

**PUBLIC LAW BOARD NO. 7633**

Case No.: 08/Award No. 08  
System File No.: UP511JF12/1570030  
Claimant: Stephen M. Zaldo

UNION PACIFIC RAILWAY COMPANY )  
 )  
 -and- )  
 )  
 BROTHERHOOD OF MAINTENANCE )  
 OF WAY EMPLOYEES DIVISION )

**Organization's Statement of Claim:**

1. The discipline (withheld from service beginning April 23, 2012 and subsequent dismissal by letter dated June 29, 2012) imposed on Mr. S. Zaldo for alleged violation of Rule 1.5 and the UPRR Drug and Alcohol policy and the Code of Federal Regulations in connection with allegations that Mr. Zaldo refused a UPRR follow-up test on April 23, 2012 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP511JF12/1570030).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Zaldo's record, and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and improper discipline.

**Facts:**

By letter dated May 29, 2012, the Carrier directed the Claimant to appear on June 14, 2012 for “investigation and hearing on charges that you allegedly refused a UPRR follow-up test. The test was administered in accordance with Union Pacific Railroad Drug and Alcohol Policy on April 23, 2012, at Van Horn, Texas, while working as a Track System Foreman.”

The Notice additionally stated that the Claimant had allegedly violated the Carrier's Drug and Alcohol Policy, Rule 1.6 and the Code of Federal Regulations and that the proposed discipline would be Level 5 UPGRADE (permanent dismissal).

**Carrier Position:**

The Claimant was under a leniency agreement as the result of a previous Level 5 UPGRADE permanent dismissal and violated that agreement when he refused a drug test. This serious offense has been shown by substantial evidence, including the testimony of Foreman Dinkins. The Claimant has not proven his affirmative defense that he was detained at a Border Patrol checkpoint. His initials in three places on the leniency agreement show that he understood the terms.

Because the leniency agreement was violated, the Carrier properly reverted the Claimant to a dismissed status. Such action finds support in prior awards. The reversion occurred during the Claimant's probation period, during which he agreed to submit to random drug/alcohol testing. His failure to cooperate and comply with testing instructions constituted insubordination, which has been found to be grounds for dismissal.

The Claimant received his due process rights, including a fair and impartial hearing as required. The Carrier did not have the power to call or subpoena Mr. Dominguez, a non-employee. While the Organization claims that the notice of investigation was vague, the notice contained the charge against the Claimant and thus allowed preparation of a defense. Also, since the Claimant requested the hearing, it must be inferred that he was aware of the violation with which he was charged. Furthermore, since this was not a disciplinary hearing, but a hearing concerned only with the events of April 23, 2012, conducted at the request of the Claimant per FRA 219.104, discipline does not have to be removed because of any lack of proper notice.

The Claimant was not prejudiced when he was taken to a hotel room on April 23, 2012 because the Carrier complied with the standard practice when concerned that an employee is under the influence of alcohol or drugs. There is no on-property practice to support the Organization's claim for food, lodging and mileage in addition to pay for time lost. And, there is no basis for overturning the discipline.

**Organization Position:**

The Organization continues its objection, made at the hearing and in the correspondence that followed, that Rule 22(a) was violated when the Carrier conducted the hearing more than 50 days after April 23, 2012 when the Claimant allegedly refused to submit to random testing. Contractual time limits are referenced in 49 CFR 219.104. Because the Claimant was removed from service, the hearing should have been convened within 20 days rather than 30. Prior awards require that the discipline be set aside because of the time limit violation.

The investigation was not fair and impartial because the Carrier failed to call all relevant witnesses and relied instead on statements, therefore depriving the Organization of the right to cross examine. The Organization was not responsible for securing the witnesses since they were Carrier witnesses and the Carrier had the burden of developing

the relevant facts. As a result, the record contains many unanswered inconsistencies. Prior awards support the Organization's contention that the Carrier's failure to call critical witnesses constitutes critical procedural error requiring dismissal of the charges without consideration of the merits.

The Carrier did not meet the required burden of proof that the Claimant refused to take a drug/alcohol test. Inconsistencies in the record do not prove that the Claimant reported to the job site and then left or that if he did report and then leave, he violated a rule. The Claimant has provided a consistent time line throughout this process as well as reasons why the Dinkins brothers might have said that he was at the job site when he was not. Furthermore, the Claimant was not ordered to take a test by a Manager as required by Rule 16.3.4 of the relevant policy. When the Claimant demanded to take the test, he was refused.

### **Findings:**

It is important to the discussion below to develop the background for this case. On November 29, 2010 the Claimant signed a Waiver/Agreement Letter in which he admitted using a prohibited substance, waived a hearing and accepted dismissal and elected to participate in an Employee Assistance Program (EAP) and a one-time return to service. He further acknowledged the possibility of immediate termination for a violation of the terms of the Waiver/Agreement Letter of a Companion Agreement during the 12-month probation period that would commence upon his return to work. Probation terms included random drug/alcohol testing.

The Claimant returned to service on May 8, 2011 and was on probation on April 23, 2012 when he allegedly refused a drug test and was placed out of service. He was notified of his return to a dismissed status by letter dated May 9, 2012. On May 21, 2012 the Claimant petitioned for a formal investigation, which took place on June 11, 2012. On June 29, 2012 the Carrier informed the Claimant that he had been assessed Level 5 UPGRADE discipline, in other words permanent dismissal.

This is not a case involving the usual investigation and hearing contemplated in Rule 22(a). The Claimant was not directed to attend a hearing because he allegedly violated one or more rules but instead because he petitioned for a hearing per the FRA regulations, having been returned to dismissed status for allegedly refusing to take a drug/alcohol test. The petition is viewed by the Board as the occurrence in this case rather than the date of the alleged refusal to submit to testing. The hearing was conducted 21 days following the date of the Claimant's petition. In light of the rather unique circumstances of this case, the Board does not find a violation of time limits and therefore does not set aside the dismissal because of any such violation.

The Board rejects the Organization's contention that the Claimant did not receive a fair and impartial hearing because Mr. Dominquez, a non-employee, could not be subpoenaed to testify. A careful reading of Mr. Dominquez's written statement reveals that much of that statement relates to what he was told by Foreman Dinkins and Operator

Dinkins. The Dinkins brothers both testified at the hearing and Foreman Dinkins read his written statement into the record. Both were cross examined by the Claimant and his representative, Mr. Finch. Thus the Carrier has provided eyewitness testimony and documentation and has not relied solely on hearsay evidence to prove the charge against the Claimant.

Rule 16.3.4 states that “An on-duty employee is required to immediately participate in a drug or alcohol test required by a manager.” (Carrier Exhibit A). While the Claimant may have been told of the test by Foreman C. Dinkins, the Foreman was relaying instructions from a Manager. Moreover, the refusal to take the test, if proven, violated the leniency agreement.

The question before the Board involves a determination of the Claimant’s whereabouts at approximately 7:30 AM on April 23, 2012. We start with the principle that as a general rule, the credibility determinations of the Hearing Officer are to be respected by the Board. That extends to the testimony of Foreman Dinkins and Operator Dinkins. Both place the Claimant in the yard at about 7:23 AM and both stated that the Claimant left shortly thereafter. There is consistency between the Claimant’s description of his own vehicle and the vehicle that Mr. Dominguez described in his statement as being in the yard at about 7:30 AM. Thus there is credible evidence that places the Claimant in the yard at about 7:30 AM and establishes that he was told of the drug/alcohol test. Then, thereafter he left the yard.

The Claimant may well have been stopped and had his vehicle searched by U.S. Customs and Border Protection (CBP) earlier in the morning on the way to Van Horn but the various calls and text messages from unknown locations do not overcome the Carrier’s evidence that the Claimant first appeared in the yard at 7:30 AM rather than approximately an hour later. This is particularly so because the Claimant has provided no official records from CBP or even written statements from one or more CBP officers that would support his time line.

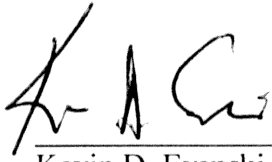
The Board notes that it is not concerned about whether the Claimant did or did not appear under the influence in the yard or that the Claimant ultimately was taken to a hotel room and placed out of service. This is about the Claimant’s leaving the yard to return later—tantamount to refusing to take a drug/alcohol test. The charge has been proven by substantial evidence.

**Award:**

Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
March 10, 2014