

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35612
Docket No. MS-35545
01-3-99-3-404**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(J. M. McNeil

PARTIES TO DISPUTE: (

**(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company - Western Lines)**

STATEMENT OF CLAIM:

“Claim of J. M. McNeil that:

- (1) The dismissal of Machine Operator J. M. McNeil for alleged violation of Rule 1.5 Item 3, of the Safety and General Rules for All Employees, effective April 10, 1994, and alleged violation of Rule 1.6, Item #3 on March 3, 1997, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement. The referenced claim is identified by the Carrier (Union Pacific Railroad) as Carrier File No. MWW 97-069.**
- (2) As a consequence of the violation referred to in Part (1) above Claimant J. M. McNeil requests that he be immediately reinstated to his former assigned position of Machine Operator on the Colfax District, that his seniority and all other contractual rights be restored unimpaired, that he be compensated net wage loss he has suffered since his wrongful dismissal, and that all charges be expunged from his personal record.”**

FINDINGS:

The Third 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.

The Claimant was a passenger in hi-rail vehicle 7800-5105B on December 31, 1996. The vehicle was on storm patrol inspecting track following windy and rainy weather. Although the rain had stopped, the tracks were wet. As it proceeded westbound on a downgrade coming out of a curve just before 9:00 P.M., the vehicle left the tracks. It traveled an estimated 125 feet from the point of departure. It then struck an embankment in such a manner that it turned around to point eastward and rolled over onto its right side.

Upon arriving on the scene and examining the location and position of the vehicle, a Carrier Official suspected that it had been operated at excessive speed for the track conditions. Given the Claimant's position in the vehicle, Carrier Rules required him to caution the operator against perceived unsafe practices. Because of the Claimant's potential responsibility, the Carrier official asked the Claimant as well as the vehicle operator to complete Form 2611 accident reports and to provide urine samples for drug or alcohol testing.

According to the record, the Claimant expressed concern about the required test because he had been taking some unknown cold or flu medication. The Carrier official informed him that he could make a declaration to that effect when his urine sample was submitted. The official provided the Claimant with access to a phone to obtain information about the unknown medication. The official later learned that the Claimant left the property and went home. The Claimant did not complete the accident report before leaving. When the official found the Claimant at home, the Claimant again declined to provide the test sample. It is undisputed that the official explained that his refusal to submit the test sample would violate Carrier Rules for insubordination as well as Rule 1.5 pertaining to drug and alcohol regulation. Nonetheless, the Claimant did not provide a test sample or a completed accident report at any time.

The Claimant had accumulated some four years and seven months of service at the time of the incident. The Claimant also had a prior Rule 1.5 infraction.

The Claimant principally challenges the discipline on the ground that the Carrier official had no proper basis for requiring a drug or alcohol test under the circumstances. In addition, the Claimant maintains that the Carrier's own policy did not call for a test under the circumstances. Finally, the comply now and grieve later principle has no application to the facts at hand.

After careful review of the record, the evidence compels us to reject the Claimant's challenge. On this record, the location and position of the vehicle, when coupled with the Claimant's position within the vehicle, provided the Carrier official a reasonable basis for suspecting that the Claimant may have had some responsibility for the incident. He had a proper basis, therefore, for requiring a drug and alcohol test sample from the Claimant. The official's testimony about the Claimant's condition immediately following the incident reflected no reason why the Claimant could not have provided the test sample and accident report as requested.

Although the Claimant's testimony about his condition after the incident conflicted with that of the official, other evidence provided the Carrier with a proper basis for discounting the credibility of the Claimant's testimony. According to the Claimant's testimony, the vehicle was being operated safely just prior to the derailment. He took no exception to the driver's performance whatsoever. This testimony is effectively impeached by the fact that the driver signed a document admitting that his actions did constitute a violation of Safety Rule 1.1 as well as Rule 72.11.7 (3) of the Chief Engineer's Instructions, which pertained to the safe operating speed of hi-rail vehicles. By the same document, the driver waived a formal Hearing and accepted his discipline.

Our review of the record reveals substantial evidence supporting the Carrier's disciplinary action. In light of the Claimant's relatively short term of service and his prior Rule 1.5 infraction, we find no proper basis for disturbing the disciplinary penalty imposed.

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 Third Division**

Dated at Chicago, Illinois, this 24th day of July, 2001.