

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 170

AWARD NO. 171

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1505672

AND

ORGANIZATION

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

System File

J-0848U-261

STATEMENT OF CLAIM

1. The Carrier violated Rules 1, 48, 48(a) and 50 of the Collective Bargaining Agreement effective July 1, 2001 when on April 30, 2008, Claimant, Track Foreman Jacques D. Bonacci was advised he was being returned to a dismissed status for violation of "Conditions for Return to Service and Remaining in Service" as a result of testing positive for an unauthorized drug in a follow-up drug/alcohol test administered on April 23, 2008.
2. As a consequence of the violation set forth in Part 1, the Organization requests that Claimant be reinstated with seniority unimpaired and be compensated for all time he was unjustly withheld from service with all other benefits restored.

STATEMENT OF BACKGROUND

In November of 2007, while assigned and working as a gang foreman, a machine operator under Claimant's supervision was involved in an on-track incident. Although Claimant had no direct involvement in the incident, Carrier required him to submit to a probable cause drug test pursuant to FRA procedures. Such probable cause tests are governed by the Code of Federal Regulations, specifically 49 CFR Section 40.87 which establishes the cutoff concentrations for both initial tests and confirmation tests of specifically identified drugs. For the drug, Marijuana, the cutoff concentration for Marijuana metabolites is 50 nanograms per milliliter (ng/mL). The probable cause test was administered to Claimant on November 19, 2007 at Council Bluffs, Iowa in

accordance with Carrier's Drug and Alcohol Policy. A split specimen was sent to Quest Diagnostics Lab located in Lenexa, Kansas and on November 21, 2007, the Lab certified that Claimant tested positive for Marijuana Metabolite.

By letter dated November 29, 2007, Carrier instructed Claimant to report to its office location in Council Bluffs, Iowa on the morning of December 21, 2007 for an investigation and hearing on charges he allegedly had a measurable drug in his system as evidenced by the positive test result yielded by Carrier's reasonable cause test. The letter apprised Claimant that if the charges were proven, it would constitute a violation of Carrier's Rule 1.5 of its General Code of Operating Rules (GCOR), its Drug and Alcohol Policy and the Transportation Code of Federal Regulations Title 49 Part 219 Section 102 (drugs). As an alternative to the investigation, Carrier apprised Claimant he had the option of waiving discipline in favor of availing himself to its One-Time Return to Service Agreement and Policy which, after his review of the conditions set forth in said Agreement, he had three (3) days from the receipt date of the November 29th letter to accept the waiver by signing and returning the document.

Claimant signed the Waiver and the One-Time Return to Service Agreement on December 1, 2007. The Waiver reads in pertinent part 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 November 29, 2007, for my violation of GCOR Rule 1.5, Union Pacific's Drug & Alcohol Policy, and 49 CFR Part 219.102.

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 by railroad management.*

2. *Failure to comply with these instructions and/or the terms and conditions of the Companion Agreement during the 12 month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing except as required by Federal regulations.*
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.*

Having signed the waiver, Claimant also indicated his acceptance of the companion "One-Time Return to Service and Policy" Agreement. The General section of this Agreement reads in whole as follows:

You will be eligible for return to service on a probationary basis upon advise that you have successfully completed the education, counseling and/or treatment determined to be necessary by Employee Assistance, including any drug and alcohol testing requirements of your program or personal plan, and you have tested negative for drugs (and alcohol if appropriate) in the return-to-duty test administered and reviewed by the office of the UP Medical Director. The probationary period will be for a twelve (12) month period commencing with the first day you return to service.

Your reinstatement is to be on a leniency basis with vacation and seniority rights Unimpaired and without pay for the time lost and with the understanding that any Claims filed on your behalf will be dismissed in their entirety.

The Conditions section of this Agreement reads in whole as follows:

To return to service and/or remain qualified once you return to service, you must read and concur with these reinstatement conditions and demonstrate your fitness for duty in accordance with the following instructions which constitute your rehabilitation and education program:

1. *You must contact Employee Assistance (EA) to enroll and begin a personal rehabilitation program with Union Pacific's EA within three (3) days after signing this waiver*
2. *You must become drug or alcohol free by successfully completing any education Counseling or treatment determined to be necessary by the Company's EA for a violation of Rule 1.5 or by the Substance Abuse Professional for a violation of Federal regulation deemed necessary by EA.*

3. *You must adhere to all agreements in your personal plan with your EA Manager.*
4. *You must test negative for drug and alcohol in a return-to-duty test which will be administered and reviewed by the office of the Union Pacific Health Services.*
5. *Prior to your reinstatement you will be required to meet with your manager to discuss the conditions and your understanding of your reinstatement.*
6. *Following reinstatement you must submit to follow-up drug, alcohol or drug and alcohol testing as required by Federal Regulations and by the Substance Abuse Professional for a violation of 219.101 or 219.102 or Union Pacific Railroad's Drug & Alcohol Policy for a violation of Rule 1.5 and as determined by EA for at least three (3) years from the date of your return to service. For a violation of Rule 1.5 (non-Federal), you will also be required to submit to drug and alcohol testing as directed by EA in conjunction with required education, counseling or treatment. NOTE: Follow-up testing is in addition to any other testing required by law or Company policy and may be conducted at any time that you are subject to duty.*
7. *Any CDL license suspension as prescribed under Federal Regulations, must be satisfied.*
8. *You must remain drug free permanently after returning to service.*
9. *You must avoid any violation of any Company rule with reference to drugs or Alcohol.*

Failure to comply with these instructions may be grounds for immediate disciplinary action by railroad management; provided however, that failure to comply with these instructions and/or the terms and conditions of the Companion Agreement during the 12 month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing.

As Claimant successfully complied and completed the program fashioned for him by EAP, Carrier returned him to service effective March 10, 2008. Upon his return to service, pursuant to the conditions set forth in the One-Time Return to Service Agreement, Claimant was in a probationary status for twelve (12) months and obligated to comply with the remaining conditions of the Agreement, to wit, to be subject to follow-up testing for drugs and alcohol and to remain drug free permanently. On April 23, 2008 Claimant submitted to a follow-up test for drugs at Carrier's collection site in Fremont, Nebraska. A split specimen was taken and sent to Quest Diagnostics Lab located in Lenexa, Kansas, the same lab that analyzed Claimant's split sample in

November of 2007 and reported Claimant tested positive for Marijuana Metabolite. In its analysis of the split sample sent to it on April 23, 2008 and received on April 24, 2008, it reported that Claimant tested positive for Marijuana Metabolite at a concentration level of 34 nanograms per milliliter (ng/ml). By letter dated April 30, 2008, Carrier apprised Claimant that in having tested positive for an illegal or unauthorized drug within a twelve (12) month period after having been released to return to work on March 10, 2008, he was in violation of the Conditions for Return to Service and Remaining in Service Agreement including enumerated items 2, 3, and 4 of said Agreement and, additionally, he was in violation of the Waiver Agreement he signed effective December 1, 2007, wherein he agreed with the following instruction:

“Failure to comply with these instructions may be grounds for immediate disciplinary action by railroad management.”

Carrier concluded this letter apprising Claimant his actions were in violation of its Drug and Alcohol Policy effective January 15, 2004 and, as such he was being returned to **dismissed status** from its service. In taking this action of reverting Claimant to dismissed status, Carrier also relied upon Rule 1.5 of its General Code of Operating Rules which reads in relevant part as follows:

Employees must not have any prohibited substances in their bodily Fluids when reporting for duty, while on duty, or while on Company Property.

On May 16, 2008, after conducting a confirmation test on Claimant's split sample, Clinical Reference Laboratory, also located in Lenexa, Kansas reconfirmed the initial test result of a concentration level of 34 ng/ml of Marijuana Metabolite reported by Quest Laboratory after testing the first half of Claimant's split sample. The Organization noted that according to the cutoff concentration level established by 49 CFR Section 40.87 of 50 ng/ml for Marijuana Metabolite, a concentration below that level, in this case, 34 ng/ml must be reported as a negative test result. On the same date of May 16, 2008, Claimant of his own volition submitted a urine specimen for testing to Alegent Healthcare located in Omaha, Nebraska as a means of disproving the result reported by Quest or, as the Organization characterized Claimant's endeavor, as a means of proving his innocence. On May 16, 2008 upon analyzing Claimant's urine sample, Alegent Healthcare reported Claimant tested negative for a number of prohibited substances including cannabinoids, another term for metabolites of Marijuana and, in addition, he tested positive for the drug, Benzodiazepines. The Organization noted that Claimant has taken the prescribed medication of Alprazolam since April 10, 2007 which falls within the group of drugs called benzodiazepines and is typically used to treat anxiety disorder, panic disorders and anxiety caused by depression. In addition, the Organization noted that Quest Diagnostics reported Claimant had tested negative for Benzodiazepines thus casting doubt on its other reported test results.

Claimant of his own volition also submitted to a second drug testing, this time to having a hair sample analyzed which was taken by Drug Testing Services located in Omaha, Nebraska and, in turn was sent to Omega Laboratories located in Morgadore, Ohio that ran a Hair 5 Drug Panel. The hair sample was taken on June 3, 2008 and on June 4, 2008, Omega reported that the hair sample was 1.5 inches in length, that the analysis performed covered a period of from zero (0) to ninety (90) days and the results indicated none of the drugs that were tested by the panel which included THC (Marijuana Metabolites) was at a concentration greater than their listed cutoff levels. The cutoff level for THC was listed at 500 picograms (pg) per milligram (mg). The Organization submits that this test result finding by Omega showed Claimant was free from THC approximately back to March 4, 2008 (going back 90 days from June 4, 2008), a date that was prior to his return to duty (by 6 days) and seven (7) weeks prior to April 23, 2008, the date the follow-up test was administered.

PARTIES' RESPECTIVE POSITIONS

As a result of both Claimant's urine and hair test results, the Organization filed the instant claim now before the Board and, in so doing, requested a hearing be held into the matter pursuant to Rule 48 of the controlling 2001 Collective Bargaining Agreement or, in the alternative, pursuant to 49 CFR 219.104 which permits an employee who disputes a non-negative test result may request a Post-Suspension Hearing. Specifically, Section (3)(ii)(c) reads as follows:

Hearing procedures. (1) If the employee denies that the test result is valid evidence of alcohol or drug use by this subpart, the employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with §§219.101 and 219.102.

Carrier, on the other hand asserts the test results from Omega do absolutely nothing to disprove or, in any way refute Claimant's positive test results from the follow-up drug test administered to him on April 23, 2008. Carrier submits both the urine and the hair tests are meaningless primarily because they were conducted weeks after the test of April 23, 2008. In this elapsed time period, Carrier asserts that Claimant could have taken measures to flush his system or manipulate the test results. Secondly, Carrier notes it has no knowledge of how the tests were conducted averring that Claimant could have provided specimens that had been altered or specimens from another individual. Carrier argues that had Claimant wished to challenge the results reported by its contracted lab, he could have requested pursuant to rights provided by Section 15.0,

that his split sample be tested within 72 hours of being informed of the non-negative test result.

As to the Organization's request a hearing be held pursuant to Rule 48, Carrier references Claimant's assent to abide by the terms of the waiver and the conditions set forth in the companion "One-Time Return to Service and Policy Agreement" and cites specifically Item #2 of his understanding of these terms and conditions, to wit; **"Failure to comply with these instructions and/or the terms and conditions of the Companion Agreement during the 12 month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing except as required by Federal regulations."** As to the Organization's request a hearing be held pursuant to Federal regulation as set forth in CFR 219.104, Carrier notes the test conducted on April 23, 2008 was a Follow-up test conducted under the auspices of its Drug and Alcohol Policy and, therefore, Claimant was not entitled to a post-suspension hearing under the provisions of CFR 219.104. Specifically, Carrier references Section (3)(i) which reads as follows:

This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than provided in this part (e.g. ... or testing under a labor agreement).

The Organization asserts that since the basis of Claimant's dismissal has a medical root cause and, in light of the fact of conflicting test results, that is that the test results from Carrier's Follow-up test of April 23, 2008 reported Claimant tested positive for Marijuana Metabolites whereas, the urine and hair samples submitted by Claimant of his own volition to two (2) different labs both of which reported Claimant tested negative for Marijuana Metabolites, that Claimant is entitled to review by a Medical Board pursuant to Rule 50 of the controlling 2001 Collective Bargaining Agreement which reads as follows:

DISQUALIFICATION – When an employee is withheld from duty because of his physical or mental condition, the employee or his duly accredited representative may, upon presentation of a dissenting opinion as to the employee's physical or mental condition by a competent physician, make written request upon his employing officer for a Medical Board.

MEDICAL PANEL – The company and employee will each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians will appoint a third neutral physician, who will be a specialist on the disability from which the employee is alleged to be suffering.

MEDICAL FINDINGS – The Medical Board thus constituted will make an examination of the employee. After completion they will make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the condition of the employee will be final.

As to the Organization's argument that it violated Rule 50 by denying Claimant to exercise rights to a Medical Board, Carrier posits that Claimant was not disqualified due to a physical or medical condition but rather was reverted to a dismissed status when he tested positive for illegal drugs during his twelve (12) month probationary period in violation of his signed Waiver/Agreement.

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 concurs and finds persuasive all arguments advanced by Carrier in support of its position countering all arguments advance by the Organization in support of the subject claim.

Most persuasive is Carrier's position that if Claimant was desirous of challenging Quest's reported test results of having tested positive for Marijuana Metabolites, he could have exercised his rights within 72 hours of his being notified of the positive test results to subject his split sample to being tested. As Claimant failed to exercise this right and instead elected to pursue two (2) additional tests, both of which were not within the ambit of any authorized procedure, the fact these tests results could not be subjected to any official review made them of no probative value in establishing his innocence. While the Organization asserts such review could have been accomplished by impaneling a Medical Board pursuant to Rule 50 of the controlling Collective Bargaining Agreement, the stark fact is as Carrier noted, Rule 50 is inapplicable to the circumstances of this particular claim as Claimant was not disqualified from his employment for medical reasons but rather was reverted to a dismissed status because he violated the terms and conditions of his Waiver and One-Time Return to Service and Policy Agreement. Thus, based on these findings the positive test results reported by Quest must stand as unrefuted. The fact thus established that Claimant tested positive for Marijuana Metabolites even at a level below the cutoff level for a probable cause testing under FRA procedures which is inapplicable in any event under a follow-up test, was sufficient to show Claimant had violated Item #9 of the reinstatement agreement

which obligated Claimant to "remain drug free permanently after returning to service" following his release from his EAP program.

The record evidence makes clear to the Board that Carrier's position of not acceding to the Organization's request to hold a hearing on grounds Claimant would have an opportunity to present the conflicting test results in a forum that would prove his innocence was proper and appropriate. First, the Organization's argument Claimant was entitled to a hearing pursuant to Rule 48 was clearly shown to be inapplicable as Claimant knowingly waived his right to such a hearing when he signed the Waiver and the Companion Agreement permitting him to return to service, notwithstanding the fact he had violated Carrier's alcohol and drug policy. Second, the Organization's argument that Claimant was entitled to a hearing pursuant to 49 CFR 219.104 was shown by a simple reading of the relevant sections cited hereinabove in the Parties' Respective Position section, to be inapplicable under all the prevailing circumstances of this claim.

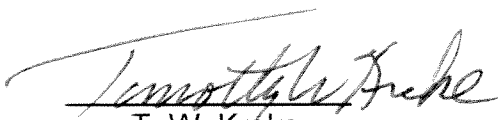
Accordingly, based on the foregoing findings the Board rules to deny the subject claim in its entirety.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois
Date: July 27, 2010