

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32489
Docket No. MW-32987
98-3-96-3-251

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service on October 12, 1994 and subsequent dismissal) of Truck Operator A. J. Wilson on December 20, 1994 for '... violation of Union Pacific Rules 1.3.1, 1.5 and 1.6. ...' was arbitrary, capricious and in violation of the Agreement (System File D-224/950305).**
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him, he shall be compensated for all wage loss suffered as a result of his being withheld from service beginning October 12, 1994 and his subsequent dismissal, and he shall be allowed to participate in the Rule 'G' Rehabilitation/Education Program."**

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.

Prior to his dismissal Claimant was employed as a Group 15 Truck Operator and had established approximately 14 years service with the Carrier. As a Truck Operator the Claimant was subject to random drug testing and, accordingly, was asked to submit to a urinalysis test on October 12, 1994. As requested the Claimant produced a sample, however, upon examination it was colorless and cool to the touch. In addition, the sample did not record a temperature reading. The Claimant was then requested to produce another sample under observation, which he did. This sample, unlike the first sample, had color and recorded on a temperature strip. The sample was then handled in accordance with established chain of custody and other protocols. Both samples were tested and the first was rejected because it did not contain creatine, a compound found in urine. The second however tested positive for amphetamines and methamphetamine. Upon Investigation and Hearing the Claimant was first withheld from service and ultimately discharged.

The Organization first attacks the dismissal on procedural grounds alleging that the Carrier's action must be overturned because it suspended the Claimant pending Investigation and because it failed to grant a postponement to the Investigation. We reject both arguments. As to the first, it is true that Rule 48(a) requires that an employee who has been in service more than 60 calendar days shall not be dismissed or otherwise disciplined before receiving a fair and impartial Hearing. However, it is also true that Rule 48(o) permits the Carrier to suspend employees pending Investigation in cases where "serious and/or flagrant violations of Company rules . . . are apparent." There can be little question that the circumstances surrounding the first urine sample were adequate to lead one to believe that the Claimant tampered with the sample. Indeed, there is no better basis for the conclusion than the fact that the Carrier saw to it that the second sample was provided under observation. The second alleged procedural error relied upon by the Organization was the Carrier's failure to postpone the Investigation. More specifically, the record reveals that the basis for the Organization's request was to postpone the Investigation so that it could obtain information regarding the manufacturer of the bottles used for the urine samples. However, the record shows that the Organization had ample time and basis well before

the Investigation to begin, and perhaps to conclude, any examination of the bottles. Moreover, because the Organization had this time, it was not unreasonable to deny the requested postponement in light of the fact that Carrier witnesses and officials were on their way to the Investigation when the Organization made its request for a postponement on the eve of the Hearing.

On the merits the Organization asserts that the Carrier has failed to meet its burden of proof that the Claimant indeed tampered with the first sample and had the drugs in question in his system. With regard to the first point it argues that the Claimant was ill with the flu and that his condition combined with the fact that he had consumed large amounts of water explain the temperature, color and appearance of the first sample. With regard to the second test that rendered a positive reading for drugs, the Organization contends that the Claimant is not obligated to prove his innocence, but that the Carrier must prove his guilt and that it has failed to do so.

Although there is no evidence to discredit the Claimant's contention that he was ill with the flu on the day in question, there is also no persuasive or conclusive evidence that his condition affected the first sample or led to inconclusive results from the second. Simply put, when the first sample was definitively eliminated as urine, whether or not the Claimant was ill, the second, which was deemed to be urine, tested positive for drugs. Therefore, at that point the Carrier met its burden of proof in the first instance and the burden of proof shifted to the Organization and the Claimant to produce evidence that might cause this Board to reject the Carrier's evidence in support of its burden of proof. This the Organization failed to do. Thus, we find that the Carrier's discipline was with cause.

AWARD

Claim denied.

Form 1
Page 4

Award No. 32489
Docket No. MW-32987
98-3-96-3-251

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 23rd day of February 1998.