

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

VS

UNION PACIFIC RAILROAD COMPANY)

NMB CASE NO. 52

AWARD NO. 52

STATEMENT OF CLAIM:

Appealing the UPGRADE Level 5 Discipline to Engineer W. A. Smith and request the expungement of discipline assessed and pay for all time lost with all seniority and vacation rights restored unimpaired.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were given due notice of hearing thereon.

The record before us indicates Claimant was subjected to a random toxicological test on October 17, 1996. The results of such test were positive for Cocaine Metabolites. When these test results were received, Carrier notified claimant to report for a formal investigation on a charge that he was in violation of Rule 1.5 of the General Code of Operating Rules. Following the investigation Carrier found claimant guilty of violation of Rule 1.5 and he was dismissed from service.

For this record we will note that claimant had previously been dismissed for violation of Rule 1.5 on December 5, 1990. At that time claimant entered the Employee Assistance Program and was subsequently reinstated to service on February 11, 1991 under the Companion Agreement in effect between the parties. In May of 1992 claimant again tested positive for the use of illegal drugs and was dismissed; however, this dismissal was later set aside by Award No. 10 of Public Law Board 4450 in that Carrier had failed to comply with proper procedure. Therefore, the positive test finding currently before this Board constitutes the third time claimant tested positive. In fact the record before us shows that claimant requested and received a test of his split sample, the results of which confirmed the findings of the initial test.

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The Organization has raised several alleged procedural issues; i.e., Carrier failed to provide a representative from the laboratory as a witness and that there was a discrepancy in dates, raising some doubt about which specimen was tested. The Organization argues that as a result of such deficiencies claimant did not receive the fair and impartial hearing to which entitled under the governing rule between the parties.

During the investigation Carrier provided as a witness its Manager Drug and Alcohol Testing, Mr. Varvel, who quite capably explained all of the procedures which were followed in securing the specimen and the testing procedures. When the question arose about the difference in dates, it was Mr. Varvel who telephoned and conferred with the Laboratory personnel and discovered the date difference was occasioned by the lab employee(s) failure to change the date on the date stamp. While it would have been better had this incident with the date stamp not occurred, it does not constitute a fatal flaw in that the evidence clearly shows claimant presented a sample specimen which was properly tested and the results came up positive for the use of Cocaine--not only on the original test, but also on the test of the split sample.

Inasmuch as Carrier presented Mr. Varvel as an expert witness, and the fact that Mr. Varvel was able to fully explain the testing procedures, it is our finding that the Organization's request for a witness from the laboratory cannot be upheld. A witness from the laboratory could only testify that the procedure outlined by Carrier witness Varvel was followed with the specimen number and Social Security number on the specimen submitted. The Laboratory personnel were not aware of claimant's name.

Based on the information before us it is our finding that claimant did receive a fair and impartial investigation and the procedural objections raised by the Organization are overruled.

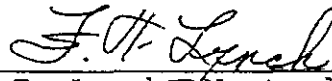
The Organization has also requested that there be a DNA testing of the urine sample submitted by claimant to determine that such sample was actually a sample from claimant. It is the opinion of this Board that there was insufficient reason produced by the Organization to justify a demand for the DNA test. The record is clear that claimant properly presented a sample to the Collector, that such sample was properly sealed and placed in a container for shipment to the laboratory. There is a complete absence of evidence that some other sample was tested, therefore, we find no justification for the DNA test requested.

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It is the opinion of this Board that the record contains sufficient information to justify Carrier's finding that claimant violated Rule 1.5 and since this was not his first violation, he was no longer a candidate to participate in the Companion Agreement program. Accordingly, Carrier's decision to dismiss claimant from service must be upheld.

AWARD

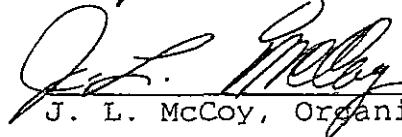
Claim denied.



F. T. Lynch, Neutral Chairman



D. J. Gonzales, Carrier Member

 I Dissent

J. L. McCoy, Organization Member

Award date March 26, 1998

CARRIER FILE NO. 9506229
ORGANIZATION FILE NO. 11145A

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS))	
VS)	NMB CASE NO. 54
)	AWARD NO. 54
UNION PACIFIC RAILROAD COMPANY)	

STATEMENT OF CLAIM:

Appealing the Level 2 Discipline assessed Engineer K. J. Sanduk and request the expungement of discipline and pay for any and all time lost with all seniority and vacation rights restored unimpaired. This action is taken as a result of the investigation on October 27, 1995.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

In its presentation of this dispute the Organization has registered a strong protest, alleging the formal investigation was not conducted in accordance with the provisions of Discipline Rule 136 of the parties agreement.

For this record we note that Rule 136 reads in part as follows:

"(c) Hearings. Hearings will be conducted as promptly as possible and within five days from date employee is withheld from service or date of notice of charges to be investigated. Notice will be in writing and specify the charges and place, date and time of hearing and must be served within five days from date occurrence to be investigated is known to exist, ***

"(d) Hearings-Postponement. Hearings may be postponed by mutual consent. The party desiring postponement must make timely request on the other party and request will be granted for reasonable cause shown. ***"

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The record before this Board is clear that the incident being investigated occurred on September 29, 1995. Notice of hearing was sent to claimant, via certified mail, setting the time and date of hearing as 1:00 PM, Wednesday, October 4, 1995. Carrier addressed a letter dated October 3, 1995 to the claimant postponing the hearing to October 12, 1995.


Carrier did not make a timely request on claimant or his representative for the postponement as required by Rule 136(d). Claimant's representative addressed a letter dated October 10, 1995 to Carrier objecting to this unilateral postponement and such objection was also made a part of the transcript of hearing.

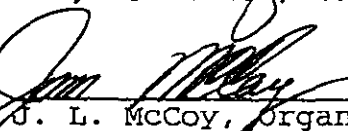
Inasmuch as the record is clear that Carrier did not comply with Rule 136(d) when it postponed the hearing without mutual consent, the Board must agree with the Organization that the hearing here involved was not conducted in accordance with the agreement terms. Under such circumstances the discipline administered cannot be permitted to remain on claimant's record.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days of the date hereof.


F. T. Lynch, Neutral Chairman


D. J. Gonzales, Carrier Member


J. L. McCoy, Organization Member

Award date

Sept 14, 1998