

PUBLIC LAW BOARD NO. 6621

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

And

UNION PACIFIC RAILROAD COMPANY

Case No. 61

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

1. The dismissal of Machine Operator F. O. Serrato for his alleged refusal to submit to a reasonable cause test on July 14, 2005 was without just and sufficient cause, in violation of the Agreement and arbitrary and capricious.
2. As a consequence of the violation referred to in Part (1) above, Machine Operator F. O. Serrao shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered. Also, his record shall be cleared of this incident.

Background:

Claimant, with seniority dating from October 3, 1968, was working as a machine operator on Gang 8502 when this incident occurred.

On May 27, 2004, Claimant sustained an on-duty injury, which required surgery on his left knee. On July 11, 2005, he returned to work following a full release. On July 14, 2005, he asked his supervisor, Troy Fallow, if he could take a personal day off on July 15. When Fallow asked the reason, Claimant allegedly said that he had reinjured his

knee, and it was swollen. Inasmuch as Claimant stated that he had reinjured himself, Fallow contacted Claim Agent Sara Naugle who told him to take Claimant to the hospital. Ms. Naugle and the Manager of Drug and Alcohol Testing in Omaha also instructed Fallow to arrange for a drug and alcohol screen in accordance with the Carrier's Drug and Alcohol Policy. After Claimant was treated at the hospital, Supervisor Fallow, Claimant, and Assistant Foreman L. S. Garcia (who served as an interpreter) went to Mr. Fallow's motel room where the Collector was waiting.

At the motel, Claimant was given water to drink and more than three hours to produce a urine sample. When he was unable to produce the sample, the Manager of Drug and Alcohol Policy was called again, and he told Supervisor Fallow to remove Claimant from service because he was considered as having refused to submit to an alcohol and drug test. At that point, Claimant allegedly became argumentative and quarrelsome. It is undisputed that Claimant was given an alcohol breath test, which was negative. He also offered to take a blood test, but that offer was rejected.

Claimant was seen by a licensed physician on July 19, 2005, who determined that Claimant did not have any medical condition which would have prevented him from giving a urine sample on July 14. Consequently, Claimant was issued a notice of investigation, and a hearing was held on August 30, 2005, following which Claimant was found to have violated Section 16 (Refusal to Permit Testing) of the Carrier's Drug and Alcohol Policy and dismissed from service.

Thereafter, the Organization filed an appeal of Claimant's behalf. It was processed in the customary manner and discussed in conference. However, the parties did not reach a resolution, and the claim is now before this Board for adjudication.

Contentions of the Parties

The Carrier submits that Claimant was properly dismissed following a full and fair hearing during which his due process rights were fully protected. He failed to produce a urine sample for testing even though he was given all of the water he requested and three hours in which to produce a specimen. When he was told that, in accordance with the Carrier's policy, he was being removed from service, he became argumentative and refused to cooperate. Based upon his "shy" bladder, he was sent to a licensed physician for a full evaluation. That doctor determined that Claimant's failure to produce a specimen constituted a refusal rather than a legitimate medical inability to provide a sample.

Based upon these facts, the Carrier contends that it met its burden of proof. As to the Organization's assertion that there was no reasonable cause to test Claimant, the Carrier responds that in light of Claimant's statement that he had reinjured his knee at work, it was appropriate to ask him to take a drug and alcohol screen. Also unpersuasive, argues the Carrier, is the Organization's contention that Claimant was unable to produce a urine sample because he felt pressured by his supervisor and the interpreter in the motel room. Given the Carrier's "zero tolerance" for employees who violate the Drug and Alcohol Policy, the Carrier submits that it was within its rights in dismissing Claimant from service.

The Organization contends that Claimant's dismissal was not based on just cause. Claimant had requested a personal day off because his knee was slightly swollen and he felt that it needed some rest. However, he did not say that he had reinjured himself, and therefore, there was no reasonable cause to compel him to take a drug test.

The Organization also insists that at no time did Claimant refuse to take the alcohol and drug test. He took the breath test, which was negative for alcohol. With respect to the drug screen, Claimant did not willfully refuse to provide a body fluid specimen. During the time he was required to produce the urine sample, he felt pressure and intimidation by the supervisor. Claimant tried several times to urinate, but was unable to do so. While the Carrier's physician subsequently found that Claimant did not have a medical reason for his failure to produce a specimen, Claimant was diagnosed as having "substantial anxiety" by his doctor on August 4, 2005. Moreover, Claimant offered to give a blood test, but Supervisor Fallow rejected that offer.

Given these circumstances, the Organization argues that the Carrier erred in determining that Claimant's behavior constituted a refusal to submit to a drug screen. It was also unfair for the Carrier to find that Claimant was insubordinate and quarrelsome. Given the stressful situation in which he was placed, his conduct was understandable.

Opinion

Claimant received a thorough and fair investigation with due notice of the charges, opportunity to defend himself, and representation. There were no procedural deficiencies in the Record.

The Union Pacific Drug and Alcohol Policy states in Rule 16.1.1 and 16.1.4: "An employee is considered to have refused to take a drug test if the employee...fails to provide a urine specimen for any drug test required by the regulations or DOT agency regulations (within three hours.)" Rule 16.3.2 provides: "An employee who is unable to provide a breath or body fluid specimen or specimens will be directed to a licensed

physician who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen for medical evaluation."

In the instant situation, on July 14, 2005, Claimant asked his supervisor if he could take the following day off because his knee was swollen and hurting. Supervisor Fallow also testified credibly that Claimant told him that he had reinjured his knee while on duty. The possibility that Claimant had sustained injury again to his knee constituted reasonable cause for the Carrier to demand that Claimant take a drug and alcohol screen. In other words, the Carrier had the right to determine whether or not there were any additional reasons that may have caused Claimant to be injured. Moreover, Rule 16.3.4 states: "An on-duty employee is required to immediately participate in a drug or alcohol test required by a manager."

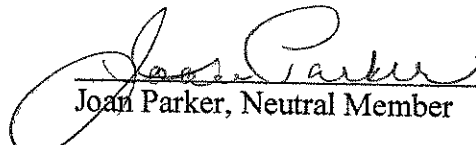
While Claimant tested negative for alcohol, he did not produce a urine sample for testing, even though he was given plenty of time to drink and three hours to provide the specimen. His claim that he felt pressure and intimidation by the interpreter and Supervisor Fallow is not persuasive. Moreover, it was later determined by a licensed physician that there was no medical reason for Claimant's alleged inability to provide a urine sample on July 14.

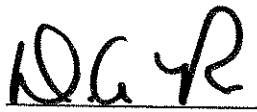
The Board has looked at the proven facts in this matter, and has also considered the appropriateness of the discipline that was imposed. It is undisputed that Claimant had almost forty years of service and an unblemished disciplinary record. While his conduct on July 14 was questionable, the Board has concluded that discharge was too harsh a penalty given Claimant's length of service and his exemplary record.

Therefore, based solely on Claimant's seniority and his clean employment record, he will be reinstated without back pay, provided he is evaluated and found to be fit for service prior to returning to work. This decision is non-precedential and is intended to address only this specific case.

Award

The claim is sustained in part. Claimant shall be reinstated to his former position. His seniority will remain unbroken, but he shall not receive any back pay, and his reinstatement is conditional upon his being evaluated under the EAP and found fit for duty prior to returning to service. This Award shall be considered non-citable and non-precedential and is intended to address only this specific case.


Joan Parker, Neutral Member


Carrier Member

Dated: May 7, 2007


Organization Member

Dated: 5-7-07