

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT**

And

UNION PACIFIC RAILROAD COMPANY

Case No. 58

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

1. The dismissal of Truck Driver Raymond R. Henry for his alleged failure to submit to an FMCSA follow-up drug and alcohol test, which is considered a positive test result, was without just and sufficient cause and based on unproven charges.
2. Truck Driver Raymond R. Henry shall now be reinstated to service with seniority and all other rights unimpaired and be compensated for all wage loss suffered.

Facts:

Claimant Henry was hired by the Carrier on March 6, 2000. On July 16, 2004, he signed a “Waiver/Acceptance of Discipline – EAP” agreement in connection with charges that he had allegedly used an illegal drug, as evidenced by his testing positive on a random FMCSA test, which was administered on July 6, 2004. Claimant accepted the terms of his one-time return to service waiver, which included his agreement to submit to follow-up drug and alcohol testing for at least three years from the date of his return to service. After participating in the Carrier’s Employee Assistance Program, Claimant returned to work on September 10, 2004 on probationary status. His Return to Service

and Remaining in Service Companion Agreement, which he accepted, stated that his failure to comply with the instructions and conditions set forth therein during his 12-month probationary period would result in his "immediate return to dismissed status without benefit of a formal hearing."

Some ten months later, on July 5, 2005, Claimant was notified at 6:00 a.m. that he would have to provide a drug screen as part of a random test. He was to do this immediately after the job briefing for his gang.

At 6:30 a.m., when Claimant had not appeared for his drug screen, the Collector began making calls. Unable to locate Claimant, the Collector went to the trailer to inquire as to Claimant's whereabouts. The gang started to look for him, and at approximately 7:00 a.m., just as the Collector was about to terminate the test, Claimant was found in a port-a-potty. The Collector then began the testing process by doing a breathalyzer for alcohol. Prior to the alcohol test, Claimant had been told that he would also be providing a urine sample, but as the Collector was about to proceed with that part of the test at 7:05 a.m., Claimant told him that he would be unable to furnish a urine specimen because he had not had anything to drink that morning. The Collector completed the breath test, at which point Claimant said he was sick and needed to use the restroom. He stayed in there for five minutes and when he emerged, he said he could not provide any urine. He then went with the Collector to the office in order to drink some water. At that time, the Collector received a phone call from one of the Carrier's Drug and Alcohol Managers who also spoke to Claimant. Thereafter, the Carrier determined to treat the test as a refusal, and the Collector left the property at 8:02 a.m.

After his removal from service, Claimant received a letter dated July 7, 2005, which returned him to a dismissed status for his violation of the Carrier's Drug and Alcohol Policy. The Organization filed an appeal, and following the Carrier's final declination, the claim was submitted to this Board for resolution.

Contentions of the Carrier

The Carrier contends that Claimant was properly returned to dismissed status because his actions constituted a refusal to take a drug and alcohol test. Claimant was clearly instructed to report for an alcohol and drug test on the morning of July 5, 2005 after his job briefing. While Claimant asserted that his instructions came from the Collector, it was his foreman who told him to report immediately for the drug screen following the job briefing. The Carrier contends that Claimant deliberately disappeared for forty-five minutes, and it was only after an extensive search all over the railroad yard, that Claimant was located. According to the Carrier, Claimant hid in the port-a-potty because he knew he would have to supply a urine specimen. However, federal regulations, as well as the Carrier's rules, did not give Claimant the right to take the test at his convenience; he was required to report for the screening when instructed.

In support of its position, the Carrier cites Rule 16.1.4 of its Drug and Alcohol Policy, which states that failure to appear for any test within a reasonable time, as determined by the employer, consistent with applicable DOT regulations, after being directed to do so by a supervisor, shall be considered a refusal to take a drug test. In the Carrier's view, Claimant violated both this rule and the terms of his waiver agreement. Therefore, his dismissal should be upheld.

Contentions of the Organization

The Organization contends that on the morning of July 5, 2005, Claimant was told by the FMCSA representative to submit to the drug screen after his job briefing. Claimant went to the briefing, and afterward he took time to inquire about some repairs that were being done on the gang truck before he went to meet with the Collector. The Organization asserts that the gang truck was an integral part of the gang, and the job briefing would not have been complete unless it was known that the repair work was finished by the automotive shop. After confirming the status of the repair work, Claimant used the port-a-potty, which was located near the trailer where the job briefing had been conducted. After leaving the restroom, Claimant went to the headquarters building to proceed with the alcohol and drug test.

Claimant provided the breath test, and according to the Organization, "for unknown reasons, the testing representative stopped the testing, and the Claimant was told he was removed from service." (Org. Brief, p. 3).

Given these circumstances, the Organization argues that Claimant did not act in violation of any rules. Moreover, the Carrier violated Rule 45, Paragraph G of the Collective Bargaining Agreement, which states, in relevant part:

(g) WAIVER – By mutual agreement with the Company, an employee may waive formal investigation and accept any discipline that does not result in dismissal....

When waiver method is used, it will not be necessary to further advise the employee that discipline has been assessed. Signed waiver will be placed on discipline record of the employee concerned....

An employee not electing to waive his right to an investigation will not, as a result of the evidence adduced at the investigation, if found at fault, be assessed a greater measure of discipline than would have been assessed had the investigation been waived.

The Organization submits that the above-quoted language was violated when the Carrier removed Claimant from service and returned him to dismissed status. The Carrier should have convened an investigation, which could have brought to light the facts concerning Claimant's alleged refusal to submit to an FMCSA follow-up drug and alcohol test.

The Organization maintains that the Carrier's actions must be considered harsh and excessive. The Carrier abused its discretion when it suspended Claimant's drug screen based upon insufficient evidence that he had sought to avoid his test. Therefore, the claim should be sustained.

Opinion

The proven facts in this case support only one logical conclusion: Claimant, having been told that he had to submit to an alcohol and drug screen, deliberately hid in order to stall or avoid taking the test. He was instructed by the Collector and his foreman, Fernando Perez, to report promptly after his job briefing for the test. Instead of doing as he was directed, he disappeared for approximately forty-five minutes without permission and was eventually located in a port-a-potty. His claim that he was following up his job briefing by checking on repairs to the gang truck was not believable. Moreover, his statement to the Collector that he was unable to provide a urine specimen suggested that he spent his time in the restroom both hiding from the Collector and emptying his bladder to insure that he would be unable to furnish a specimen.

Claimant knew that when he returned to work under his waiver agreement, he would be subject to follow-up alcohol and drug testing and that he would have to serve a 12-month probationary period. His Return to Service and Remaining in Service Companion

Agreement expressly stated that his failure to adhere to his instructions and the terms of that Companion Agreement during the 12-month probationary period would result in his "immediate return to dismissed status without benefit of a formal hearing." In light of this language, Claimant was not entitled to a hearing, and there was no violation of Rule 45 of the Agreement.

Under Rule 16.0, Refusals to Permit Testing and Tampering of the Carrier's Drug and Alcohol Policy, an employee is considered to have refused to take a drug test if he "fails to appear for any test...within a reasonable period of time, as determined by the employer, consistent with the applicable DOT agency regulations, after being directed to do so by a railroad supervisor." Claimant was in violation of this rule, as well as his waiver agreement, because he was nowhere to be found for forty-five minutes. The Carrier waited a reasonable period of time, and in fact initiated a search for Claimant, only to discover that he was closeted in the port-a-potty when he should have been taking his drug test. Even if he had gone to the automotive shop to check on some repairs, that task should not have taken very long, and, in any event, it does not explain what Claimant was doing in the restroom for an excessive period of time when he knew he was expected to report for his drug test.

Claimant's behavior was reasonably determined by the Carrier to be a refusal to take a drug test, and under the self-activating terms of his waiver agreement, he was properly restored to dismissed status. He did not have the discretion to decide when he would take his mandated alcohol and drug test. He was under orders to report immediately for the test after his job briefing, and he elected to disregard those orders. Given these facts, Claimant's appeal must be rejected.

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Award

The claim is denied.

W.G. King
Carrier Member
Dated: May 7, 2007

Joan Parker
Joan Parker, Neutral Member

[Signature]
Organization Member
Dated: 5-7-07