NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 120
and	)
	) Award No. 99
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of Track Foreman Keith W. Collins for alleged violation of Union Pacific Operating Rule 1.5 of the General Code of Operating Rules, the Union Pacific Railroad Drug and Alcohol Policy, Transportation Code of Federal Regulations Title 49 Part 382 Section 213 and Items 2, 3 and 4 of the Conditions for Return to Service including the Waiver Agreement signed on July 30, 2004 in connection with the allegation that he allegedly tested positive for drugs following the FMCSA Follow-Up Test administered on November 3, 2006 is unjust, unwarranted and in violation of the Agreement (System File MW 07-43/1471325 MPR).

2. As a consequence of the violation outlined in Part (1) above, Mr. Collins shall now be reinstated to the service of the Carrier on his former position and for the Union Pacific Railroad Company to compensate him for all loss of time, vacation rights, including the reinstatement of all seniority rights unimpaired and for all personal expenses to be reimbursed back to him and his wife while driving from his home.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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.

On November 14, 2006, Claimant was notified to report for a formal investigation on

December 11, 2006, concerning his allegedly testing positive for an illegal substance during a follow-up drug test of November 3, 2006. The hearing was postponed to and held on January 9, 2007. On January 19, 2007, Carrier notified Claimant that he was dismissed from service.

The Organization contends that Carrier violated Rule 21 by postponing the hearing from December 11, 2006 to January 9, 2007, over Claimant's objection. The record, however, does not support the Organization's contention. Rule 21(b) provides, "Formal investigation may be postponed or time limits referred to herein extended by mutual agreement between the Carrier and the employee or his representative." On its face, Rule 21(b) requires agreement with the charged employee or the Organization. It does not require the agreement of both.

The Director of Track Maintenance testified that he telephoned Claimant to request Claimant's agreement to postponing the hearing. According to the DTM, he proposed postponing the hearing to January 9, 2007, and Claimant voiced concerns that his wife might have surgery that day. The DTM testified that he advised Claimant that if Claimant's wife had surgery on January 9, a different date would be established and that Claimant agreed to that arrangement.

The DTM's testimony was not rebutted at the hearing. More than a month after the hearing, the Organization submitted a written statement from Claimant's wife, dated February 11, 2007, claiming that she was present for the telephone conversation between Claimant and the DTM and that Claimant expressly objected to postponing the hearing. We do not look kindly upon this late submission of the statement. Both Claimant and his wife testified at the hearing and neither took issue with the DTM's testimony. By waiting until a month after the hearing to submit a written statement, Claimant and his wife sought to avoid the cross-examination that would have occurred had they testified to their version of the phone conversation at the hearing. There is no justification in the record for their not testifying about the phone conversation at the hearing. The submission of the February 11, 2007, statement came too late for it to be considered. Based on the uncontradicted testimony of the DTM, we find that the hearing was postponed with Claimant's agreement in accordance with Rule 21(b).

There is no dispute that Claimant tested positive for illegal drugs on July 16, 2004, and that he signed a waiver agreement, pursuant to which he returned to work on November 4, 2004, subject to follow-up testing. There is also no dispute that on November 3, 2006, Claimant, in a follow-up test, tested positive for amphetamines. The Organization argues, however, that Claimant's positive drug test was triggered by prescription medication. Furthermore, the Organization contends that, as testified to by Claimant's wife, she mixed up Claimant's medication with his son's on November 3, 2006, and inadvertently had Claimant take his son's medication.

The documentary record, however, contradicts the testimony and the claim that Claimant's positive drug test was triggered by prescription medication. Two documents were submitted. One was a prescription for Dextroamphetamine but that prescription was dated November 13, 2006, i.e., subsequent to the positive drug test on November 3. It could not

establish that Claimant had taken that medication on November 3. The second document was a printout from Overturf Healthmart Pharmacy showing Claimant's purchases of prescription medication. It shows a purchase of Dextroamphetimine on November 13, 2006, again ten days after the positive drug test. It does show purchases of 600 mg Ibuprofen (which is not an amphetamine) on July 25, 2006 and 300mg Trileptal on July 18, 2006. There is no evidence in the record as to whether Trileptal could trigger a positive drug test for amphetamines. Even assuming it could, the purchase on July 18, 2006 was for a quantity of 36. Thus, even if only one dose was taken per day, the supply would have run out long before Claimant's positive drug text on November 3, 2006. In light of the documentation that Claimant himself offered, we conclude that Carrier's rejection of the contention that the positive drug test was triggered by prescription drugs is supported by substantial evidence. Carrier met its burden of proof with respect to the charges.

We further find that the penalty of dismissal was not arbitrary, capricious or excessive. Accordingly, the claim must be denied.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member Sept 17, 2008

T. W. Kreke
Employee Member Sept 17, 2008

Dated at Chicago, Illinois, August 31, 2008