

PUBLIC LAW BOARD NO. 6375

**Case No. 2
Award No. 2**

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Tie Gang Foreman R. Rodriguez for his alleged use of an:**

‘... illegal or unauthorized drug or alcohol as evidenced by the positive test result of the Reasonable Cause drug and/or alcohol test administered to you on August 11, 1997, in accordance with Union Pacific Railroad Drug and Alcohol Policy and Procedures effective March 1, 1997, while you were working as Tie Gang Foreman.

This is in violation of Rules 1.5 of the General Code of Operating Rules effective April 10, 1994, and Union Pacific Railroad Drug and Alcohol Policy effective March 1, 1997.’

was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (Carrier’s File 1115520D SPW).

- (2) As a consequence of the violation referred to in Part (1) above, Foreman R. Rodriguez shall now be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of the incident.”**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Organization involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of

hearing thereon, including the Claimant.

By Notice dated August 18, 1997, Claimant was ordered to report for a formal investigation to determine his responsibility, if any, for violation of Rules 1.50 of the General Code of Operating Rules and the effective Drug and Alcohol Policy and Procedures. The Carrier alleged that while working as Tie Gang Foreman the Claimant failed an administered Reasonable Cause Drug and Alcohol test on August 11, 1997. After postponement, the investigation was held on September 1, 1997. Subsequently, the Claimant was notified by notice dated October 3, 1997, that he had been found guilty as charged and was dismissed from service.

The Organization argues that consideration of the circumstances provide no justification whatsoever for probable cause testing of the Claimant. The Organization maintains that the Claimant should never have been tested under any of the Carrier's Rules. It argues that the testing was without any justifiable cause or reason. Carrier's argument that the Claimant failed to properly report the incident is rejected. Claimant overheard on his radio that one of his Machine Operators needed machine repairs for an accident. He went to the site, determined it was not an emergency and relayed this incident to his Supervisor, Mr. Cary. Although Mr. Cary first indicated that the minor damage could be ignored, in further consultation with another Carrier Supervisor, a drug and alcohol test was ordered for both Claimant and the employee involved. The Organization argues that the Claimant was not involved in the accident and that Claimant's "violation" should be voided.

The Carrier maintains that the Claimant was properly found guilty of a drug violation. In fact, he admitted to Supervisor Cary prior to taking the drug test that he would probably test positive; a result thereafter confirmed. The Carrier rejects the argument that it lacked reasonable cause to test the Claimant, pointing to Article III, Section E, Subsection 1. The Carrier maintained that the Claimant was tested because under the Carrier's policy it was not immediately clear that he played no part in the incident. In fact, the Carrier maintains that the Claimant was directly involved and its actions fully appropriate. The Carrier asserts that given the positive test and the fact that this was the Claimant's second drug incident, dismissal was appropriate.

The Board finds that the Carrier's actions violate no elements of due process within the Agreement. There is sufficient testimony from witnesses to preclude any others in satisfying the Carrier's burden of proof. Central to this instant case is a decision by the Board as to reasonable cause. The Carrier asserts that reasonable cause

was established pursuant to Article III, Section E, Subsection 1, which states in pertinent part:

An accident or incident in which drug and alcohol testing is not mandatory under FRA or FHWA regulations may require testing under Union Pacific authority. If the railroad representative can immediately determine, based on specific knowledge or information, that the individual employee had no role in the cause or severity of the accident/incident, then that employee shall be excluded from testing...


This Board is not persuaded by the Organization's arguments that because the Claimant was miles away when the accident occurred, called his Supervisor to report the minor incident when he arrived, he should not have been tested under Article III, supra. Mr. Cary testified: "And the foreman [Claimant] would be tested, due to the fact it was not reported in a timely manner." The Board does not find the Claimant's explanation persuasive; that he failed to immediately report the accident, as it was not an emergency, and that he had been instructed not to report accidents via radio communication. Testimony clearly refutes the Claimant's statement that he could not report the incident at 2 p.m. due to prior instructions about such reports by radio communication.

The Claimant was a Foreman. He had a responsibility to follow the Rules. Testimony indicates the initial call was at 2 p.m. and Engineering Supervisor Cary indicated he found out about the incident four hours later when he arrived at 6 p.m. When his Supervisor arrived four hours later to find an incident that had not been reported, the Board finds sufficient reason existed to have probable cause for a drug test. Supervisor Cary testified that Manager Peterson would not allow Claimant out of the urinalysis because "the tests were mandatory for failure to report in a timely manner."

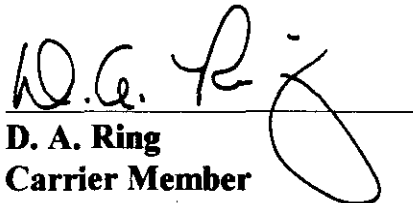
The Board has carefully reviewed the full testimony and record. There was sufficient cause for drug testing under Article III for failure to immediately report the incident. The Board therefore turns to the issue of guilt. The Claimant informed Mr. Cary prior to the drug test that "he could not pass the urinalysis." He failed, in testing positive for marijuana. The Claimant was guilty as charged and given that this was the Claimant's second drug abuse violation, the Board finds no valid reason for concluding that the discipline assessed was excessive. Carrier's policy grants only a one time return to service within a ten year period and thereafter, permanent dismissal. Given this full record, the claim must be denied.

AWARD:

Claim denied.


Marty E. Zusman, Chairman
Neutral Member


R. B. Wehrli
Organization Member


D. A. Ring
Carrier Member

Date: 10-10-02