail Gang Supervisor R. C. Calloway in his letter of April 26, 1989 and reiterated in the findings of a Board Award No. 444 of the Special Board of Adjustment 279 in October, 1990 to remain drug free indefinitely as evidenced by the positive drug result of the Engineering Services Physical test given you on April 7, 1992 at Palastine, Texas."

Carrier concluded culpability therefor. The Claimant was dismissed from service as discipline therefor pursuant to the Union Pacific Drug Policy which has been well articulated and was distributed to all employees by Stan McLaughlin, Assistant Vice President Engineering Services, on or about April 10, 1989.

This Claimant was involved in the findings of our Award No. 444 which was decided February 26, 1991. Said Award is by reference hereto made a part hereof. That case involved Claimant who was dismissed from service as discipline. As stated in Page 3 of the award:

"In the instant case, the Claimant was given the letter dated April 26, 1989 with specific instructions from Track Supervisor R. C. Calloway. Instructions #3 from Track

Supervisor R. C. Calloway, read: 'If you fail to provide a negative drug test as set out above within ninety (90) days from your date of disqualification, or if you failed to complete the Employee's Assistance Program, successfully, as set out in paragraph 2 above, you hereby notified that you may be subject to dismissal if it is determined that you failed to follow the instructions in this letter.'

As pointed out in our Award No. 444, Claimant Smith was given that letter. Claimant Smith in that case, failed to provide a negative drug test within 90 days of a positive test. He was dismissed therefor for failure to comply with instructions #3 and dismissed from service as discipline therefor. Our Board found that there were grounds for according the Claimant benefit of the doubt, i.e., that the Engineering Department physical examinations given on April 10, 1989, that the fact that his long years of service were to be given recognition and that he was accorded the benefit of the doubt. Here, the Claimant again in this case tested positive in April 1992 during his yearly physical examination. His urine specimen contained 56.7 NG/ML of marijuana metabolite. The Claimant puts forward the rationale for his positive test results as being the result of passive inhalation. We think that reason has been addressed and found wanting, by Award No. 8 of PLB 561 (Seidenberg), on this property, which by reference is adopted and incorporated herein. Said Board, on this point, said:

"The Board finds the defense of passive inhalation is not persuasive or effective. The study cited by the Organization do not remotely approach the situation of the Claimant. The studies (Sweden) dealt with three subjects smoking two cigarettes with hashish of a concentration of 15% for 30 minutes in a small car. The cut off limit for marijuana was 13 NG/ML in the urine and for blood, 0.5 NG/ML. The Board finds no prohibitive evidence that Claimant approached the condition under which the cited experiments were conducted. On the other hand, the Carrier has cited studies which show that extreme and unrealistic situations will produce measurable cannabinoids in the urine of the subject. However, the experiments do not reflect the real life situation. The experiment cited by the Carrier indicate that smoking marijuana in a social situation will not, through passive inhalation produce positive results in drug tests.


The Board must also take cognizance of the fact that if the defense of the passive inhalation was accepted as a valid defense to positive test results, it would be virtually impossible to enforce Rule G. A given employee producing


positive drug results could advance the defense of passive inhalation, and the Carrier would be at loss to insist the results showed the use of the proscribed substance, and enforced penalties for this illegal use."

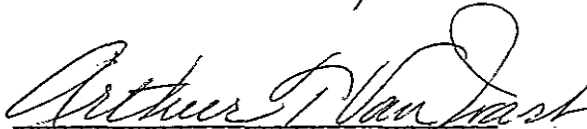
Claimant's admission of having taken five drug tests is proof for concluding a lack of credibility as to that claim, as well as alleged irregularities with the sample taken from Mr. Smith which we find as not being not persuasive.

The mere existence of this case is proof that the Claimant has repeated his history of drug use. He was again caught by a positive finding for the use of marijuana. This claim will be denied.

Award: Claim denied.


S. A. Hammons, Jr., Employee Member


Kathy Alexander, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member