

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36040
Docket No. MW-36345
02-3-00-3-590**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 discipline (withheld from service and subsequent dismissal) imposed upon Mr. R. A. Davis for alleged violation of Union Pacific Rule 1.6 of the General Code of Operating Rules (effective April 10, 1994) and the Union Pacific Railroad Company Drug and Alcohol Policy (effective March 1, 1997) in connection with the engineering physical drug test administered on April 23, 1999 at Redding, California was unwarranted, on the basis of unproven charges and in violation of the Agreement (Carrier’s File 1204048 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. A. Davis shall now be reinstated to his former position with seniority and all other rights unimpaired, compensated for net wage loss suffered and have the charges leveled against him removed 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.

On April 23, 1999, the Claimant was marking crossties when he was directed to undergo a periodic physical examination. Included as part of the examination was a drug and alcohol screening. The Claimant provided a urine specimen. According to the Claimant's testimony, the container was sealed when he took it to provide a sample, the Collector was not present when he voided, and the specimen was sealed in his presence.

The specimen was taken to the Lab One laboratory in Lenaxa, Kansas, where tests were to be performed. As a preliminary matter, however, it was determined that the sample tested negative for creatinine, indicating that the sample submitted was not consistent with human urine. No further tests were conducted on the sample.

This information was released to the Medical Review Officer. On April 30, 1999, the MRO discussed the findings with the Claimant, who had no explanation for the discrepant results.

The Carrier thereafter requested that Lab One provide the specific creatinine readings found in the Claimant's specimen. The record shows that Lab One is a DHS certified laboratory. Its protocols and procedures are consistent with federal guidelines. According to guidelines issued by the Department of Health and Human Services, a specimen is defined as "substituted" or not exhibiting the characteristics associated with normal human urine, if the creatinine concentration is less than or equal to 5 mg/dl and the specific gravity is less than or equal to 1.001 or greater than 1.020. The test results on the Claimant's sample showed 4 mg/dl and a specific gravity reading of 1.039, so on both measures, the creatinine levels fell outside the parameters consistent with human urine.

The Carrier's Drug and Alcohol Policy also incorporates federal guidelines regarding the interpretation of specimen results. Pursuant to those guidelines, the MRO is instructed to designate an adulterated or substituted specimen as a "refusal to test." The guidelines further specify: "The MRO also informs the employee that the right to have the split specimen tested by the donor is withdrawn. Therefore, neither a test of the split specimen nor a retest of the primary specimen is offered to the donor."

The MRO forwarded the test results to L. C. Varvel, the Manager, Drug and Alcohol Testing. The Claimant was thereafter removed from service and directed to attend an Investigation to determine whether he violated Rule 1.6, which prohibits dishonesty, and Section IX of the Carrier's Drug and Alcohol Policy, which provides that "tampering with a sample in order to prevent a valid test (e.g., through substitution, dilution or adulteration of the sample) constitutes a refusal and indicates insubordination and dishonesty, and, if proven the employee will be dismissed. . . ."

At the Investigation, which was held on May 5, 1999, Manager Varvel testified regarding the test results, data, specimen security and chain of custody documentation for the April 23, 1999 specimen submitted by the Claimant. He stated that the procedures for testing and chain of custody were properly followed and documented in the Claimant's case.

The Claimant denied submitting a substituted or adulterated sample. He maintained that he complied with the testing process by submitting his urine specimen. He further testified that, before he began his employment with the Carrier in 1995, he worked as a Truck Driver for ten years. The Claimant stated that he passed every drug test required of him both as a Truck Driver and as a Carrier employee over a span of 14 years.

After the Investigation, the Claimant was notified of his termination. The Organization protested the dismissal, contending that the Carrier's sole proof of guilt consisted of a lab report that could not be subjected to cross-examination. The Organization argues that the charges here are serious and therefore the Carrier should be required in a case such as this to substantiate the test results with additional or corroborative evidence, which could easily have been accomplished if the MRO ordered a second test to confirm the findings. Moreover, there is considerable evidence to support the Claimant's innocence. Against this evidence, the Carrier has not met its burden of proof and the claim should therefore be sustained.

The Carrier contends that the record fully supports the finding that the Claimant tampered with the sample. The lab reports indicate that the specimen readings were not consistent with human urine and, because all procedures were adhered to in attaining the sample and maintaining it through the chain of custody, there is sufficient proof that the Claimant is guilty of the charges herein. The Carrier points out that the penalty for tampering with a specimen is dismissal, and accordingly there is no basis to interfere with the penalty meted out herein.

The Board carefully studied the record and the precedent Awards cited by the parties. Initially, we observe that certified drug testing laboratories require careful record keeping, strict controls on collection, identification and preservation of samples, and checks to ensure the lab is operating correctly. As a result, if a reputable, certified lab follows the critical steps in handling and analyzing a urine sample, the test result will be extremely reliable. To counter that evidence takes more than a bald assertion of error or speculation that somehow samples were switched.

In this case, the testing was accomplished in accordance with lab protocols and federal guidelines. The sample was handled consistent with procedures used for testing adulterated samples. Considering the evidence, the Hearing Officer properly concluded that the validity and accuracy of the test were proved and the integrity of the sample was preserved.

The Organization has not presented any probative basis for disqualifying the test results. In contrast to the cases cited by the Organization, there has been no showing that there was a less than accurate determination of the Claimant's sample or that any other circumstances were present that could have compromised the results. No realistic or probative scenario was presented to suggest that some unauthorized person gained access to the Claimant's specimen and switched it for a tainted one.

Given this state of the record, we find that the Carrier met its burden of proof with convincing evidence. The Carrier was not required to conduct further testing in order to meet its evidentiary burden; in fact, federal guidelines expressly provide that in cases of specimen tampering, no further confirmatory testing is to be conducted. Once a reliable test report was proffered, accompanied by an explanation of the procedures used to achieve the end result, the burden shifted to the Organization to rebut the evidence and no persuasive evidence was offered which did so. The Claimant's denial of wrongdoing and the fact that he tested negative on prior occasions do not outweigh the findings of the lab report which has sufficient indicia of accuracy and reliability.

To paraphrase a prior decision, it is not necessary for the Board to determine how a sample was tampered with but to determine that it was tampered with. Special Board of Adjustment No. 279, Award 595. Once that finding is made, the Carrier's assertion that dismissal was the appropriate remedy becomes persuasive. The Claimant's violation of Carrier Rules and Policies was a serious transgression that properly subjected him to termination.

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.