

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 168, (Case No. 189)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: January 18, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The discipline (Level 5 - Dismissal) of Mr. J. Q. Ingram for violation of General Code of Operating Rule 1.5 and the UP Drug and Alcohol Policy in connection with violation of the one (1) time return to work agreement signed January 12, 2010 evidenced by a positive drug test administered on September 7, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-528-JF-10/1540190).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Ingram shall be granted remedy in accordance with Rule 21(f) of the Agreement."**

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The facts indicate the Claimant entered the service of the Carrier on July 23, 2003. While employed as a Welder in Beaumont, Texas, he was required to submit to a random FRA drug/alcohol screening test on December 29, 2009, for which he tested positive. Claimant accepted dismissal and was returned to service by a Waiver signed on January 12, 2010. Claimant then entered the Carrier's Employee Assistance Program (EAP). He was released by EAP and returned to service on May 12, 2010. As part of the terms of his Waiver, the Claimant was subject to a 12 month probationary period beginning on the date he returned to service. Paragraph 10 of the Waiver stated that the Claimant was to avoid use of any drugs or alcohol and

if he failed to do so he would be returned to a dismissed status without benefit of formal Hearing except as required by Federal regulations.

As part of his return to work program Claimant was subject to follow-up testing and on September 7, 2010, while working as a BMW Foreman on Gang 3572 he was administered a follow-up test. Claimant tested positive for Amphetamines and Methamphetamines and because of that test he was returned to a dismissed status account of alleged violation of the Waiver Agreement, Rule 1.5 of the General Code of Operating Rules and the UP Drug & Alcohol Policy.

It is the position of the Organization that the Claimant was diagnosed with ADHD, by personal physician Ravikumar Kanneganti, M.D., P.A., who prescribed medication for treatment consisting of Vyvanse, 60MG and Ambien 10 MG. The Organization furnished the Carrier letters from Doctors Kanneganti (September 23, 2010) and Jalali (October 15, 2010) both of which stated that the drug Vyvanse will test positive for amphetamine and methamphetamine. It further argued that at the time of the test, on September 7, 2010, the Claimant told the person administering the test what medications he was taking and because of that notification the MRO was advised of the medications he was taking. Additionally, it asserted there was no evidence presented that the Medical Review Officer (MRO) ever attempted to contact the Claimant about any medicines he was taking that could have resulted in his positive test. It concluded the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant was instructed to write down all medications he was taking at the time of the testing on the back of his chain of custody form to use as a reference later which he did not do. According to it, the Medical Review Officer (MRO) upon receipt of the Claimant's results would have contacted the Claimant to inquire about all prescriptions the Claimant was taking after which Claimant would have had the opportunity to present any information needed by the MRO. The MRO would have reviewed that information and the Claimant's cut off levels and then would have made a medical ruling of whether the test should remain a positive or be changed to a negative. It further argued that the Code of Federal Regulations 49 Part 49.123 charges a certified MRO to determine whether there is a legitimate medical explanation of a positive result. Specifically, CFR 49 Part 40.137 requires a MRO to rule a test negative if an employee is able to present a legitimate medical explanation for his or her positive test and because the Claimant did not present pertinent information during the testing process the test remained positive. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and finds that we have two contradictory stories as to what transpired at the testing site on September 7, 2010, as to whether the test

administrator was advised by the Claimant that he was taking Vyvanase and Ambien. The Organization set forth a definitive statement in its letter of February 4, 2011, that the Claimant notified the tester he was taking the aforementioned drugs, whereas, a close review of the Carrier's final declination reveals that it argued that during the testing process, the Claimant would have been instructed to write down all of the medications he was taking. The latter statement is problematic because it listed the probable and/or likely manner in which a drug and alcohol test should have been administered, but provided no proof as to what was actually done. Whether or not the testing process was properly administered in the field becomes a secondary problem because after the Claimant tested positive the MRO was obligated to contact the Claimant to inquire about all prescriptions he was taking. After being contacted by the MRO the Claimant should of had the opportunity to present information to the MRO explaining why he tested positive. The MRO should have then reviewed that information and the Claimant's cut off level and in accordance with Federal Regulations, the MRO was required to make a medical ruling of whether the test should have remained positive or changed to a negative. There was no evidence and/or statement provided from the MRO that Claimant was contacted and given the opportunity to offer evidence and a reason as to why he may have tested positive. Absent a statement from the MRO we cannot draw a conclusion that the Claimant was offered a chance to present evidence that he was taking drugs for ADHD under the supervision of a physician that would have caused his testing to be positive.

The Board has carefully considered the arguments raised by the parties and we have examined the conditions contained in the Waiver Agreement. It is clear the Claimant agreed to comply with requirements of the Waiver in exchange for conditional reinstatement and there is no argument that he tested positive on September 7, 2010, while still in his probationary period. It is equally clear that the Carrier had the right to enforce the conditions agreed to by the Claimant, however, the Board is not persuaded that the Claimant was provided the opportunity to offer evidence that he was taking medications which according to his un-rebutted medical expertise would show a positive result. As previously stated absent a contradictory statement from the MRO and medical evidence that contradicts his physicians' statements regarding the effects of Vyvanase we are left with a plausible explanation for the Claimant testing positive. Therefore, the Board finds and hold that the return of the Claimant to a dismissed status was in error and Claimant shall be reinstated to service, with seniority intact and benefits unimpaired with full back pay at the straight time rate of pay from September 21, 2010, until restored to service in accordance with Rule 21(f) of the Agreement. Upon return to service the Claimant will be subject to the conditions of the January 12, 2010, Waiver Agreement until he has fulfilled the remaining months, which was approximately eight months, of the 12 month probationary period. The Board also forewarns the Claimant that in the future he needs to be careful to diligently adhere to all Carrier Rules.

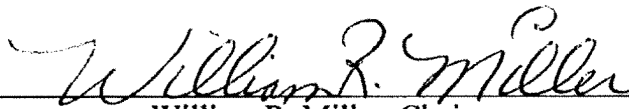
P.L.B. No. 6402

Award No. 168, Case No. 189

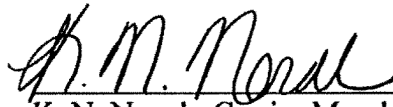
Page 4

AWARD

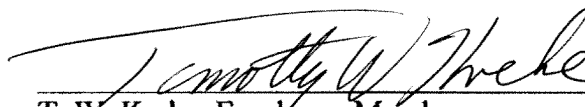
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 4-5-2012