

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 199
AWARD NO. 191

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1529194

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

D-09-39D

STATEMENT OF CLAIM

1. The dismissal of Mr. John A. Brainard for the alleged violation of Rule 1.5 of the General Code of Operating Rules (GCOR) and Union Pacific Railroad Drug and Alcohol Policy in connection with allegedly having measurable drug in his system as evidenced by the positive test result of a random drug test on June 22, 2009 is harsh, excessive, arbitrary and capricious and in violation of the Agreement.
2. As a consequence of the unjust dismissal described in Part 1 above, Claimant Brainard is entitled to the remedy prescribed in Rule 48 (h) of the Agreement.

Rule 48 – Discipline and Grievances

- (h) If the charge(s) against the employee is not sustained, the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to former position and compensated for net wage loss, is any, which may have been incurred by the employee.***

STATEMENT OF BACKGROUND

At the time the events occurred giving rise to Claimant's dismissal from service of the Carrier, Claimant had in excess of twenty-seven (27) years of seniority (hire date of August 16, 1983) within the various classifications of the Carrier's Maintenance of Way and Structures Department and was assigned and working as a Bridge and Building Carpenter in Denver, Colorado.

On June 22, 2009, in accord with Carrier's Drug and Alcohol Policy (Effective January 15, 2004), Claimant underwent a random drug test wherein he cooperatively provided a urine specimen and then returned to work performing the assigned duties of his position as carpenter on Wyoming Division B & B Gang No. 5541. Claimant's urine specimen was sent to University Services Toxicology Services Group located in Philadelphia, Pennsylvania. Claimant's urine specimen was received by University Services on June 23, 2009 and on that same date the specimen was tested resulting in a positive finding for metabolites of marijuana (THC – Tetrahydrocannabinol – the primary psychoactive chemical compound contained in marijuana). Said test results were certified by University Services on June 25, 2009. University Services sent a faxed letter to Carrier employee Penny Lyons on July 10, 2009, apprising that the Lab had failed to make contact with Claimant to notify him he had to speak to the Medical Review Officer (MRO) and, as a result of this failure the Lab was requesting Carrier's assistance to contact Claimant.

The record evidence reflects that Claimant's supervisor, Manager of Bridge Maintenance D. D. Bauer received an email from Cyndi L. Dudik, an employee at Carrier's Drug and Alcohol Department sent at 12:47 p.m. on July 11, 2009 apprising Claimant had tested positive for marijuana. Based upon this notification, Bauer was instructed to take Claimant out of service and to inform Claimant of said action. However, the record evidence reflects that on the previous day, July 10, 2009, Claimant contacted University Services MRO at 3:30 p.m. Mountain Standard Time (MST) requesting that the split sample of his urine (Sample B) be sent for analysis at a second laboratory. On July 13, 2009, Carrier officer, John A. Ward was notified by email sent at 8:33 a.m. by Administrative Assistant Deborah L. McMillin confirming she had called Claimant on July 11, 2009 at 3:03 p.m. and notified him verbally to call the MRO at University Services and that Claimant informed her he had already made contact with the MRO at University Services the day before (Carrier Exs. 19 and 16 respectively). By letter dated July 23, 2009, University Services MRO, Dr. Angela Walker informed Claimant that, at his request, she had ordered an analysis of his split specimen which was sent to Legacy Metrolab Laboratory located in Portland, Oregon designated by him by fax sent to her on July 10, 2009, and that their analysis confirmed the presence of Marijuana (THC).

Notwithstanding the sequence of the above communications, the record evidence reflects that from the date the positive drug result was certified by University Services, June 25, 2009 through July 9, 2009, Claimant reported to work and performed his

assigned duties without incident. Apparently, notwithstanding Bauer's testimony he received both notification of Claimant's positive test result for Marijuana and instruction to take Claimant out of service on July 11, 2009, Claimant had already been informed of the positive test result, had contacted MRO Dr. Walker at University Services and been removed from service on July 10, 2009. In any event, the record evidence establishes that neither Claimant nor the Carrier had been notified of the positive test results for an intervening period of seventeen (17) days (between June 22, 2009, the date Claimant's urine sample was collected [8 days] and July 9, 2009, the last day he was permitted to work [9 days]). By Certified Mail Return Receipt, Carrier issued Claimant Notification of Formal Investigation dated July 13, 2009, which reads in pertinent part as follows:

Please report ... on Tuesday, August 4, 2009 ... for an investigation and hearing. The charges are that you allegedly had measurable drug in your system as evidenced by the positive test result of the UPRR Random Test.
* * *

Proposed discipline for this offense is a Level 5, according to the UPGRADE Policy. If proved, this would be in violation of Union Pacific Operating Rule 1.5 of the General Code of Operating Rules, Union Pacific Railroad Drug and Alcohol Policy.

* * * *

You may waive discipline described above and avail yourself of Union Pacific's One-Time Return to Service Agreement and Policy by reviewing the below conditions, signing the attached waiver and returning two originals to Administrative Assistant D.L. McMillin

You have three (3) calendar days from receipt of this letter to accept the waiver. Should you elect to reject the discipline as proposed be advised that the hearing in this matter will be held as scheduled and that the Carrier will not be bound by, or limited to, the proposed discipline, i.e., the measure of discipline which may be assessed as a result of the hearing will be based on the facts developed in the hearing and may be different (more or less) than the discipline originally proposed.

The record evidence reflects that Claimant elected not to sign the waiver in light of his belief such waiver relinquished his "due process" rights which includes the right to a fair and impartial investigation arising from allegations of wrongful conduct.

Rule 1.5 (Drugs and Alcohol) – reads in pertinent part as follows:

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on Company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

The record evidence reflects that by mutual agreement of the Organization and the Carrier (the Parties), the formal investigation hearing was postponed and rescheduled to convene on August 24, 2009. On August 24, 2009, upon convening the investigation hearing, Carrier unilaterally, over the objection of the Organization, recessed the proceedings to reconvene on September 3, 2009 ostensibly for the purpose of extending to Claimant a second chance to accept waiver of a formal hearing and, in the alternative to avail himself of Carrier's One-Time Return to Service Agreement and Policy. With this second opportunity extended to Claimant, Carrier gave him ten (10) calendar days to accept the waiver instead of the initial three (3) calendar days associated with the first opportunity to accept a waiver. The conditions of the waiver were as follows:

I concur with the drug testing results. In signing this election, it is an admission that I intentionally used and tested positive for an illegal or unauthorized drug or alcohol. I further understand that a denial of my use of the illegal drug or alcohol to Employee Assistance at a later date will not allow me to continue to participate in any education or rehabilitation program.

I wish to waive my right to a formal hearing and accept dismissal in connection with the charges of July 13, 2009, for my violation of GCOR Rule 1.5, Union Pacific's Drug & Alcohol Policy.

I also elect to participate in Employee Assistance's Rehabilitation / Education Program and to avail myself of the opportunity for a one-time return to service as provided in Article 21 of Union Pacific's Drug and Alcohol Policy and the controlling Companion Agreement.

I acknowledge and understand that my return to service from this dismissal, after being released by Employee Assistance, will be through bidding to a vacant position, or placing myself on a vacant bulletined position for which I hold seniority rights, or being recalled in accordance with the collective bargaining agreement.

I understand and agree that any future return to service will be under the terms and conditions as stated in your letter above. I understand that to begin my participation, I must contact Employee Assistance . . . within three days of the effective date of this agreement.

Employee Will Initial These Three Items To Verify Understanding:

- 1. *Failure to comply with these instructions may be grounds for immediate disciplinary action _____.***
- 2. *When subject to the conditions of a Companion Agreement, failure to comply with these instructions during the 12-month probationary period may result in immediate return to dismissed status without benefit of a Company Disciplinary Hearing _____.***
- 3. *When non-compliance involves non-negative results or refusal of a drug or alcohol test conducted under FRA authority, an employee who denies the validity of the test results may demand a Federal Post-Suspension Hearing under the provisions of 49 CFR 219.104.***

It is noted that the ten (10) days given Claimant to accept the waiver coincided with the elapsed number of days between the recessed hearing of August 24, 2009 and the reconvening of the hearing set for September 3, 2009. The fact that the hearing did reconvene on September 3, 2009 indicates that Claimant, for a second time, declined to accept the terms and conditions of the waiver. By written Notification of Discipline Assessed dated September 21, 2009, Carrier Officer, Todd R. Martindale, Director of Bridge Maintenance apprised Claimant that upon review and consideration of all testimony recorded in the hearing transcript, he found more than a substantial degree of evidence to warrant sustaining the charge against him of violating GCOR Rule 1.5 and Union Pacific Railroad Drug and Alcohol Policy. Accordingly, Claimant was assessed a Level 5 discipline under Carrier's UPGRADE Disciplinary Policy and dismissed from service. By letter dated November 19, 2009, the Organization appealed Claimant's dismissal that ultimately resulted in progressing the claim before the Board due to the Parties' unsuccessful effort on the property to resolve the claim.

ORGANIZATION'S POSITION – PROCEDURAL OBJECTIONS

The record before the Board is replete with numerous procedural objections raised by the Organization that when viewed either individually or taken together constitutes fatal flaw in Carrier's position requiring a finding to overturn Claimant's dismissal.

- 1. Carrier violated Item 4 of the Parties' Prevention Program Companion Agreement when it initially offered Claimant the right to a waiver and one time reinstatement**

of employment and only gave him three (3) days within which to accept the waiver. The purpose of said Prevention Program and the provision of Item 4 reads as follows:

The Carrier and the Brotherhood of Maintenance of Way Employees Division, jointly recognizing that safety is the paramount concern and, further, that an alcohol and drug free environment is an essential element in maintaining a safe workplace, agree to the following to ensure the utmost compliance with Union Pacific Rule 1.5 – Drugs and Alcohol.

4. The employee may elect to participate in the [Drug and Alcohol Rehabilitation / Education] Program by completing and returning the request form to the Carrier Officer who signed the Notice of Dismissal within ten (10) days of receipt of the Notice.

The Organization submits Carrier acknowledged its violation of this Agreement by recessing the postponed hearing of August 24, 2009 and re-offering the waiver to Claimant providing him with the contractually agreed upon ten (10) days within which to accept or decline the waiver.

2. Carrier committed another procedural error when over the strenuous objection of both the Organization and Claimant, it unilaterally recessed the August 24, 2009 hearing in order to remedy the procedural error referenced in point 1 above. Secondly, the Organization notes, recessing the hearing unnecessarily and to Claimant's detriment, extended the time of Claimant's being held out-of-service awaiting a decision since, even though he was denied his due process right initially of being given only three (3) days instead of ten (10) days to accept or decline the offer of a waiver, he nevertheless made it quite clear in not accepting the initial offer that he would not accept the second offer notwithstanding that the second offer was in compliance with the Prevention Program Agreement.
3. The documentation and numerous associated technical problems pertaining to the paperwork relating to the handling of Claimant's urine specimen after it was first collected on June 22, 2009, and the results obtained on June 25, 2009, up to and through July 9, 2009, when University Services Laboratory first attempted to notify Claimant of the positive result casts serious doubt as to whether the chain of custody was properly followed and possibly broken and the same applies to the handling of Claimant's split sample.
4. The record evidence establishes that the random drug test administered to Claimant on June 22, 2009 was a non-Federal Drug and Alcohol Test, yet

Carrier Officer Malloy, University Services Laboratory, the collector of the urine specimen, the two processing laboratories, Clinical Reference Laboratory and Metro Lab – Legacy Lab Services, and Carrier's Medical Review Officers Gerson and Walker were all incapable of identifying the different requirements related to non-Federal as opposed to U. S. Department of Transportation (DOT) testing regulations set forth in Code of Federal Regulations, in particular **CFR 49-40.7 (a) and CFR 49.163 (c)**.

CARRIER'S POSITION – PROCEDURAL OBJECTIONS

Carrier submits that even if such procedural deviations exist, they are all minor and therefore not fatal to the merits of the case which show, by substantial evidence that Claimant tested positive for metabolites of marijuana in his system at a time he had reported to work and was performing his regularly assigned duties.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.


The Board is persuaded that notwithstanding a showing by Carrier that the random drug test performed on Claimant on June 22, 2009 yielded a positive result for the presence of marijuana in his system which was confirmed by the testing of his split sample, the Board is also persuaded by the many troublesome deviations evident in the handling of the Claimant's specimen, the delayed and late reporting of his test results, and the manner in which Carrier conducted its investigation hearing, that the procedural deficiencies raised by the Organization, in fact, impacted detrimentally on Claimant to the point that, in their totality, they constitute a fatal flaw to Carrier's otherwise meritorious position. The bottom line is that, since Carrier expects its employees to adhere and obey its rules, regulations, and policies, it is likewise incumbent upon Carrier to adhere and comply with its counterpart attendant responsibilities in enforcing its rules, regulations and policies. In the instant case, the Organization has shown by substantive evidence and argument that Carrier failed to responsibly adhere to the applicable testing regulations attendant to drug testing of an employee and failed to comply with the applicable provision under the mutually agreed upon Prevention and Companion Program to initially afford Claimant his due process right of a ten (10) day period within which to either accept or decline a waiver for a one time reinstatement to employment with the Carrier.


While the Board finds the procedural deficiencies to constitute fatal error to Carrier's position, we nevertheless want to make very clear that we are not at the same time absolving Claimant of his wrongful conduct of showing up to work with an illegal drug in his system, as we echo Carrier's position that safety considerations are of paramount importance in the Railroad industry and serve to trump any compromises to safety that may arise. We also want to make abundantly clear that we totally reject Claimant's assertion that the evidence adduced from the record proceedings in any way supports the accusation that Carrier, even in light of the many procedural deficiencies that exist here, acted to alter or, in any way change, Claimant's test results.

Accordingly, based on the foregoing findings, the Board rules to reinstate Claimant with seniority unimpaired but without back pay or other benefits he may have been entitled to receive had he not been dismissed from service. Additionally, we rule that this Award be made a permanent part of Claimant's official personnel file. This Award is to become effective within thirty (30) days from the date signed by the Parties.

A W A R D

Claim Sustained as Per Findings


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Dissent


T. W. Kreke

Chicago, Illinois

Date: September 12, 2011

CARRIER'S DISSENT TO AWARD 191 OF PUBLIC LAW BOARD 6302 REFEREE LARNEY

The Carrier cannot concur with the conclusion of the Board. It is unacceptable for the Board to return an employee to work who was not willing to accept responsibility for indulging in an illegal drug when such actions put himself and others in harm's way. Claimant was treated differently than all other employees in this situation. In this Award the Referee correctly determines Claimant in fact had a measurable drug in his system and then rationalizes his findings that:

" The Board is persuaded that notwithstanding a showing by Carrier that the random drug test performed on Claimant on June 22, 2009 yielded a positive result for the presence of marijuana in his system which was confirmed by the testing of his split sample, the Board is also persuaded by the many troublesome deviations evident in the handling of the Claimant's specimen, the delayed and late reporting of his test results, and the manner in which Carrier conducted its investigation hearing, that the procedural deficiencies raised by the Organization, in fact, impacted detrimentally on Claimant to the point that, in their totality, they constitute a fatal flaw to Carrier's otherwise meritorious position."

The Board acted upon procedural objections that were of such a nature that were not only unproven, but they did not provide any harm to the Claimant's due process rights nor did it affect the outcome of the test. It is absolutely incomprehensible that for the Board to find that four asserted minor procedural errors would somehow equal a major or fatal error. At no time was the Claimant substantially harmed by any of the Carrier's actions.

One of the alleged procedural errors was that the Carrier failed to provide Claimant a full 10 days to review the waiver offer. The record clearly shows that when the Organization objected to this issue, the Carrier granted the Claimant the opportunity to take the full 10 days to consider his options. The record also clearly established that Claimant never intended on taking the waiver as he stated that he already had more than 10 days to decide on the waiver and that he would not sign it if he was given 100 days to sign. Clearly Claimant was not harmed by the typographical error, nor would it have changed the outcome of the process.

The Board's concern with the Claimant not being notified within 10 days of the test is also without merit. Again, although the Organization asserted a violation of the Claimant's due process rights when it took 17 days for the Claimant to be notified of the positive test, it was never proven beyond a mere assertion in the claim. In turn, the Federal Railroad Administration (FRA), FRA Docket Number EQUAL-2009-04, determined that the Carrier is only required to notify an employee of a positive test

within 10 days it receives notification of the MRO's findings. The FRA is the proper body of authority to interpret their rules and not this Board. Claimant was notified by the Carrier immediately following their knowledge of the positive test. This clearly was not a procedural violation on the Carrier's behalf.

Although the Organization also challenged the paperwork and chain of command during the process the Organization never provided a substantial evidence of any wrong doing on the Carrier's behalf. The testimony in the transcripts clearly follow the proper chain of command and Claimant's request for a split sample test further confirmed he was positive for marijuana.

The fact that the testifying officer did not understand the type of test given was nothing but a red hearing argument by the Organization. The type of test given is irrelevant given the fact Claimant tested positive for an illegal drug in his system. The positive test was the crucial issue for the Board. The board failed to value the accepted public policy that has been established and the Carrier's like-minded no tolerance policy for the use of drugs and alcohol on its property and within the industry's safety standards.

For all of these reasons the Claimant should not have been allowed the opportunity to return to work. None of the alleged procedural errors were proven nor did they cause harm to Claimant's due process rights. The Carrier and the Organization do not condone the use of drugs for employees and this board should not either. Claimant is being given extraordinary treatment which is beyond comprehension of the Carrier. The only redeeming thing in this award is that it only addresses this specific case and is therefore not establishing precedent. The Carrier dissents to the Award.

B. W. Hargus

Carrier Member PLB 6302

August 31, 2011