

PUBLIC LAW BOARD NO. 7204

UNITED TRANSPORTATION UNION)
)
 vs.)
)
BNSF RAILWAY COMPANY)

CASE NO. 12
AWARD NO. 12

STATEMENT OF CLAIM:

Claim and appeal in behalf of Dilworth, ND Conductor D.A. Peterson for pay for all time lost, including investigation held October 26, 2006, immediate return to service and complete record clearance account dismissed on November 2, 2006 for alleged violation of GCOR Rule 1.5 (alleged positive urine test for marijuana) on September 6, 2005.

FINDINGS:

Public Law Board No. 7204, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant, D.A. Peterson, had been employed by the Carrier for approximately 12 years. On September 18, 2006, Claimant was charged to attend an investigation “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violation of General Code of Operating Rules 1.5, *Drugs and Alcohol*, as indicated by results of your drug and alcohol follow-up test performed September 6, 2006 at Dilworth, MN, while you were in covered service, on duty at 0700 hours, September 6, 2006.”

The applicable rules provide, in relevant part:

The use of or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in

their bodily fluids when reporting for duty, while on duty, or while on company property.

Any one or more of the following conditions will subject employees to dismissal

(a) A repeat positive test either for controlled substances or alcohol obtained under any circumstances. Those employees who have tested positive in the past ten (10) years will be subject to dismissal whenever they test positive a second time . . .

The facts of this case are not in dispute. Claimant tested positive for a controlled substance in October 2005. As a result of that infraction, Claimant entered the Carrier's Employee Assistance Program and, among other conditions for retention of his employment, was subject to follow-up drug/alcohol testing. He was scheduled for such testing on August 15, 2006. However, Claimant was on vacation, so the testing was performed on September 6, 2006. As discussed below, that testing produced a positive result, which led to the instant charges. Claimant had been scheduled for testing again on September 1, 2006, and the Carrier determined that the two tests would be performed on consecutive days. The second test, performed on September 7, 2006, yielded a negative result.

With respect to the first test, the Carrier requires all of its onsite collectors to use overnight shipping, but the collector reported that although the specimen was properly shipped by DHS, it was not received at the lab until September 13, 2006. There were no exceptions noted in the collection process. The evidence established that the bottles were received with the seals intact and associated paperwork complete. Claimant's signature was on the form, and the chain of custody form was intact. On September 15, 2006, notification was received of Claimant's positive result for a controlled substance, cannabinoids. The cutoff for a positive result is 15 mg/ml and the specimen was confirmed at 31. Thereafter, Claimant requested that the split sample be tested, and the second lab confirmed the positive result.

The Carrier's expert witness testified that he had reviewed the paperwork associated with the first test and could not find any flaws. He also stated that the chance of error on a split sample is extremely low, and noted that the level of controlled substance drops with time. He acknowledged that the result was unusual, as he could not recall any prior instances of back-to-back testing with one positive and one negative result, but could not find any fatal procedural flaw in the process.

The Carrier asserts that the Organization relies primarily upon the negative result of the second test to establish that Claimant's innocence, but, the Carrier notes, its witness explained that the concentration of a controlled substance drops with time, so the negative result does not establish that the first outcome was inaccurate. The Carrier also notes that the first collection, on September 6, 2006, was tested as a split sample, with two different labs confirming the positive result.

As for the Organization's argument that the six-day delay tainted the procedure, the Carrier acknowledges there was no good reason for the delay but, it states, there is also nothing to establish that it impacted the chain of custody. The Carrier further points to its witness' testimony that the odds of error, given that two different labs performed the testing, were extremely low. Therefore, the Carrier urges, the positive test results establish Claimant's guilt.

The Carrier contends that dismissal is appropriate. Carrier policy is quite clear that this is the appropriate penalty for second-time drug/alcohol violators like Claimant, the Carrier states. Indeed, the Carrier notes, this is actually Claimant's third violation, as he tested positive in November 1988, again in October 2005, and on this occasion, September 2006. Claimant must be held accountable for his actions, the Carrier urges, and the claim should be denied.

The Organization notes that Claimant was subjected to two tests, on September 6 and September 7, 2006. The first specimen did not arrive at the lab for six days, in violation of the 24-hour FRA requirement, and was positive. The second specimen, tested in a timely manner, was negative. The Organization points out that the Carrier admits the collection was handled in an unprofessional manner, so, it states, this Board should not accept the representations of the responsible individuals as to the chain of custody. These procedures were fatally flawed, the Organization concludes, and the claim should be sustained.

The Board has carefully reviewed the record in its entirety. Although we recognize the unusual circumstances surrounding Claimant's drug/alcohol testing in this matter, the overall record does not contradict the medical evidence of Claimant's positive result, and that evidence is sufficient to satisfy the Carrier's burden of proving Claimant's guilt by substantial evidence. While the Organization contends that the lab's delayed receipt of Claimant's first sample calls into question the positive result, we cannot agree. Other than the delay, there is nothing to impugn the validity of the testing, as no exceptions were noted in the collection and the sample arrived at the lab sealed and intact, with all paperwork in proper order. The fact that the split sample, tested in the usual manner by a second, independent lab, confirmed the first result, also mitigates against a conclusion that the delay in any way affected the integrity of the sample or the testing process.

We also cannot conclude that the second test's negative result calls into question the first test's results. The level of controlled substance in an individual's system drops with time, so the negative result does not establish that Claimant was substance-free on the day of the first test. Thus, the medical evidence establishes that Claimant did, in fact, ingest a prohibited substance, and his guilt has been established by substantial evidence.

Given that fact, the record demonstrates that Claimant failed to comply with the conditions for retention of his employment following his previous positive test result. Numerous arbitration awards support the Carrier's right to discharge an employee in such


circumstances. Therefore, the Carrier's decision to dismiss the Claimant cannot be found arbitrary, capricious or unjust.


AWARD

Claim denied.


JACALYN J. ZIMMERMAN

Neutral Member


ROGER BOLDRA
Carrier Member


J.L. SCHOLLMAYER
Organization Member

Dated this 31ST day of March, 2009.