

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332

Parties to Dispute:

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

-and-

NORFOLK SOUTHERN RAILWAY
COMPANY

AWARD

Case No. 149

Claimant X. X. XXXXX

STATEMENT OF CLAIM:

"Claim on behalf of Electrician X. X. XXXXXX in Altoona, Pennsylvania, for reinstatement with seniority rights impaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician XXXXXX is unjustly withheld from Carrier's service. We also request his personal record be cleared of the matter."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant XXXXXX, working as an Electrician at Carrier's Juniata Locomotive Shop, Altoona, PA at the time this claim arose, was summoned to a formal investigation set for April 21, 2015, to respond to charges of testing positive for prohibited substances after failing a drug screen on March 10, 2015. At the conclusion of that hearing, by letter dated May 13, 2015, Carrier advised him that he had been found responsible for failure to comply with the instructions of Carrier's Medical Director and Company policy and was dismissed from all service. This claim submitted by the Organization on Mr. XXXXXX'

behalf ensued. When it remained unresolved in discussions between the parties on the property it was advanced to this Board for final resolution.

In support of its action, Carrier argues to this Board that the formal record of hearing contains ample evidence establishing the Claimant had failed to keep his system free of prohibited drugs as ordered. By way of background, it states that Mr. XXXXXX had earlier been dismissed from service for use of prohibited drugs in violation of Company policy and following undergoing rehabilitation treatment pursuant to Carrier's DARS program, returned to service effective May 14, 2014, conditioned upon keeping his system free of prohibited substances and participating in DARS continuing care programs as appropriate. Additionally, routine unscheduled follow-up drug screening was required as a condition of restoration to service. Specifically, Claimant was advised as follows:

“During the first five years following your return to work, you may, from time to time, be required by me to report to a collection site for further testing under direct observation in order to demonstrate that you are not using prohibited drugs. Should you fail to comply or should a future test be positive, or any violation of Rule G occur, you will be subject to dismissal.”

According to the testimony and documentary evidence sponsored by Carrier, on April 1, 2015, its officials were advised by the Company's medical team on that the urine sample furnished by the Claimant in testing administered on March 10, 2015, produced positive results for alprazolam metabolite (Xanax). No challenges were asserted with respect to any aspect of the testing procedure, and the Claimant received a fair and impartial investigation into these matters, ably represented by the Organization's advocates. Based upon all information developed on the record at Claimant's formal investigation, Carrier maintains that the Claimant's dismissal was fully warranted.

The Organization contends that Carrier's Hearing Officer unfairly admitted medical evidence into the record not sponsored by any representative from the NS Medical unit or Quest Diagnostics facility. In so doing, it argues, Claimant's representatives were denied an opportunity to cross examine on the critical documents supporting Carrier's case. Secondly, it maintains the dismissal constituted unduly harsh and excessive discipline; in

light of the circumstances presented, progressive discipline would have been more appropriate.

For the reasons that follow, the Board finds the Organization's arguments not persuasive. First, the record reflects that no Organization representative objected to the introduction of the evidence of drug use reflected in the follow-up drug screen records at the time it was offered in evidence at Claimant's hearing. Any objection to the documentation based upon purported inability to cross-examine, therefore, must reasonably be seen as waived at the formal investigation. The conclusion that "such objections must be raised during the course of the investigation or they are considered to have been waived," as affirmed by the arbitral authority Carrier relies upon, is well settled. (Citation omitted.) Second, as Carrier correctly asserts, the test results in this case did not, as argued, constitute medical opinion but were rather routine business documents. Their sponsorship by General Foreman Sipes rather than the testing technician or medical authorities in context cannot reasonably be considered as representing any fatal procedural flaw.

Based upon its review of the record, the Board finds that Claimant XXXXXX received the fair and impartial investigation he was entitled to under the Agreement. With respect to the quantum of discipline, we find the penalty assess appropriate and not arbitrary under the circumstances. Not only was progressive discipline not required after DARS handling, but the conditions imposed on the Grievant following his return to service after an earlier Rule G violation could not have been any more clear. Carrier's Policy on Drugs as it appears in the Norfolk Southern Book of Safety and General Conduct Rules provides in part as follows:

"An employee who tests positive and then complies with the above requirements will be returned to service. The employee will be advised in writing, however, that the use of prohibited dugs is contrary to Company policy. The employee will be instructed by the Medical Director to keep his or her system free of such drugs and that he or she must participate in any appropriate DARS continuing care recommendation to remain eligible for service. That employee will be subject to dismissal if any further test is positive."

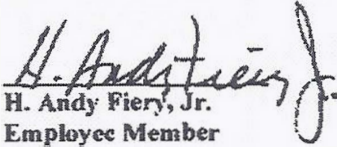
OPINION AND AWARD

Public Law Board No. 5332 – Case No. 149

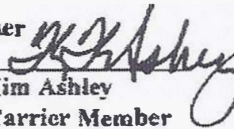
In sum, properly admissible medical test results conclusively established in this instance that Claimant XXXXXX, by his second Rule G violation on March 10, 2015, established on this record, had clearly failed to comply with the terms of his earlier restoration to service in 2014. The record affords no basis for believing that Claimant was somehow unaware of his status or uninformed about the consequences of his continued use of prohibited substances. Accordingly, the Board is presented with no basis for subverting Carrier's dismissal action and must deny the claim.

A W A R D

The Claim is denied


H. Andy Fiery, Jr.
Employee Member


James E. Conway
Chairman and Neutral Member


Kim Ashley
Carrier Member

Dated: September 27, 2016