

**BEFORE PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 32**

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

1. The discipline (withheld from service and subsequent dismissal) imposed upon Mr. R.J. Emery for alleged violation of Section IX (Refusal to Permit Testing of the Union Pacific Drug and Alcohol Policy), in connection with charges leveled against him under letter dated March 27, 2001, was arbitrary, capricious, unwarranted and in violation of the Agreement [Carrier's File 12279991-D SPW).
2. As a consequence of the violation referred to in Part (1) above, Mr. R.J. Emery shall now '... be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for all wages (straight time and overtime) and benefit loss suffered by him, including but not limited to medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing, compensated the time associated with Claimant coming into the office to attend his investigation, along with any mileage expense associated with his travel to Salt Lake City to attend his investigation, and the alleged charge(s) be expunged from his personal record.'

**Background:**

Claimant R.J. Emery, a track inspector with 21 years' seniority, seriously injured both of his knees when a section foreman crushed between two hi-railers in 1997. Even after multiple surgeries on both knees, his right knee kept sticking and the left one repeatedly gave way unexpectedly. Although his knees required him to miss work on several occasions after the original injury, the Carrier did not require him to complete any additional accident reports because of the ongoing nature of the injury.

On Monday, March 19, 2001<sup>1</sup> at about 1:45 p.m., Claimant's left knee gave way as he was stepping onto a truck while at work. He finished his shift, took some medication that night, and hoped to be able to return to work the next day. He was unable to do so, however, and telephoned foreman D. Boggs to ask him to advise Supervisor C.F. Winn that he would be absent from work that day because his knee had popped out, requiring a doctor's visit. According to the Carrier, Claimant stated that he would call back later that evening, but failed to do so. The following day, Wednesday, March 20, Claimant left a message in Winn's voicemail telling him that he would miss work that day because he had to get an MRI done on his knee, and that he would call that evening with an update. Claimant did not telephone Winn that evening.

Early on Thursday morning, Claimant's father drove him to the hospital to have the MRI on his knee. Claimant had asked his father to drive, because he knew that he would be given tranquilizers to ease his claustrophobia associated with having the MRI. Meanwhile, because Claimant had not shown up for work on Thursday morning, Foreman Boggs and Supervisor Winn drove to Claimant's house to determine how he was and when he would be coming to work. At Claimant's house, they found a young man who told them that Claimant's father had driven Claimant to a doctor in Salt Lake City and were expected to return that afternoon.

Boggs and Winn returned that afternoon and found Claimant with a knee brace cleaning out his truck. Claimant told Winn that he had just returned from the doctor. In response to Winn's questioning, Claimant explained that he had hurt his knee getting into his truck on Monday afternoon while at work. Winn then told Claimant that he would have to accompany him to the office to complete an accident report. Claimant agreed, but told Winn that he could

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<sup>1</sup> Unless otherwise stated, all dates are in 2001.

only be gone for about 10-15 minutes because his children were coming, and that his ex-wife would not leave them off if he were not there.<sup>2</sup> According to Claimant, he also told Winn that he would drive his own vehicle to the office, but Winn insisted on driving him there and would bring him right back. Winn did not recall that exchange.

While Claimant was completing his accident report at the office, Winn telephoned his supervisor, P.M. Dannelly, who instructed him to arrange for Claimant to have a reasonable cause drug/alcohol test because Claimant had not provided a timely accident report. When Claimant learned that the individual administering the drug/alcohol test would not be there for two hours, he protested and offered to take the test at a local clinic. Winn declined that alternative. At about that time, Claimant's ex-sister-in-law, who had driven up to the office, told him that his ex-wife would be leaving off his kids in about ten minutes.

Meanwhile, Boggs, who had finished cleaning out Claimant's truck, telephoned from a nearby gas station and advised Winn that the credit card for Claimant's truck was not valid and he needed money to pay for the gas. Winn then left the office to go to the gas station. Before he left, he heard Claimant say that he needed to make a telephone call. Claimant waited for about twenty minutes after Winn had left, and then departed with his sister-in-law who drove him home just in time to receive his children. Claimant had left no message for Winn advising him that he had left.

When Winn returned to the office, he was unable to find Claimant. By letter dated March 27, P.M. Dannelly, Director of Track Maintenance, notified Claimant of an investigation and hearing on charges that on March 22 he allegedly refused, while on Company property, to take a

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<sup>2</sup> On cross-examination by Claimant, Winn agreed that Claimant had told him this.

reasonable cause drug/alcohol test and had left Company property without authority. Following the investigation and hearing, Dannelly wrote Claimant a letter dated April 30, advising him that he was sustaining all charges brought against him, including a violation of the Carrier's Drug and Alcohol Policy (the "Policy"), which provides in pertinent part:

IX. Refusals to Permit Testing/Tampering

- Employees, except those applying for transfer to a safety-sensitive job, who refuse to permit drug or alcohol testing under this policy will be immediately withdrawn from service.
- After removal from service for refusal to provide a sample, a disciplinary investigation will be held, if required by agreement, to determine if the employee refused to provide a sample or undergo a breath alcohol test.

(Car. Ex. D). The Carrier had attempted to conduct its reasonable cause testing of Claimant pursuant to Section III(E) of the Policy, which provides in pertinent part:

Union Pacific, on its own management prerogative or pursuant to existing collective bargaining agreements, requires reasonable cause drug and alcohol testing of all safety-sensitive employees including HOSA employees and CMV operators (management and agreement alike) when:

- An employee's acts or omissions result in the violation of any safety or operating rule which has the potential to (1) result in an accident and/or personal injury to self or others or (2) actually results in personal injury or significant property damage . . .

(Id).

Dannelly's April 30 letter also sustained the charges against Claimant that he had violated Operating Rules 1.15 and 1.6(3), which provide in pertinent part:

1.15 Duty – Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

Continued failure by employees to protect their employment will be sufficient cause for dismissal.

1.6 Conduct

Employees must not be:

\* \* \* \*

3. Insubordinate

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Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be condoned.

(Car. Ex. C-1, C-2).

**Carrier's Position:**

The Carrier claims that it had reasonable cause to conduct a drug/alcohol test on Claimant because he was late in submitting his accident report with respect to his knee injury on March 19. In support, the Carrier cites the fact that Claimant did not complete the accident report until three days after the accident. In addition, the Carrier refers to witness C. Varvel, who stated that late reporting of an accident is considered reasonable cause for administering a test under the Policy.

Further, the Carrier asserts that Claimant, in defiance of Supervisor Winn's directive to wait for the individual administering the test to arrive, left the Company's premises without telling anyone. According to the Carrier, Claimant never told Winn about any prior commitments that might have precluded him from waiting for the tester. Rather, the Carrier submits that Claimant had told him only that his children were coming and that he needed to make a phone call, which he was permitted to do, to make sure that they got to where they were

going. Accordingly, the Carrier contends that Claimant's departure from the office constituted insubordination and a blatant violation of the Policy.

**Organization's Position:**

The Organization submits that the Carrier did not have reasonable cause to administer a test under the Policy for failure to complete an accident report. According to the Organization, Claimant's knee problems were well-known to the Carrier because of his on-the-job accident four years earlier when both of his knees were crushed. The Organization also refers to the fact that on numerous subsequent occasions when Claimant missed time because of continuing knee problems, he never was required to submit an accident report. Accordingly, the Organization contends that, under the circumstances, there was no mandate under the Policy to conduct a reasonable cause test. Moreover, in response to the Carrier's charge that Claimant refused to take the drug/alcohol test, the Organization urges that he did not refuse because he left the premises, not to avoid the drug/alcohol test, but to see his children.

With respect to the charge that Claimant left the Carrier's property without proper authority, the Organization claims that Supervisor Winn finally acknowledged on cross examination that Claimant had told him before they went together to the office that he had to return home in 15-20 minutes because his children were coming. Because those were the conditions under which Claimant went with Winn to the office, the Organization contends that Claimant had tacit permission to return home fifteen minutes after departing for the office.

**Findings:**

The Carrier asserts that it had reasonable cause to require Claimant to submit to a drug/alcohol test because he failed to submit an accident report until three days after he injured his knee on March 19. Although it is undisputed that Claimant did not complete his accident report until three days had elapsed after his knee had gone out, there is some question as to whether it was reasonable to conduct such a drug/alcohol test in the instant case – Claimant never had been required to submit an accident report when, during the four previous years, knee injuries had prevented him on several occasions from working. Because of the Carrier's practice during the preceding four-year period of not requiring Claimant to file an accident report when one of his knees prevented him from working, it is arguable that there was no reasonable cause for the Carrier to conduct a drug/alcohol test without prior notice to Claimant that the practice had changed. That is particularly true because Claimant promptly notified his supervisor orally as soon as he knew that his March 19 knee injury was disabling, and because Claimant immediately cooperated with his supervisor's request on March 22 to submit the report. On the other hand, because Claimant had not telephoned his supervisor on Tuesday and Wednesday evenings, as the Carrier expected, and did not call in to say that he would be absent from work on Thursday morning, Supervisor Winn had reason to be suspicious about the circumstances of Claimant's absence.

Assuming that there was reasonable cause for the Carrier to conduct a drug/alcohol test based on the Carrier's standard procedure of testing an employee who has not provided a timely accident report, there are, nevertheless, extenuating circumstances that mitigate Claimant's discharge. Contrary to the Carrier's claim, Supervisor Winn conceded on cross-examination that,

before he and Claimant drove to the office so that Claimant could complete an accident report, Claimant told him that he would have to return home in ten or fifteen minutes because his ex-wife was about to drop off his children with him:

Q. [By Claimant] Didn't I ask you when we - - when you asked me - - when you coerced me to go down - - when you said you wanted to take me down to the depot and talk to me about how I was and stuff, didn't I tell you that I could - - it had to only be 10 to 15 minutes, because I had my children coming and my wife said that she wouldn't - - that if I wasn't there, she'd be taking off with them, my ex-wife?

A: [By Winn] You did. Yeah. You did - - state that.

(Tr. 20).

It was not until after they had arrived at the office that Winn's supervisor directed him to arrange for a drug/alcohol test. Importantly, Claimant did not refuse to take the test; instead he offered to have it taken at a local clinic as long as he could promptly get home. After Claimant had learned that the tester would not be present to administer the test for two hours, and after Winn had left the office for more than twenty minutes, Claimant himself left the office to keep his appointment with his children. Because Claimant had informed Winn before leaving home that he could only remain away from home ten to fifteen minutes and Winn had tacitly agreed to that condition, it was unreasonable for the Carrier to discharge Claimant for: (1) failing to wait two hours in the office to undergo a drug/alcohol test; and (2) leaving the Carrier's premises without authority. Accordingly, the Board has concluded that termination was an unduly harsh penalty for the infractions charged and was an abuse of the Carrier's discretion.

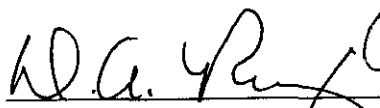
On the other hand, Claimant was by no means blameless, as he should have left a message reminding Winn that he had to get home to receive his children. His disappearance




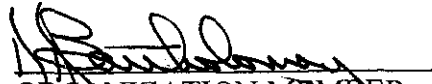
without notifying Winn, when he knew that Winn expected him to remain for his drug/alcohol test, constituted an unauthorized leaving of Company premises and insubordination, in violation of Rules 1.15 and 1.6(3). Likewise, Claimant bears significant responsibility for failing to communicate sufficiently with Winn on the evenings of March 20 and 21 about his injury. For these reasons, Claimant will not be entitled to any back pay upon his reinstatement.

Award:

The claim is granted in part. Claimant violated Operating Rules 1.15 and 1.6(3), but, for the reasons set forth above, his discipline is reduced to a suspension without back pay. The Carrier shall promptly reinstate Claimant to his former position without back pay, and without loss of seniority.

  
CARRIER MEMBER  
DATED: August 11, 2004

  
JOAN PARKER, Neutral Member

  
ORGANIZATION MEMBER  
DATED: 8-11-04