

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 11

Statement of Claim: Claim of the System Committee of the Brotherhood that:

- (1) The Union Pacific Railroad Company erred and violated the contractual Rights of foreman Ronald L. Ruiz when they unjustly assessed his Record with a Level 5 discipline and dismissed him from service on July 1, 2002, as a consequence of investigation held on June 13, 2002.
- (2) Therefore, the Union Pacific Railroad Company make whole foreman Ronald L. Ruiz as follows:
 - (a) reinstate him to service with seniority rights unimpaired;
 - (b) compensate him for all wages lost at the prevailing rate of pay of Foremen and all applicable overtime;
 - (c) make him whole for all vacations;
 - (d) make him whole for all health and welfare and insurance benefits;
 - (e) make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;
 - (f) make him whole for any and all other benefits not specifically mentioned herein that he would have earned during the time withheld from service, and;
 - (g) any record of their arbitrary and unjust disciplinary action be expunged from his personal record.

Background

By letter dated March 27, 2002, the Carrier instructed the Claimant, a Specialized Gang Foreman working on line at Deming, New Mexico, to report for a formal investigation on April 18, 2002. The investigation was based on allegations that the

Claimant used an illegal or unauthorized drug as evidenced by a positive drug test administered on March 20, 2002. At the request of the Organization, the hearing was postponed three times and was finally held on June 13, 2002. The Claimant was represented at the hearing but did not personally appear. Following the investigation, the Carrier found the Claimant to have violated Rule 1.5, as well as the Union Pacific Railroad Drug and Alcohol Policy and the Transportation Code of Federal Regulations Title 49, Part 382, Section 213. He was assessed a Level 5 discipline under the Carrier's UPGRADE Discipline Policy – Permanent Dismissal.

The Relevant Rules

Rule 1.5 of the General Code of Operating Rules provides:

Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

The Carrier's Drug and Alcohol Policy, effective March 1997, states, in relevant part:

The illegal use...of any drug or controlled substance is prohibited at any time, either on or off duty.

The Transportation Code of Federal Regulations Title 49 Part 382, Section 213 states:

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance...

Findings:

The Claimant's test on March 20, 2002 was his second positive test result. He first tested positive on February 3, 2000 during a FHWA random alcohol test, which showed measurable alcohol in his system. Thereafter, he was given the opportunity for a one-

time return to duty by going through the Carrier's Employee Assistance Program, and he committed to remaining drug-free permanently after returning to service. Following his return to work on April 10, 2000, the Claimant had nine tests, all of which were negative until he tested positive for marijuana on March 20, 2002.

Contentions of the Parties

The Organization contends that the Carrier violated the Claimant's due process rights by conducting the investigation *in absentia* and by not affording the Claimant adequate time to heal from an impairing physical condition. In the Organization's view, the Carrier's refusal to postpone the hearing denied the Claimant opportunity to prepare a proper defense against the charges.

The Carrier denies any procedural violations. It submits that it waited for more than a month to conduct the investigation, and the Claimant failed to appear at the rescheduled hearing. Despite Claimant's non-appearance, he was represented by the Organization and afforded full opportunity to cross-examine witnesses.

As to the merits, the Carrier submits that the March 20th positive drug test was the Claimant's second within a ten-year period. The Carrier's Drug and Alcohol Policy provides that the only time an employee will be allowed to retain employment after a positive test result is when the employee has not had a positive test within a ten-year period. The drug test as issue was properly administered, in accordance with federal regulations, and a NIDA-certified lab conducted the test. Moreover, Claimant never attempted to have his split sample tested by another lab for verification.

Opinion

The Organization did not prove any procedural violations. At the Organization's request, the investigative hearing was postponed several times. When the Claimant requested yet another postponement, he did not provide sufficient documentation to justify further delay. The doctor's note he submitted referred to an ankle problem and stated that an orthopedic surgeon would have to clear him before he could return to work. The doctor's note, however, did not prohibit the Claimant from attending the hearing. Although the Claimant elected not to attend the hearing or produce any witnesses to testify on his behalf, he was represented capably by the Organization at the hearing, which was conducted fairly and competently. Thus, the fact that the hearing was *in absentia* did not undermine its integrity or deprive the Claimant of his due process rights.

As to the drug test itself, the evidence in the Record shows that all Carrier and federal guidelines were followed. The test was properly administered, analysis of the specimen was performed by a certified laboratory, the chain of custody was preserved, and all required documentation was completed. Based upon an initial test and a confirmatory test, the Claimant tested positive for marijuana.

The Union Pacific Drug and Alcohol Policy provides at Page 13, Paragraph E:

An employee who has been dismissed for a violation of this policy will be permitted a one-time return to service following successful completion of a rehabilitation program approved by [Employee Assistance], provided that the employee has had no previous drug or alcohol violation for 10 years and provided further that no other significant rule violation is involved.

Because the Claimant tested positive for alcohol in February 2000 during a FHWA random test, his positive drug test in March 2002 made him ineligible to either work

with Employee Assistance or maintain his job with the Carrier. It is undisputed that the Claimant understood that his job depended upon his remaining drug-free and that he would be subject to follow-up testing. Numerous boards have addressed the issue of employees who fail in their rehabilitation programs to remain alcohol/drug free.

Particularly relevant is the decision of PLB 5895, in which the Board held:

The Board has carefully considered the record in the instant case and Claimant's twenty years of service with the Carrier. However, length of service alone is not sufficient to overcome the seriousness of the occurrence of a second instance of discovery of use of illegal substances while on duty. The Carrier has uniformly implemented a policy of affording to employees who test positive for illegal substances an opportunity to rehabilitate themselves and return to work free of drugs and alcohol. Claimant availed himself of this policy and, after rehabilitation, returned to service. However, it is undisputed that he relapsed and engaged in illegal substance use a second time.

The Board is not without sympathy for Claimant's plight. However, in light of the seriousness of the offense, the fact that it is a violation of federal rules, Carrier rules and Claimant's own agreement with the Carrier to remain drug and alcohol free, there is no basis for concluding that the penalty of dismissal is not warranted.

Similar reasoning is applicable to the instant case. The Board is mindful of the Claimant's thirty-one years of service with the Carrier. However, he willfully violated the Carrier's rules and Drug/Alcohol Policy after he already had been given a second chance. Furthermore, there is no basis to mitigate the discharge penalty, given his past disciplinary record. Unfortunately, the Claimant had numerous disciplines during the twenty years that preceded his dismissal. Thus, while the Board considered the Claimant's entire work history, it quickly became clear that the Claimant was not an

exemplary employee and that his positive drug test was just one of many infractions on his record.

For all of the foregoing reasons, the Board finds that there was substantial, credible evidence in the Record to support the Carrier's finding of guilt and to sustain the penalty that was imposed.

Award

The claim is denied.


JOAN PARKER, NEUTRAL MEMBER


CARRIER MEMBER
DATED: 7-16-03


ORGANIZATION MEMBER
DATED: 7-16-03