

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13947
Docket No. 13807
NRAB-00002-060028
(06-2-28)

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(International Association of Machinists and Aerospace
(and Aerospace Workers

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Dispute – Claim of Employee:

That the Union Pacific Railroad Company (hereinafter referred to as Carrier or Company) violated the National Agreement dated June 1, 1960, between the International Association of Machinists and the Union Pacific Railroad Company when it dismissed Machinist Jack Wheeler (hereinafter referred to as claimant) from the service of the Carrier.

Relief Requested:

That the Union Pacific Railroad Company be ordered to reinstate the Claimant, compensate him for all lost wages, and give back to him all lost benefits.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Charges were issued May 4, 2006 alleging Claimant refused to take a Reasonable Cause Drug and Alcohol Test. An investigation was held on June 7, 2006 with the Carrier issuing dismissal June 15, 2006 and June 16, 2006. The Organization appealed the decision resulting in this Board's careful review.

The Organization has raised procedural issues, unjust treatment and also argues that the Claimant was never provided a copy of the Carrier's Drug and Alcohol Policy. It further argues that the Claimant suffers from a severe medical problem known to the Carrier which makes it nearly impossible to produce a urine sample. When requested to take the drug test or be fired, the Claimant indicated he could not produce a sample; would offer a blood sample; and when again directed to take the test, offered written statement acknowledging marijuana use.

The Organization maintains that this offer is a positive test, particularly because he was unable to produce urine. The Organization argues that it is not thereafter appropriate to dismiss the Claimant for insubordination, particularly because he did not refuse the test.

The Carrier denied procedural error, unjust treatment, or the Claimant's lack of a copy of policy. It further argued that the Rules on testing were well known to the Claimant. He was ordered to take a urine test, knew the consequences of refusal and refused. The Carrier maintains that all other factors do not mitigate the direct refusal and failure to heed the Carrier's Rules and Drug and Alcohol Policy.

Manager of Locomotive Maintenance Haney testified that on May 3, 2006, he was approached by the Locomotive Supervisor who informed him that the Claimant had been observed sleeping twice on the shift. Manager Haney contacted General Superintendent Keller and agreed that a reasonable cause drug and alcohol screen

would be performed. Testimony from Manager Haney is that the Claimant refused the test.

There is no doubt that he was ordered to take the test and refused. During discussions with the Claimant Manager Haney testified that he ordered the Claimant to take the test and if he did not do so, informed the Claimant that it would be insubordination resulting in dismissal. Manager Hayden supported that testimony, which the Claimant does not deny. Manager Hayden presented the facts as:

“ . . . I over heard Mr. Haney tell [Claimant] that it was company policy that he take a urinalysis when there is probably cause. . . Mr. Haney then explained that if he did not take the test he would be dismissed from service. . . [Claimant] than asked Mr. Haney for a blank piece of paper . . . wrote something down and gave it to Mr. Haney and said . . . I’m admitting that I have a problem and need some help but I’m not going to take the test. . . [Claimant] said he was going to leave and not wait for the test person. Mr. Haney again told Jack that if he did this – he was dismissed from service . . . ”

The Claimant admits to the fact that he was informed to wait for the drug tester and take the urinalysis. The Claimant also admits he refused and left before the test. Claimant’s testimony that he had been told that “if I do not urinate in two hours, I’m automatically terminated for insubordination” is denied, but even if *arguendo*, it were true, it would not justify refusal and leaving the site. Proof that the Claimant could not urinate at this test is not in the record, as he left. Nor is it in the record what the test might have found.

The alleged violations are of the Carrier’s Drug and Alcohol Policy, Section 16, Refusal to Permit Testing/Tampering and Rule 1.6(3) – Insubordinate. There is undeniable proof in this record supporting violation of both Rules. Claimant testified that he was informed to take the test and left prior to the test being administrated. He was therefore guilty of both charges.

The Organization's arguments about procedure have been carefully reviewed prior to our consideration of merits. They deserve a brief comment. The Board finds the Claimant was not prejudged; the dismissal and then corrected dismissal letter was proper. We find no support for the Organization's argument that the Claimant was unaware of the testing procedure either for lack of a copy of the Policy or inability to comply due to medical problems. The Carrier provided evidence that the Claimant had been issued the Drug and Alcohol Policy February 25, 2004. The Carrier also pointed out that the Claimant had previously been tested and provided urine samples.

Throughout this instant case we have centered upon the Claimant's failure to provide urine. Had the Claimant attempted and failed the policy permits a medical review officer to evaluate and decide on an alternate evaluation process. Refusal is insubordination. Additionally, the Organization argues that the Claimant submitted an admission of marihuana use. As testified by Manager Mitchell, the test had already been ordered and admission of use *subsequent* to the order is not actionable as might have been prior to a reasonable suspicion test.

In full consideration, the Board is compelled to note that the case centers upon the Carrier Rule, the Claimant's action and the circumstance at bar. The Rules were clear, known to the Claimant and timely presented to him; to remain and take a urine test. The Carrier has proven that the Claimant understood what was expected, having been prior tested and aware of the Policy. The circumstances of his health indicated in testimony and medical document do not prove inability to provide urine. The admission of drug use does not satisfy the Rule. The argument that the Claimant offered a blood test is not permitted by the Policy; nor does it relieve the Claimant of responsibility to obey instructions. Employees can not develop their own options and alternatives, but must comply with Rules and Policy.

The Carrier has met its burden of proof. The violations are serious and sufficient to support the Carrier's dismissal. Accordingly, the Claim must be denied.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 15th day of July 2008.