

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43752  
Docket No. MW-45021  
19-3-NRAB-00003-180520**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (dismissal) imposed on Mr. M. Trottier, by letter dated January 19, 2017, for alleged violation of GCOR 1.5 Drugs and Alcohol, GCOR 1.6 – Conduct and GCOR 1.13 – Reporting and Complying with Instructions was without just cause, on the basis of unproven charges and in violation of the Agreement (System File B-1734D-202/USA-BMWED\_DM&E-2017-00016 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Trottier shall ‘...be made whole by compensating him for all wage and benefit loss suffered by him for his employment termination, any and all expenses incurred or lost as a result of Round trip Travel not paid for the scheduled Hearings on January 6th, 2017, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of retirement month credit and any other loss. All seniority rights restored. We request that this event be expunged from the Charged employees (sic) employment record with any and all loss recovered.’”**

**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.

By letter dated December 14, 2016 the Claimant was sent a notice of a formal investigation (NOI) to occur at 1000 hours at CP Offices, 800 5th Avenue SW, Waseca, MN 56093. The NOI stated:

The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with you allegedly being asked to provide a FMCSA random alcohol and drug test conducted and required under 49 CFR Part 382 of the Federal Motor Carrier Safety Administration Regulations and Canadian Pacific's Drug and Alcohol Free Workplace Testing Policy on December 13, 2016. You allegedly brought with you a substituted urine specimen which constitutes a refusal to test under 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Program. This is a Federal Violation under the FMCSA regulations.

The NOI also indicated “a possible violation of, but is not limited to, the following rules:” GCOR 1.5 Drugs and Alcohol, GCOR 1.6 – Conduct and CGOR 1.13 – Reporting and Complying with Instructions.

Following the investigation, by letter dated January 19, 2017 over the signature of Derek Harter, Assistant Chief Engineer Chicago, the Claimant was informed of his immediate dismissal for a violation of the above-noted rules. By letter dated March 13, 2017 the Organization filed a claim on Mr. Trottier's behalf. The claim was properly progressed on the property with the dispute remaining unresolved. Thereafter the claim was timely progressed to this Board for final adjudication.

The Carrier contends that the Claimant received a fair and impartial investigation and was afforded all due process rights. The collector of the urine specimen was not a Carrier employee, but provided a notarized affidavit. She was not

listed as a witness on the NOI and the Organization seemingly made no effort to have her appear. The Carrier's expert, Ms. Rainwater, who oversees the Carrier's DOT drug and alcohol testing program, provided first-hand information about the incident. The investigation was unbiased; the Claimant was not prejudged. The Carrier is not required to produce documents prior to an investigation. The location of the investigation did not prejudice the Claimant.

The required substantial evidence of guilt was produced. The testimony of Ms. Rainwater and Manager of Welding Weller that the specimen collector told them of the Claimant's admission that the unadulterated urine specimen would have tested positive for THC, thus he brought an adulterated sample, went unrefuted. Use of an adulterated sample is considered a refusal to test in accordance with Federal statutes. The random test was provided for by 49 CRR Part 382 of the FMCSA Regulations and by Canadian Pacific's Drug and Alcohol Free Workplace Testing Policy. The Claimant's refusal to test voided his right to an offer of rehabilitation. The dismissal was not excessive for what, in essence, was dishonesty.

The Organization insists that the claim should be sustained because the investigation was not fair and impartial and because the Claimant's due process rights were violated. The hearing was not near the Claimant's assigned headquarter point or his residence, thus requiring excess travel. The specimen collector, a key witness, was not made available for cross examination by the Organization, as the Carrier relied on the collector's written statement. Critical questions about the collection of the specimen thus went unanswered. That the statement was notarized does not cure the defect.

The Carrier has not provided the required proof of guilt. There is no evidence that GCOR 1.5 Drugs and Alcohol was violated. The Claimant never testified that he had marijuana in his system at times relevant. There are no test results in the record. Ms. Rainwater has no first-hand knowledge of the incident. The Carrier's speculation and conjecture, which is what the dismissal is based on, does not rise to sufficient evidence. Finally, the dismissal is excessive and unwarranted because it serves only to punish rather than to correct.

Several preliminary comments are in order before the Board's analysis is set forth. The location of the hearing did not render it unfair and/or partial. The Organization correctly contends that having a statement notarized does not cure the hearsay defect when the author of the statement does not appear as a witness. While hearsay evidence may serve as a fatal flaw in some cases, for reasons noted below, it does not in this case. Moreover, the Board does not consider Ms. Rainwater's

information as first-hand because her sources were documents and statements from those on site.

On December 13, 2016 the Claimant was “administered a Department of Transportation Federal Motor Carrier Safety Administration (FMCSA) random alcohol and drug test conducted and required under 49 CFR Part 382 of the FMCSA Regulations . . .” (Investigation Exhibit 2 [IE-2]). Section 40.191 of the relevant regulations states that an admission that a specimen was adulterated or substituted or that a valid report of an adulterated or substituted test result is considered a refusal to test. A refusal to test required that the employee be prohibited from thereafter performing safety sensitive functions. In her written statement to Ms. Rainwater, collector Becky Hall noted that the Claimant’s first urine sample was cold and that he would be observed while providing a second sample. Ms. Hall further wrote that “Donor pulled me aside and said he would drop dirty for the observed. I asked him if he brought a sample with him, he said yes. . . . I asked what he would have showing up, he said THC” (IE-3). Ms. Rainwater testified that she was called by Ms. Hall and told of the cold urine sample and the Claimant’s admission.

Manager Welding Weller, who was present at the site of the specimen collection, testified that the Claimant “did the first test, and then afterwards we stepped away and had a conversation together about what was going to happen, and he informed me that he would not pass the test due to THC” (TR-38).

The combination of hearsay and direct testimony points to an adulterated specimen and marijuana use. The Claimant was present throughout the investigation, heard the testimony and had access to Ms. Hall’s notarized statement. When the Claimant was called to testify he was asked three questions by Conducting Officer Jeff Sundet: 1) a question concerning the Claimant’s assignment on December 13, 2016; 2) a question to confirm that the Claimant was brought in for a random drug and alcohol test on December 13, 2016; and 3) a question to see if the Claimant was rules qualified. The Claimant’s representative declined to ask additional questions. The import herein is that the Claimant had an opportunity to dispute the collector’s written statement, Ms. Rainwater’s testimony and Manager Weller’s testimony and did not do so. The evidence stands unrefuted and provides more than substantial evidence that the Claimant has violated both Federal regulations and the GCORs listed in the NOI and the dismissal letter.

The Organization’s contentions that the Carrier has not met the burden of proof and that there are no test results in evidence are so wide of the mark as to require no

comment in view of the evidence set forth above. Certain violations justify summary discharge so that even if the Claimant did not have a prior record suspension, his dishonesty in providing the cold urine specimen and his above-noted admissions violated GCORs 1.5 – Drugs and Alcohol, 1.6 – Conduct and 1.13 Reporting and Complying with Instructions. In particular, GCOR 1.6 states that “Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported” (IE-13). Ironically, had the Claimant provided an honest specimen that tested positive for THC, it is possible that he might have been directed to the EAP and might have received a second chance, but his actions negated that option.

**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 16th day of July 2019.