

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 43

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

1. The dismissal of Tie Ballast Foreman David P. Cary for his alleged insubordination and failure to remain for probable cause drug testing on July 29, 2003 was without just and sufficient cause, arbitrary and capricious. (Carrier's File 1385355-D SPW).
2. Tie Ballast Foreman David P. Cary shall "... now be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired and compensated for all net wage and benefit loss suffered by him since his removal from service and subsequent dismissal, and that the alleged charges be expunged from his personal record."

Background:

Claimant David B. Cary, a Tie Ballast Foreman with about nineteen years' seniority, was acting foreman for two pieces of contractors' equipment that were permitted to go onto a track in violation of a track warrant on July 29, 2003.¹ When Claimant realized that a train was approaching the equipment, he acted quickly to clear the track before the approaching train arrived. As a result of the incident, Supervisor Chad Schmidt required Claimant and Gabriel Villareal, the foreman in charge of the contractors in question, to undergo a reasonable cause drug and alcohol test that afternoon. When Schmidt called the individual to administer the urinalysis, telling her Claimant's and Villareal's names, Claimant asked why he had to undergo such a test, too. Schmidt responded that he had decided that both Claimant and Villareal would

¹ Unless otherwise stated, all dates will be in 2003.

have to be tested.

Schmidt, Villareal and Claimant then waited at a road exit in Schmidt's vehicle for the individual who would be administering the urinalyses, because she did not know the way to the testing site. After waiting for her for about an hour and a half, she arrived and they all went to the testing site. While Villareal, who was to be tested first, was at the testing site, Schmidt remained in his vehicle outside. Claimant went to his own truck, which was parked nearby, for about fifteen minutes. When he returned to Schmidt's vehicle, he handed through the passenger side window his hard hat, vest, some keys and a safety action plan, stating that he did not need to "take this crap." (Tr. at 30.)

Claimant's prior disciplinary record included: (1) a one-day suspension for a Level 2 rule violation for failing to comply with instructions concerning the reporting of overtime in September 1995; (2) a Level 2 rule violation for sleeping on duty in May 2002; (3) and a five-day suspension for a Level 3 rule violation for occupying main track without authority in October 2002.

The Carrier dismissed Claimant by letter dated August 1 pursuant to Rule 48(L) of the Collective Bargaining Agreement for refusing to remain on the property for a reasonable cause drug and alcohol test. In a letter dated August 8, the Organization, pursuant to Rule 48(L), requested that a hearing be held. In a letter dated August 25, the Carrier notified Claimant of an investigation and hearing to determine his responsibility, if any, for allegedly leaving a drug and alcohol testing site after having been instructed by his supervisor to remain on the property for a reasonable cause drug and alcohol test. Following the investigation and hearing, the Carrier notified Claimant in a letter dated October 9 that he was dismissed for violating Rule 1.6

(insubordination), Rule 1.5 (absenteeism), Rule 1.5 (Drug and Alcohol) as amended by System Special Instruction 10-A of the Union Pacific Rules, as well as the Carrier's Drug and Alcohol Policy, Section IX, Refusal to Permit Testing/Tampering. The Organization submitted a claim on November 20, challenging the dismissal. The parties were unable to amicably resolve the dispute on the property, and submitted it to the Board for final and binding resolution.

Carrier's Position:

The Carrier submits that it properly requested that Claimant submit to a reasonable cause drug and alcohol test, because Claimant allegedly had violated a track warrant, nearly causing a collision. According to the Carrier, Claimant must have understood that he was to be tested, because he heard supervisor C. Schmidt telephone the testing agent to tell her that Claimant would be tested, and then waited with Schmidt and fellow foreman G. Villareal for a long time for the testing agent to meet them. Moreover, the Carrier asserts that it is undisputed that Claimant then returned to Schmidt certain property including his hard hat and keys, saying that "he did not need to take this crap." The Carrier also claims that Claimant's actions were consistent with his prior record, which included failure to comply with instructions in September 1995, failure to notify his supervisors in May 2002, and violating operating rules in October 2002.

In response to the Organization's contention that Claimant was so distraught that he left the property, the Carrier points to the total lack of record support. Furthermore, the Carrier urges that it cannot permit employees to disobey orders to remain on the property merely because they claim to be distraught.

With respect the Carrier's decision to dismiss Claimant, it argues, citing arbitral

precedent, that refusal to submit to a drug and alcohol test and leaving the property is a basis for a permanent dismissal. Because the dismissal was not arbitrary, capricious or an abuse of the Carrier's discretion, it argues that the dismissal should not be disturbed.

Organization's Position:

The Organization submits that, because the Carrier did not have reasonable cause to conduct a drug and alcohol test on Claimant, he cannot be found guilty of refusing the test. In addition, the Organization claims that Claimant did not willfully abandon his job or refuse to submit to a urinalysis test.

Rather, according to the Organization, Claimant was distraught when Schmidt accused him of having shared responsibility for violating a track warrant and endangering his fellow employees. Moreover, the Organization contends that Claimant credibly testified that he was not directed to submit to a drug and alcohol test, and that he had no recollection that he had turned in to Schmidt his Company equipment, including his hard hat and keys.

Findings:

Notwithstanding the Organization's argument, to the contrary, the Board finds that supervisor Schmidt directed Claimant to take a drug and alcohol test. Schmidt testified credibly that, when Claimant protested that he should not be required to undergo urinalysis, Schmidt told him that he had decided to require both Claimant and G. Villareal to be tested. In addition, Schmidt testified credibly that, just before Claimant was due to be tested, he turned in his Company equipment, including his hard hat and keys, stating that he did not need to "take this crap." (Tr. at 30). Schmidt's testimony provided substantial evidence to establish that he had

directed Claimant to take a drug and alcohol test, and that Claimant had refused. Moreover, because Claimant asserted at the investigation that he was too distraught to remember what had happened, he did not contradict Schmidt's testimony.

The Organization also contends that the Carrier did not have reasonable cause to conduct the test in the first place. The Board disagrees. Schmidt had reason to believe that Claimant, who was acting foreman in charge of certain equipment, allowed the equipment to go on a track in violation of a track warrant. Because the incident could have led to a serious accident, endangering employees' and contractors' lives, Schmidt had reasonable cause to require Claimant to undergo urinalysis.

No more persuasive is the Organization's argument that Claimant was so distraught about being accused of being partially responsible for the incident that he should not be held responsible for turning in his equipment and refusing the test. According to Schmidt's credible testimony, Claimant displayed no sign of being distraught. To the contrary, Claimant described in some detail what had happened in connection with the violation of the track warrant, and completed a written report about it. Furthermore, even if Claimant had been upset about his potential responsibility for the incident, he had no reasonable basis to leave the property in defiance of Schmidt's directive to undergo a drug and alcohol test.

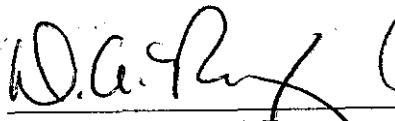
Refusing to take a drug and alcohol test and leaving the Carrier's property in derogation of a supervisor's directive is a serious offense. Contrary to the Organization's arguments, dismissal for Claimant's actions on July 29, 2003 was not arbitrary, capricious or an abuse of Carrier discretion, particularly because of Claimant's prior disciplinary record, which included: (1) a one-day suspension for a Level 2 rule violation for failing to comply with instructions

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concerning the reporting of overtime in September 1995; (2) a Level 2 rule violation for sleeping on duty in May 2002; (3) and a five-day suspension for a Level 3 rule violation for occupying main track without authority in October 2002.

Award:

The claim is denied.


CARRIER MEMBER
DATED: 10-18-04


JOAN PARKER, Neutral Member


ORGANIZATION MEMBER
DATED: 10-18-04