

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44701  
Docket No. MW-46121  
22-3-NRAB-00003-200622**

**The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.**

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

**PARTIES TO DISPUTE: (  
(Montana Rail Link**

**STATEMENT OF CLAIM:**

- “(1) The discipline (dismissal), by letter dated April 24, 2019, imposed upon by Mr. N. Weninger for alleged violation of Montana Rail Link General Code of Operating Rule (GCOR) 1.13 for alleged failure to comply with the instructions of a supervisor, GCOR 1.6 for allegedly being quarrelsome and discourteous, which governs Montana Rail Link employees per Item 11 in the System Special Instructions of Timetable #19, and 49 CFR Section 40.19 and 49 CFR Section 219.107 for alleged refusal to submit a sample during a ransom drug and alcohol test at the Laurel “Yard Office on February 6, 2019 was arbitrary, unwarranted and in violation of the Agreement (System File MRL-301-E MRL).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Weninger’s record shall now ‘... be immediately cleared and any mention of these charges be expunged from any Montana Rail Link records. And, that he be put back in service immediately and compensated for all lost time and wages.’”**

**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.

Claimant received a letter advising him to attend a fact finding:

[F]or the purpose of determining your responsibility, if any, in relation to the following incident. You maybe invitation of 49 CFR 40.191 and of 49 CFR 219.107, as a result of the incident that occurred between 0730 and 1100 hours on February 19, 2019, in Laurel, Montana, wherein you were subject to random drug and alcohol testing. At the laurel Yard office pursuant to Montana Rail Link policy as well as federal requirements, and you allegedly refused the test.

This alleged incident may reveal violations of the following: 49 CFR Section 40.191, 49 CFR Section 219.107. Consequently, pursuant to 49 CFR Section 219.104(a)(2),

Under Section 49 CFR Section 219.107 an employee who refuses to provide a specimen must be withdrawn from service for a period of nine months.

According to CFR Section 219.104, you are entitled to a hearing to determine your status.

This alleged incident may also reveal violations of Montana Rail Link General Code of Operating Rules, GCOR 1.13, by your alleged failure to comply with instructions of a supervisor; GCOR 1.6, by being quarrelsome and discourteous; and GCOR 1.5, which governs Montana Rail Link's employees per Item 11 in the System Special Instructions of Timetable No. 19.

Additionally, this alleged incident may reveal a violation of Section 11 of Montana Rail Link's Drug and Alcohol Policy.

Following a continuance, the matter was first heard on March 22, 2019. The hearing was continued when the Claimant's representative was barred from the hearing, the second day of hearing was held March 29, 2019.

Following the hearing the Claimant was notified in a letter dated April 24, 2019, that he was removed from service for:

**Violation of Montana Rail Link General Code of Operating Rule (GCOR) 1.13 by your failure to comply with instructions of a supervisor, GCOR 1.16 by being quarrelsome and discourteous, which governs Montana Rail Link employees per Item 11 in the Systems Special Instruction of Timetable #19 and 49 CFR Section 40.191 and 49 CFR Section 219.107 for your refusal to submit a sample during a random drug and alcohol test at the Laurel Yard Office per Montana Rail Link policy AS WELL AS Federal requirements.**

A number of exhibits were entered at the hearing, including a statement by Midlands Testing Services tester ["Tester"] which provided:

**On 6 February '19 I was called to do a breath and urine collection on donor [Claimant]. After he completed the breath test, we moved to the urine test. After securing the restroom, [Claimant] was given instructions as to how to provide a sample and he went into the restroom. Once he opened the door and stated he was finished, I went in and immediately checked for the proper volume and temperature. I saw no indication on the temperature on the temperature strip on the cup. I proceeded to complete this collection and after it was completed I informed the donor that because the temperature was out of range, another collection would have to be performed under direct observation. [Claimant] began to argue and cuss to a point that I felt it necessary to call MTS because of this aggressive behavior. He was also told that this behavior would constitute a refusal if it continued. The manager became aware of situation and responded as well as the DER.**

**[Claimant] was allowed to drink water and encouraged to do so, until a direct observer could be brought to the scene. He drank a 10 ounce bottle of water at 0903, 0925 and 0934. David Tester arrived and a first attempt under direct observation occurred at 0942 and no sample was obtained. [Claimant] was given the opportunity and drank a 10 ounce**

bottle at 1022 but declined to drink. During this time, the donor was given instructions not to use his phone but continued after being told not to. At 1039, [Claimant] stated that he had to have a bowel movement and was told that the direct observer would accompany him so he could provide urine specimen. [Claimant] refused to allow this and the test was a refusal. Manager Allan Knutson was on site and [Claimant] was turned over to his custody.

A statement by the Midlands Testing Service observer [“Observer”] who was called to observe collection of the second sample provided:

I received a call from Kendall at Midlands Testing at 8:33 AM MST on Wednesday, 2/6/2019. I was sent to the MRL site in Laurel to do a direct observe on the donor. Arriving at 9:22 AM MST, I met up with the Midlands tester already on site. Both the tester and the donor were in the room where testing procedures start from. The tester on site briefed me on the situation and answered questions that I had. I did talk with Kendall once at the site as the donor was combative and using foul language. I did ask the donor his name and he told me Noah. I wanted to know his name so I could possibly help calm the situation. Noah was very combative using foul language towards the tester that was in charge. Noah had already drank one 10 ounce bottle of water by the time I arrived. There was an attempt at a direct observe sample however Noah was unable to submit a sample. The three hour clock commenced. I left Noah and the tester in charge in the room as I sat outside the room. Some time had passed and I went back in the room and noticed that Noah had not drank a second bottle of water yet. I suggested that if he drank the second bottle of water that would help him produce a direct observed sample. I vacated the room. The tester in charge came out a short time later and told me that Noah needed to have a bowel movement. Noah once again became very combative using foul language when he was informed what the procedure would be. The whole situation was a continuing escalation. The tester in charge reached out to on site management and the test was deemed a refusal. I left the site at 10:55 AM MST.

The Carrier officer in charge of Drug and Alcohol testing testified:

**Q. And the statement here from Ms. [Tester] indicates that after what she had deemed a test refusal, she turned the Principal, [Claimant], over to manager Allan Knutson. How was Mr. Knutson notified of what was going on?**

**A. I was informed by Midlands Testing that a cold sample had been provided and that the testing event had progressed to a direct observation. I asked them to keep me informed if there were any developments in the collection process and to let me know when the collection process had concluded.**

**Following the start of the direct observation process, I received another call from Midlands Testing Services advising that there were some concerns about the donor's behavior and that the situation could escalate to a refusal.**

**At that point I called Allan Knutson, who was the manager on-site, and I asked him to check in with the collector and with the employee to make sure that they had everything they needed to complete the collection process, and to remind [Claimant] of his obligation under the policy and the Federal regulations to fully and completely comply with the testing procedures.**

**Mr. Knutson called me back several minutes later and advised me that he had those conversations and that the testing process was continuing at that time.**

**The Midlands tester also testified as follows:**

**Q. Ms. Duhamel, any additional contact with Mr. Knutson prior to -- or after the test or after the time that you had talked to him initially?**

**A. I -- after I spoke with Allan about visiting with [Claimant] and the collector and he advised me that the direct observation was continuing, the next phone call I received was from Midlands Testing advising that the direct observation collection had not been completed because [Claimant] had refused, and at that point he had been turned over to his supervisor, Allan Knutson.**

A few moments after that, Mr. Knutson called me and let me know that the testing process had concluded, that there -- that it had been deemed a refusal and that he would be escorting [Claimant] home.

The Assistant Roadmaster had been instructed notify Claimant of his test and to escort him to the test. He read a statement into the record that he prepared after Claimant's random testing:

Good morning, Jeff. I'm not sure I have a lot to add here because most everything transpired behind closed doors, but here is what I know. Allan informed me the day before that he was going to be in Billings and asked if I could take care of a random for Noah. The next morning after the job briefing I informed Noah of his random and kept him with me until I delivered him to the tester at 0800. We walked into the conference room I filled out my part of the paperwork and everything went as usual. Up to that point Noah had not acted unusual in any way that I can recall nor was he visibly irritated as the tester started going over stuff with him. I exited the room and shut the door behind me. For the next 20 minutes or so I was away from the conference room doing odds and ends around the Yard Office while I waited to give him a ride back to the section. When I returned to check on him they had just walked out of the bathroom and I presumed he has just given a sample. Neither Noah or the tester at that time seemed upset and all seemed to be going as normal. I sat down outside the conference room and waited. After about 10 minutes I started hearing what I presumed was arguing. I am not comfortable saying I heard this or that because it was quite muffled. I could definitely hear Noah raising his voice. The only thing I am certain I heard is Noah yelling at her and asking her how she knew his sample was not the right temperature. After it became apparent something was not quite right I gave Knutson a call and told him I thought there might be an issue at which point he told me he was almost back to the Yard Office. At one Point the Kayleen (the tester) came out of the room to make a phone call I asked if I could help in anyway and she told me it was none of my business. I waited around a little bit longer. Just by overhearing the arguments I presumed another tester was on their way. I wandered around a little - a little bit and spoke with Allan. He told me he could take over, but I told him I would stick around for a little bit and try to see it through.

At this point a gentleman showed up to give Noah an observed test. Noah was getting more upset and argumentative by this point, and Kayleen was also getting visibly upset. The last part that I had anything to do with is when Kayleen and Noah were in the room alone arguing again. I heard Noah tell Kayleen he was done with her and just wanted to leave, and then he asked for me by my last name. At this point the conference room door opened and Noah stepped into the doorway and asked me to help him. He said, "This bitch is crazy." Kayleen appeared in the doorway behind him very upset; I again asked her what was going on and if I could help. She held up her hand to silence me and told Noah that if he left the room it was a failure and that he needed to get back into the room. She then reached around him grabbed the door and shut them both back inside. I felt things were getting out of control at this point, so I went back to Allan and let him know what had transpired and that I felt like I was no longer of use there. He said he would take over and I left the Yard Office to go about my normal duties.

Those are the details that I can remember, Jeff. If you have any questions feel free to call. Thanks.

The Roadmaster of Laurel, Montana testified about going to the conference room where the testing was being conducted after being notified by the Assistant Roadmaster of a possible situation. He described the events:

**Q.** Okay. And from there what -- what did you do from there?

**A.** Well, I went and talked to Derek and I told him I could relieve him, but he said he thought he had it handled, under control, so I went to my office, was doing work, and then talked to Derek once more and he said it seemed like it was escalating. I then got a call from the tester's supervisor saying that the tester was having troubles with the testee. And so I told her, okay, I'll talk to Jacquie Duhamel who is in charge, called Jacquie Duhamel and told her what was going on, she said, yes, I'm aware of that, and requested that I go to the -- to the room where they were doing the testing and let Noah know that the actions he was presenting at that time needed to cease or it would be considered a no test.

**Q.** And you did have that conversation with [Claimant]?

A. Yes, I did. response to you when you had that conversation with him?

A. He just told me that, she's not listening to me, and I just told him, I says, I can't get involved, I just got to let you know that the screaming and arguing and loud noises needed to stop.

Q. And did you witness any of the, as you called it, screaming and arguing?

A. No, I didn't.

A managers/ trainer for Midlands Testing testified about the testing process on February 6, 2019. He supervised the tester and observer of the Claimant's test. He reviewed their paperwork and also reviewed their written statements. He was not present at the testing site and had no direct knowledge of what occurred at the testing site. On cross examination, the following colloquy occurred:

Q. Mr. [Midlands Manager], has there been complaints lodged concerning any of the testers under your management?

A. Yes.

Q. And has [this tester] been part of those complaints?

A. I can't specifically think of any.

Q. Mr. [Midlands Manager] are you aware of an incident that occurred concerning a previous test in which almost the same scenario was concerning Mr. Grove –

Hearing Officer: Objection, unless that was -- unless that test date was on February 6, 2019, behavior in the past and incidents in past, we need to keep it to –

Organization Representative: Question on the table, Mr. [Hearing Officer], and first of all, you are out of line by objecting. So, again, are you crossing the line now to be a Carrier witness, let me know, because I'm going to have to take a recess to align a set of questions for you as a witness; No. 2, I



just asked a question of whether any complaints have been filed, and Mr. [Midlands Manager] had a little trouble recalling that, so I was helping him recall where an instance could very well have been, because it's near identical to the allegations in this one, that a complaint was filed. Certainly Mr. [Midlands Manager] would have heard, because the channels that he's just described follow the same path, so I'm trying to help jog his memory about the legitimate question of complaints.

Hearing Officer:

Okay. So if it is not labeled in Exhibit A and it does not have anything to do with the events surrounding in Exhibit A, then we will not ask questions about that.

Organization Representative: Well, then, again your role as a Carrier witness now will be objected to on the record, made part of the appeal. And again, your constant -- Mr.[Hearing Officer], you have taken latitudes in the first four hours of this investigation Fact-Finding to cover ground as far and wide as we could go, and now when I come in to try to do the same, Mr. [Hearing Officer] says, no, that's not going to be allowed. So are we going to get the same levels of latitude, are we going to get a fair and impartial investigation here as required under Article 13? Or should we just suspend or recess this investigation until we can get a Conducting Officer, because we have a Carrier witness now, because you placed an objection on the record, that will conduct this according to

Article 13 as required and agreed upon between the parties?

Hearing Officer: Okay. You're right, we are going to take a recess, and you are no longer a part of this investigation. We will recess, you can exit the room and –

Organization Representative: I want to make sure you understand -- I understand you correctly, I take a procedural element to due process rights afforded by Agreement and you're asking me to leave the investigation?

Hearing Officer: I am asking you to leave the investigation for behavior and conduct –

Organization Representative: We'll certainly take that record up with the General Chairman and straight to the top of MRL. You're well within your rights to recess this investigation and we'll make it part of the record.

Hearing Officer: Very well.

Organization Representative: Recess it, make it happen.

Hearing Officer: The time is 1436, we will recess this investigation until another Chairman or Representative can represent [Claimant]. We'll go off record. (Recess.)

Hearing Officer: Good afternoon. Back on record. The time is 1457. For the record, the Principal and the Representative have both left the premises. This Fact-Finding session will be recessed until further notice and reconvened at a later time.

On day two of the hearing, the Hearing Officer was replaced. The cross examination of the Midlands Manager was continued by the Union Representative.

The on-site tester testified on Day 2 of the hearing, a portion of which is reproduced:

**Q. Ms. [Tester] , can you explain to me in detail what transpired after the temperature did not verify?**

**A. I continued to process the specimen to where he signed and dated it, and then it was in the computer, finished, and bagged in the biohazard bag that I send off to the lab. I then informed him.**

**Q. Okay.**

**A. Oh, and his reaction after was -- first it was surprise and then he kept on questioning me how I read the temperature strip, or tell him, I didn't tell him, and he kept on questioning it, I had to call -- I gave him his water, the first 10 ounces at 903, I had started to do the form in FormFox, which is on my computer, and was unable to get in to do the second test, in FormFox, so I had to call Midlands Testing Service and get help to see if I could get that done. And while I was on the phone, he kept on questioning me -- questions on how I was doing it, and he was kind of getting a defensive point -- tone and hostile, and his voice increases, he was pacing up along the window by the conference room. And at that time he had just signs of accusation and threats that I didn't know what I was doing, that progressed kind of through to the end also.**

**Q. Okay. A. He refused to stop using his phone after I told him he could not use his phone. During that time also he was -- went to the door to open the door, and I instructed him that it would be -- that he could not leave the site, it would be a refusal to test. He again a little later went to the door and opened it and talked to [assistant roadmaster], I don't know how you quite say his name.**

**Q. Okay.**

**A. And I again told him he needed to shut the door, and he would not do so, and I had to get up and shut the door because he was -- was -- he wasn't supposed to talk to anybody, and that by not following instructions it would be a refusal to test.**

The tester continued:

**Q. Ms. [Tester], was [Claimant] being quarrelsome?**

**A. He continued to ask the same questions over and over during this process, and -- and I finally said that I was not going to answer any of his questions anymore because I was trying to deescalate it after I had paraphrased the answers to his questions multiple times, and that I was going to -- I kept on saying, when he kept on asking questions even after that, I said no comment.**

**Q. Okay. Ms. [Tester], your statement reads you warned [Claimant] if his behavior continued, it could be grounds for a refusal; is that correct?**

**A. Correct.**

**Q. Do you recall {his} response to that?**

**A. I do not remember his words, no, specific words.**

**Q. Okay.**

**A. I don't -- I don't record anything.**

**Q. Okay. Ms. [Tester], after you escalated the interaction you described, did a manager from Montana Rail Link respond?**

**A. I -- I had gone to [the roadmaster] and informed him about it being a direct observe, and at that time I think I might have told him at that time.**

**Q. And who was that that you spoke to?**

**A. [The Roadmaster]**

**Q. Ms. [Tester], your statement describes [Claimant] drinking a 10 ounce bottle of water at 903, 925 and 934 while waiting for an observer; is that correct?**

**A. Yes.**

**Q. Okay. And at 942 your statement describes an attempt was made by [Claimant] to provide a sample, but no sample was obtained; is that correct?**

A. Yes, he went in with [the observer] to do the direct observe and it was in -- did not give a sample.

Q. Did [Claimant] state why?

A. I guess he stated the donor was unable to give a sample.

Q. No, did [Claimant] make a statement then, that you recall?

A. Oh, no, I don't recall.

Q. Okay. Ms. [Tester], from reading the statement correctly, [Claimant] did not drink any more water after this point; is that correct?

A. No, he was given his fourth 10 ounce bottle of water at 1022, but declined to do so.

Q. Declined to drink it?

A. Correct.

The Midlands Testing observer testified on the second day of hearing. He described what occurred when he responded to the Carrier Conference Room to observe the second test. He described the situation at the testing site upon his arrival:

Q. Okay. Mr. [Observer], you mentioned in your statement that [Claimant] was using foul language and being combative; is that correct?

A. Yes, sir.

Q. What did [Claimant] say when you suggested he drink a second bottle of water?

A. I'm not sure -- I'm not sure he said anything. I do recall mentioning it to him, because I do know the procedure where -- when the donor cannot produce a sample, then the three-hour clock starts and they are allowed to drink up to 40 ounces of water. However, we like to limit it to less than 40 ounces so it does not dilute -- potentially dilute the sample. Now, as far as what he said to me after I told him about drinking the second bottle of water, I know my statement

was, you know, it could help you produce a sample, but I can't necessarily say I recall him saying anything to me.

**Q. Okay. Mr. [Observer], what was [Claimant]'s reaction when you were asked to observe him during a bowel movement?**

**A. It -- it was -- it was not good. I was called into the room by the observer in charge and I was informed -- she said what needed to be done and then we told him what the procedure would be. And there again, it was not a pretty situation, foul language. I mean, I could give you verbatim if you'd like, I'll leave it up to you to do the questioning.**

**Q. Okay. Mr. [Observer], is this something you would typically observe?**

**A. No. What do you mean, is this something I would typically observe?**

**Q. As an observer, asked to observe during a bowel movement?**

**A. No, that was the first time I had -- that was the first time I'd ever been put in that position.**

**Q. Okay.**

**A. But we explained to him -- it was explained to him what the procedure would be. And there again, foul language and, you know, just a not wanting to do it.**

**Q. Okay. Mr. [Observer], you said the whole situation was continual escalation, can you describe that?**

**A. Well, I could tell by the temperament of the donor, Noah, is why I made that assessment, because the foul language just kept coming, there would be times when it would be more rapidly, more usage of it, and his just complete refusal to cooperate. And like I say, when I first walked into the situation, it wasn't good, but as the procedure moved on -- and you can see the times I was in that building for that test -- as the time progressed, so did the matter, it just kept kind of going up a notch or two, so to speak.**

**On cross examination, the Midlands observer testified:**

**Q. Mr. [Observer], at any time did you observe [the Tester] using foul language?**

**A. I did not, no.**

**Q. And did you overhear her at any time while outside of the room using foul language? A. I did -- I did not.**

**Q. Mr. [Observer], at any time did Claimant indicate to you why he was at issue and upset over the first initial test?**

**A. Well, yeah, I mean -- I mean I'll be frank, he said she didn't know what the fuck she was doing.**

**Q. And did he attest at any time to what his concerns with what -- how -- how she was implementing the test?**

**A. Repeat that would you, please.**

**Q. Certainly. Mr. [Observer], did she -- or did Claimant indicate what his concerns were with the -- how [the Tester] was conducting the test?**

**A. I'm not sure that he expressed to me anything like that, but now give me a moment to go back and picture the situation. I know -- no, like I say, I -- I mean, he made the remark that I stated about her not knowing what she was doing and -- and that's about all I can say to that. And I -- and I had no idea why -- why he made that remark, and he didn't really -- he didn't really elaborate on it.**

**The Claimant testified that he contacted the Assistant Roadmaster during the testing because the tester was getting angry with her computer and cellular phone during the testing process. He asked for the Assistant Roadmaster's intervention to diffuse the situation the tester was creating. The Claimant testified:**

**Q. On February 6th, 2019, between 0730 and 1000 hours, wherein did you -- wherein you were subject to a random drug and alcohol test Laurel Yard Office per Montana Rail Link Policy as federal requirements, did you comply with this rule?**

**A. Yes.**

**Q. How do you feel you were in compliance with this rule?**

- A. I was in compliance with this rule because I was subject and I took a alcohol test that showed that I had no alcohol in my system on railroad property on February 6th. And I provided a urine sample for Montana Rail Link that they never tested or never did anything with. And I believe me providing a sample is following these rules to not have any alcohol or drugs on your system.

The Claimant further testified about the interaction with the tester following his production of a sample that was initialed and sealed:

- Q. [Claimant], upon returning to the testing station, now back to the table as you've referred it, walk us through then again procedurally what took place at that point?

- A. Me and Ms. [Tester] came into the room, I sat down in the chair that I had originally been sitting in, she sat down at her computer, she kept getting phone calls on her phone, ignoring them, ignoring them, it was obviously making her angry, she was cursing at whoever kept calling her on the phone, because it obviously was interrupting whatever she had going on at the time. She proceeded to yell at her computer for a little bit.

At this point I was sitting there and she had me sign the two little vials, initial and date them. She put them back in the bag. She proceeded to tell me about somebody on her phone that was making her angry, that they wouldn't quit calling her.

And at that point, after I initialed the two vials, I felt that the test was over and done with, so I grabbed my phone and my wallet that I had sitting on the table, and at that point Ms. [Tester] decided that -- she told me not to touch my cell phone, I apologized and told her that I thought our test was done and over with, and she told me that that was part of a procedure that she wasn't going to deal with, and she was not going to deal with me not following her instructions.

And she told me at this point that I could do an observed test for not complying with her instructions with cell phone. And at this point I asked her what the reasoning for me doing an observed was, and it was this point that Ms. [Tester] took my urine out of the Fed Ex bag that she had it and proceeded to put the vial in front of my



face and tell me that this doesn't feel very cold -- or this doesn't feel very warm.

And then at that point, she told me that she doesn't know if I put this in the microwave or not, to which I told her I didn't even know what she was even -- if it was cold or if it was hot or what the deal was, because obviously if it was in a microwave, it would not be cold.

And so I proceeded to tell her that was fine, that if she wanted me to do an observed, I would do an observed, just for the simple fact that I've done numerous observed and my career with Montana Rail Link was hindering on me cooperating with her instructions.

Q. And, [Claimant], how much time had taken place from the time you had provided the sample and returned from the bathroom to the testing station?

A. I would say at least 10 to 15 minutes.

Q. And at any time during that time period did you exit the bathroom prior to providing the sample?

A. No.

Q. [Claimant], was there a means to exit the bathroom or the area where you provided the sample other than the entry door you both entered and left from?

A. No, that was the only way in or the only way out.

Q. Was there a microwave in the bathroom?

A. No.

Q. [Claimant], in your testimony you had attested to the vials being labeled, sealed and placed in a Fed Ex container; is that correct?

A. Yes.

Q. Was there any reason for you to believe at that time that the test was not over?

A. No, I thought that the test was over at this portion of the procedure.

**Q. [Claimant], , in this case Assistant Roadmaster both testified and wrote out a statement as to overhearing a conversation that had escalated to the point of a concern for the temperature. Why were you upset at that point or why -- why had you taken exception, I guess is the better...**

**A. Well, I was upset at that point because when she told me she wanted to do this procedure, I'm not in a position to let it get to this point of a refusal, and so I was questioning her on how she just now determined that this urine was cold, why she didn't do this in the first place. And she told me that she didn't have to answer any of my questions.**

**Q. And at one point, [Claimant], testimony has been provided that you had went to the door and had a conversation with [Assistant Roadmaster]; is that correct?**

**A. Yes.**

**Q. And what was your intentions?**

**A. My intentions at that point were to get my supervisor in the room to diffuse the situation with Ms. [Tester] because she was -- she couldn't figure out how to contact whoever she needed to on her computer or her phone, and it was visibly making her upset. And so I tried to get my Supervisor [Assistant Roadmaster] to come in there so he could at least see that I wasn't trying to berate this lady or refuse any of these tests.**

**Q. Was it your intention at that time to exit the test?**

**A. No.**

**Q. And upon talking to [the Assistant Roadmaster] was he allowed in the room and did he confirm or verify the test in any way?**

**A. He was not allowed in the room. She wouldn't even speak to [Assistant Roadmaster]. She told me that if I took another step out of that room, it would be a refusal. And she proceeded to slam the door in my face and in [Assistant Roadmaster's] face because he was sitting in the chair and he had stood up when I had came to the door to see what was going on. And I think he was trying to physically come in the room to see what was going on and she**

slammed the door in his face and told him that it was none of his business.

**Q. [Claimant], earlier in testimony Ms. [Tester] attested to swearing at her computer, is that an accurate depiction of what happened?**

**A. Yes.**

**Q. And, [Claimant], as a result of her difficulty with the computer, was that the basis for the calls she was trying to make?**

**A. She was trying to receive calls, somebody was trying to call her repeatedly on her cell phone. And then she was trying to make a call and the calls kept coming in and it visibly upset her, to the point where she actually threw her phone across the room and said she wasn't dealing with them people either.**

**Q. [Claimant], have you -- are you aware of any other issues concerning this tester on the property?**

**A. Yes.**

**[Second Hearing Officer]: I'd like us to keep this conversation to just what happened to [Claimant] test that day if we could.**

**[Organization Representative]: That goes to again there would be, [Second Hearing Officer]], the conduct as an issue is much to be concerned with Ms. [Tester] as it is [Claimant]. And, certainly, the conduct and the credibility of Ms. [Tester] would be subject and relevant to the matter under investigation, and I would like the opportunity to make that part of our defense under the proper due process of rights.**

**[Second Hearing Officer]: I'm not going to allow that. All that we can talk about is what happened that day during the test, we're not here to discuss what happened in previous**

events, just during that test, if we could.

[Organization Representative]: The conduct of Ms. [Tester] as described by the testimony will be made part of our appeal should the appeal be necessary with any and all evidence corresponding to that made part of the appeal as well.

[Second Hearing Officer]: Understood.

The Claimant later testified about what occurred following the test:

Q. [Claimant] , upon completing the test, do you know, was the sample then tested and the forms processed as required under 49 CFR?

A. It was not.

Q. Were any of the forms advanced outside of yourself, the railroad, Midland Testing -- or Midlands Testing?

A. I believe, yes, that I had -- I had only been given one form and when I proceeded to my Fact-Finding there was two forms.

Q. [Claimant], your testimony supports that you were given -- or that two forms were made part of this investigation. Did you sign and date the second Controlled Custody Form?

A. No.

Q. Were you presented with a second Controlled Custody Form during the test?

A. No.

Q. [Claimant], did you contact the testing facility to confirm the test of the first -- the results of the first test?

A. Yes.

Q. And what information did you acquire?

A. I was told by a lady named Cheryl, I had called the numbers that I had been given only on this one piece of paper, and she told me that

she had a control and custody number, the specimen ID number is what she called it, and she said that she never received a sample, to which she put me on hold and told me that she had to -- she'll get right back to me, about ten minutes later she said that she called the lab itself and she did not understand why she had a Control Custody Form but she had no urine to go with it.

So she told me that I needed to call whoever did the test itself and find out why they never sent a sample with the Control Form. And I actually made five different calls to this lab throughout the course of the month and a half to see if they had received any samples.

The Claimant further testified about the testing procedure and his interaction with the tester:

Q. [Claimant], Ms. [Tester] had testified to you asking questions repeatedly, why were you asking questions repeatedly and what were your concerns?

A. My concern was where we are at today, I was concerned that it had taken her so long to process any of this, that she decided to do an observed, and my concern was, is I didn't want the railroad to feel like I was trying to avoid or refuse their drug and alcohol test.

Q. And why is that, [Claimant]?

A. Because I had already proceeded with this process and I was given a second opportunity to present myself to the railroad, and I feel that the last seven years I have done that as far as drugs and alcohol testing has gone. And so I didn't want her to -- I didn't want any part of the railroad to think that I had refused this test. I wanted them to see that I was complying like I had done all the other times that they had drug tested me.

Q. At any time, [Claimant], did Ms. [Tester] inform you that you are not allowed to ask questions or refuse to answer your questions?

A. No.

**Q. [Claimant], earlier in testimony Ms. [Tester] had also referred to and so does Mr. [Observer] to having to have a bowel movement and you asking questions about that; is that correct?**

**A. Yes.**

**Q. And at that point did you refuse the urinalysis testing at any point?**

**A. No.**

**Q. Ms. [Tester]'s testimony and Mr. [Observer]'s testimony reflects that a refusal took place, what were you refusing at the time?**

**A. I was not refusing anything, I had just simply asked them a question.**

**Q. So, [Claimant], it's your testimony that you did not refuse to provide a sample at that point?**

**A. I did not.**

**Q. [Claimant], how much time had transpired from the time you first took the second observation or near pass on the test, how much -- how much time had transpired at that point?**

**A. I would say probably maybe 45 minutes.**

**Q And, [Claimant], according to 49 CFR Part 40 of the Federal Code of Regulations how much time are you allotted to provide that?**

**A. Three hours.**

**Q. And during any time starting from the time of the breathalyzer did you refuse to provide the sample?**

**A. I did not.**

**In further examination by the Second Hearing Officer, the Claimant testified to the following:**

**Q. [Claimant], Ms. [Tester] had testified to you asking questions repeatedly, why were you asking questions repeatedly and what were your concerns?**

**A. My concern was where we are at today, I was concerned that it had taken her so long to process any of this, that she decided to do an**

observed, and my concern was, is I didn't want the railroad to feel like I was trying to avoid or refuse their drug and alcohol test.

**Q. And why is that, [Claimant]?**

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**Q. And at that point did you refuse the urinalysis testing at any point?**

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**Q. [Claimant], how much time had transpired from the time you first took the second observation or near pass on the test, how much -- how much time had transpired at that point?**

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**Q. And, [Claimant], according to 49 CFR Part 40 of the Federal Code of Regulations how much time are you allotted to provide that?**

**A. Three hours.**

**Q. And during any time starting from the time of the breathalyzer did you refuse to provide the sample?**

**A. I did not.**

**The following colloquy occurred at the end of the second day of hearing:**

**[Second Hearing Officer]:** Understood. [Claimant], have you been allowed to present witnesses and evidence on your behalf and cross-examine all witnesses who have testified?

**[Claimant]:** No.

**[Second Hearing Officer]:** As to what point?

**[Claimant]:** I was not provided with all of the witnesses and testimony that I had originally planned on.

**[Second Hearing Officer]:** Do you have a specific on that? I mean I wasn't here for the previous things so —

**[Organization Representative]:** Specific on the record, objections were made on the record as to relevant witnesses concerning the demeanor and credibility of Ms. [Tester]] and Mr. [Observer]. Again, there were requests made for the presence of direct witness testimony for the observation of the demeanor of Ms. [Tester]], and she was not made available for direct witness cross-examination. And the list goes on and on.



We also have requested information made part of our initial Article 13 requests for information prior to the investigation, it was not provided. Again, those will all be made part of our appeal -- or a part of our closing statement in detail.

[Second Hearing Officer]: Okay. Understood. Thank you, [Organization Representative]]. I guess basically the same question, [Organization Representative]], have you been allowed to present witnesses and evidence on behalf of [Claimant]] and cross-examine all witnesses who have testified here today?

[Organization Representative]: No, sir, we have not.

[Second Hearing Officer]: Mr. [Second Organization Representative], have you been allowed to present witnesses and evidence on behalf of [Claimant]] and cross-examine all witnesses who have testified here today.

[Additional Organization Representative]: No.

[Second Hearing Officer]]: [Organization Representative]], were you present during the entire course of this Fact-Finding session and heard all the testimony given?

[Organization Representative]: I heard the testimony given during the proceeding, but were absent the remainder of necessary testimony by witnesses denied by the Carrier Conducting Officer.

The Carrier maintains that there is substantial evidence that the Claimant produced an out of range sample, failed to produce a second sample under observed

conditions, was quarrelsome and discourteous with the tester, and failed to follow the instructions of a supervisor.

The Carrier continues that the Claimant was afforded a fair and impartial hearing and that the Organization Representative became so quarrelsome that he was removed from the hearing. The Carrier refutes the Organization argument that the Conducting Officer was not impartial and cites to the numerous objections by the Organization Representative as an attempt to clutter the transcript and create confusion about the Claimant's conduct. The Organization's representative was repeatedly reminded not to interrupt the Conducting Officer and has a history of such behavior.

The Carrier continues that Conducting Officers are instructed to only allow testimony and evidence pertaining to each individual investigation and that it was not error to exclude evidence outside the charged conduct. Any Organization attempt to include new evidence in the appeal should be rejected because it was not included at the hearing. The Carrier refutes the claim that it failed to produce requested documents prior to the hearing.

The Carrier maintains that the evidence shows that the Claimant refused to provide an observed sample. The Carrier concludes that the Claimant was afforded a full and fair hearing in accordance with the Agreement. There was substantial evidence of the violation. Based upon the Claimant's disciplinary history, the termination was appropriate.

The Organization counters that the Claimant was not afforded a fair and impartial hearing because of the conduct of the hearing officer. The hearing officer asked leading questions and acted as an advocate for the Carrier. Further, the hearing officer refused to rule on objections and denied inquiry reflecting on witness credibility and also excluded Article 13 from the record. Article 13 is the basis for the hearing system and was relevant to the instant matter.

The Organization continues that the first hearing officer clearly prejudged the instant matter and his conduct made that obvious. This prejudgment was obvious when the first conducting officer refused to allow testimony about the Tester being involved in possible misconduct in other tests. The Organization submits that evidence of similar situations of the tester alleging cold samples was excluded. The Organization continues that the Tester admitted to improper conduct by swearing at her computer during the testing procedure. Similar conduct was not

allowed to be questioned during the hearing and that exclusion was evidence of prejudgment.

The Organization continues that the Conducting Officer erred by failing to rule on serious objections. The role of the conducting officer is not to note objections, but to rule on objections. Noting objections and not ruling on objections denies the due process provided for by the Agreement. The Organization notes that the misconduct of the first conducting officer is illustrated on page 107 of the record wherein the conducting officer objects to a question by the Organization. This objection clearly shows that the conducting officer was acting as an advocate and not as a neutral fact finder.

The Organization also maintains that there were errors with the chain of custody forms in the instant matter which would render the test invalid. The Organization continues that the instant tester has conducted herself inappropriately in a number of tests with employees and included the statements of other employees. The Organization cites to a pre-hearing meeting in which the statements and other evidence of misconduct were excluded.

The Organization continues that there was a signed and dated form for the first test, but that no sample was received by the lab. This evidence supports the Claimant's version of events that the sample was within testing range and had been split by the tester and readied for shipping in the Fed Ex envelope. This evidence also supports the Claimant's testimony. The tester, who had admitted swearing at her computer and being upset, removed the items from the envelope and told the Claimant that it was cold. The Claimant was familiar with the procedure for random testing. He had previously been reinstated after positive tests and had been tested dozens of times since his reinstatement.

The Organization also contends that the Claimant did not disobey a supervisor's order. As the Assistant Roadmaster's testimony showed, he appeared for the test and offered the first sample. He complied with the direction.

The Organization concludes that there is no substantial evidence in the record of the cited misconduct and that the Organization's claim should be granted.

The Third Division sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the

question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

This Division has reviewed the record and submissions in the instant matter. The Division notes that each party cites to evidence outside the record. The Carrier to discussions by Carrier officer it claims were in response to Organization document requests and the Carrier to statements of coworkers claimed to be excluded in a prehearing meeting.

The Claimant is charged with disobeying orders. The evidence shows that he accompanied the assistant roadmaster to the testing in the conference room. The assistant roadmaster testified that the Claimant complied with the order. The Roadmaster also testified that he went to the conference room and instructed the Claimant to cease any arguing or shouting. The Roadmaster did not hear any further arguing or shouting. The evidence shows that the Claimant complied with the orders of the Roadmaster and the Assistant Roadmaster and there is no substantial evidence in the record to support the charge.

The Claimant is also charged with being argumentative and quarrelsome. The evidence clearly shows that the Claimant was not argumentative or quarrelsome with Carrier employees. The charge relates to his actions with the Midlands tester.

The Evidence shows the Claimant accompanied his supervisor to the conference room for testing. As the supervisor testified, the Claimant and the tester emerged from the washroom after the Claimant produced the initial sample. Sometime later he heard arguing between the Claimant and the tester. The conference door opened, the Claimant called out to the supervisor stating "this bitch does not know what she is doing", the Tester ordered the Claimant to remain in the room, and the Tester closed the door on the supervisor. The supervisor notified the Roadmaster. The Roadmaster came to the conference room and instructed the Claimant to cease any shouting or quarreling. The Roadmaster did not hear any quarreling or shouting.

The testimony of the Tester and the Claimant are at odds. The Tester stating that the Claimant became quarrelsome and unruly when she informed him that the sample was cold and the Claimant stating that the sample was fresh and that the Tester removed it from the bag after she became upset with her computer and somebody who repeatedly had phoned her. She started swearing, threw her phone

across the room, and engaged in unprofessional and offensive conduct to which the Claimant responded.

The Organization contends, among the various arguments, that the first hearing officer and second hearing officer erred by precluding inquiry into any possible bias or background of the Midlands tester, or similar complaints of unprofessional conduct. The Carrier argues in its submission:

Conducting Officers are instructed to only allow testimony and evidence pertaining to each individual investigation. To allow otherwise on behalf of either the Claimant or the Carrier would be prejudicial to the Claimant. The continuous attempts by the Organization in this case to enter testimony of employees not involved in this incident, including the statements attached to the Appeal Letter, were not relevant to Claimant's rules violation and only served to distract from the Claimant's infractions. For these reasons, that information was not made part of the record during the Fact Finding

Here, on the first day of the hearing, the Organization sought to inquire about the background of the tester and that testimony was precluded when the hearing officer objected to the testimony. This Division need not address the actions of the hearing officer acting as an advocate by objecting to a question, rather, this Division addresses the error of the hearing officer in refusing to allow inquiry into the background of the tester.

Here, the Organization alleged serious misconduct on the part of the tester when conducting the test. The Organization was precluded from asking legitimate and relevant questions about the background of the tester. Whether there were complaints of misconduct against this tester were legitimate areas of inquiry. The Carrier's submission references "conducting officers are instructed to allow testimony and evidence pertaining to each individual investigation" but did not allow inquiry into possible bias or misconduct by the tester when conducting tests. This was error.

That error was compounded on the second day of hearing when the conducting officer precluded questions of the Claimant regarding the background of the tester. As noted by the Organization Representative, there was a credible area of inquiry that he wished to examine. However, the Conducting officer limited the questions to the day of the incident. As noted by both the Organization and the Carrier and many decisions in the rail industry, the Conducting Officer has a duty

to conduct a fair hearing. Here, it was error to limit the credibility inquiry to the day of the incident where the tester had many prior interactions with Carrier employees. The conducting officers erred by limiting the questioning regarding complaints and credibility of the third party tester.

This Division notes the Carrier argument that the Organization Representative was conducting himself unprofessionally and objecting excessively in an effort to obfuscate the record. This Division notes that some of the objections appeared to be excessive, but that some were also appropriate. Regardless of the conduct of a representative, the Conducting Officer nonetheless has a duty to preserve the integrity of the process. A review of the second day of hearing shows that the Conducting Officer was striving to ensure the fairness of the proceedings. This Division also notes that although the second day Conducting Officer erred in precluding certain credibility questions, that error was a mistake and not made in an effort to prejudge or act to undermine the Organization's efforts. Nonetheless, it was a mistake that affected the Claimant's rights to defend the allegation.

The testimony about the initial test was at odds and the Organization was improperly prevented from relevant and legitimate inquiry into the tester's credibility and complaints lodged against her for her conduct at prior tests. The improper limiting of the relevant inquiry renders the charge of quarrelsome and argumentative conduct as unproven. This Division cannot discern whether the Claimant started the arguing or whether the tester started the arguing. This charge is not proven.

What is proven through the testimony of the Midlands observer is that the Claimant did not produce an observed sample. Although the Organization contends that the conduct of the tester obviates the need for the second test, the Organization's position is not persuasive.

A fundamental tenant of labor relations is the maxim "Work now, grieve later." Grievant and the tester clearly had issues. The testimony does not establish any of those disagreements carrying over to the Claimant and the observer. Regardless of whether he liked or agreed with the tester, the Claimant was ordered to produce an observed sample pursuant to the testing regimen. As noted at the hearing, the Claimant had given dozens of drug and alcohol testing samples and was very familiar with the procedure. The Claimant was unhappy that he had to produce an observer sample, and ultimately, he did not produce an observed sample.

The Claimant was ordered to produce a sample for testing. The Claimant was then ordered to produce an observed sample and did not. The Carrier has proven that the Claimant failed to produce a sample and that therefore counts as a failed test.

The Division finds that, in light of the Conducting Officers' errors in precluding relevant evidence on the first two charges, it is unreasonable for the Carrier to dismiss the Claimant. However, given the proven charge, a grant of the claim with full back pay is inappropriate.

As the Claimant noted, he has prior reinstatements for failed drug and alcohol tests and has had dozens of random tests since his reinstatement. The Claimant does not come to random testing a neophyte. He chose to respond to the alleged unprofessional conduct by the tester aware of the consequences of not producing a sample when the Midlands observer became involved. It is appropriate for the Claimant to be restored to his position with his seniority unimpaired. However, given his history, it is inappropriate for the Claimant to be awarded back pay.

### **AWARD**

Claim sustained in accordance with the Findings.

### **ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 28<sup>th</sup> day of January 2022.