Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36039
Docket No. MW-36339
02-3-00-3-575

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Truck Driver C. J. DeMello for alleged violation of Rule 1.6 of the Union Pacific Rules, Effective April 10, 1994 and Section IX of the Union Pacific Drug and Alcohol Policy and Procedures, effective March 1, 1997, when he allegedly provided an adulterated specimen for a reasonable cause test administered on February 24, 1999 at Citrus Heights, California, was arbitrary and based on an unproven charge (Carrier's File 1201530 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. J. DeMello shall now be reinstated to service at his former position with seniority and all other rights unimpaired, compensated for net wage loss suffered and have his record cleared of the incident."

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 hired by the Carrier on March 16, 1997. Prior to his dismissal, the Claimant was employed as a Truck Driver/Crane Operator. On February 24, 1999, he was directed to submit to reasonable cause testing as a result of damage sustained to a crane truck driven by the Claimant on that date. The Claimant provided a urine specimen. He signed a statement certifying that the sample he provided was sealed in his presence and was not adulterated in any manner.

When the sample was tested at the lab, it was determined that the specimen had been adulterated. This determination was reached based on the finding that the nitrite level in the specimen was approximately three times higher than what is normally found in human urine. Because of that finding, the lab did not perform a toxicological test.

On March 4, 1999, the Claimant was notified of the test results by the Medical Review Officer and was given the opportunity to provide a response. The Claimant was subsequently advised to attend an Investigation into the charge that he provided an adulterated specimen in violation of Carrier Rules and Policies. After the Investigation, which was held on March 17, 1998, the Claimant was dismissed from service.

Notwithstanding the Organization's contentions to the contrary, the Board is satisfied that the Carrier met the test of substantial evidence in this case. It is true that there were no witnesses who actually observed the Claimant tamper with the urine specimen. Privacy concerns generally preclude such direct observation. However, there are procedures in place to detect subterfuge without resorting to personal observation. One of these is to test the sample for the presence of nitrites. Here, the lab reports show that the Claimant's nitrite level was 1428; the cut-off level is 500.

There was no evidence presented at the Hearing to indicate that there were lapses in the chain of custody or that the testing procedures were otherwise irregular or flawed. On the contrary, the record shows that all due care was exercised both in securing the sample and protecting it during the laboratory processing. At the Hearing, the Carrier presented the testimony of Senior Manager of Drug and Alcohol Testing, L. C. Varvel, who gave supporting testimony as to the procedures and methodologies

of the testing and the significance of the Claimant's test results. In addition, the Carrier submitted the federal guidelines for reporting and interpreting specimen validity tests, and the results in this case are consistent with those guidelines. Thus, although the Organization contended that the testing was inadequate and insufficient because no confirmatory test was done, we are not in a position to say that more was required of the Carrier once the integrity of the sample was established and it was shown that the testing was administered in accordance with established procedures and federal guidelines.

Concluding as we do that the Carrier met its threshold burden of establishing the charges directed against the Claimant, the burden then shifted to the Organization to affirmatively produce credible evidence to show that there were other, exculpatory explanations for the test findings. In this, the Organization failed. The Claimant offered various reasons for the test findings. He testified that he has a single kidney and suffers from Hepatitis C, and that medications could have caused the high nitrite result. He also testified that he dropped the specimen into the toilet bowl and that vitamins or occupational hazards could have accounted for the lab findings.

The Claimant was given the opportunity to provide this information to the Medical Review Officer after the test results were obtained. The MRO did not find the Claimant's explanations to be a sufficient basis to vitiate the test results. In the absence of any direct evidence to support a contention that the claimed circumstances would have resulted in a nitrite reading of 1428, we find the Organization's defenses unpersuasive.

The Board further notes that the Organization submitted additional evidence after the Investigation in the form of a statement by the Claimant's physician dated July 14, 2000 as well as several "scientific articles" and a statement dated September 8, 2000 from David W. Fretthold, Ph.D. Clearly, this evidence should have been proffered at the Investigation so that the Hearing Officer would have had the benefit of considering the record in full before issuing a decision. But even considering the evidence as it was submitted later during the on-property handling, it is clear that none of it explains the Claimant's test results.

The only remaining question centers on the reasonableness of the penalty meted out. As in most industries, adulteration of a sample in order to prevent a valid test is considered a most serious offense. Under the Carrier's drug and alcohol policy, such a violation, when proven, subjects an employee to dismissal without benefit of a one-

time employee assistance return to work opportunity because the misconduct is deemed tantamount to insubordination and dishonesty. Numerous Awards have upheld termination as the appropriate measure of discipline in similar cases of sample tampering. See First Division Awards 25269, 25310; Third Division Award 35395; Public Law Board No. 6053, Award 38; Public Law Board No. 4901, Award 124; Special Board of Adjustment No. 235, Award 3229; Special Board of Adjustment No. 595, Award 595; Special Board of Adjustment No. 928, Award 336; Special Board of Adjustment No. 955, Award 492. We see no reason for departing from that conclusion in the case at hand.

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 21st day of May, 2002.