

PUBLIC LAW BOARD NO. 3241

In the Matter of:) National Mediation Board
) Administrator
BROTHERHOOD OF MAINTENANCE OF)
WAY EMPLOYES,)
)
Organization,)
and)
)
UNION PACIFIC RAILROAD) Case No. 59
COMPANY,) Award No. 59
)
Carrier.)

Hearing Date: May 7, 1996
Hearing Location: Sacramento, California
Date of Award: July 22, 1996

MEMBERS OF THE BOARD

Employes' Member: C. F. Foose
Carrier Member: D. A. Ring
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when it dismissed Engineer Pile Driver Mr. J. S. Craven. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired, with pay for all loss suffered and his record cleared of all charges.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

On November 5, 1991, Claimant, an Engineer Pile Driver, tested positive for an illegal narcotic. Since it was Claimant's second positive drug test result, Claimant knowingly waived any right to enter the Carrier's Companion (EAP) Program if he committed another Rule G violation. While the record is unclear if Claimant successfully completed drug rehabilitation treatment following the second positive drug test result, the Carrier, nevertheless, reinstated him to service on May 4, 1992. As a condition of his reinstatement, Claimant was placed in the Carrier's follow up drug testing program that required Claimant to undergo random, unannounced drug screens.

On November 23, 1993, the Carrier subjected Claimant to a follow-up drug test. The collector prepared the restroom for Claimant to provide the urine specimen. Claimant went into the lavatory alone. He returned from the restroom and handed the collector a specimen that was unusually cold. The temperature strip on the specimen bottle displayed 88°. The collector took Claimant's temperature orally. It was normal at 97.5°. Consequently, Claimant was asked to provide a second specimen. The General Foreman accompanied Claimant into the lavatory. However, due to Claimant's position in the toilet stall, the General Foreman did not observe Claimant void. Indeed, the Foreman testified that Claimant seemed to dig for something in his pants and the Foreman thought he heard the sound of liquid spilling. The temperature of the second sample was 88.5°. Again, it was too cold. Claimant returned to the restroom a third

time. This time, the Foreman watched the urine pass directly from Claimant's body into the specimen bottle. The specimen temperature was within the normal range as specified by Federal Railroad Administration Regulations.

Using a reputable laboratory, the Carrier tested all three urine samples. The first two samples tested negative for drugs while the third specimen tested positive for the opiate metabolite.

The Carrier convened an investigation on January 4, 1994, to determine if Claimant had tampered with the first two specimens that he provided to the collector on November 23, 1993.

At the investigation, the Manager of Drug and Alcohol Testing explained that the first two samples tested negative because the urine temperature was extremely low. According to the Manager, the laboratory was also suspicious of the test results because the samples had a low concentration of creatinine. The Manager further expounded that because of the substantial difference between the temperatures of the first two specimens and Claimant's body temperature, the first two specimens were tainted. In addition, the Manager stressed that since the third specimen was within the appropriate temperature range, Claimant must have diluted the first two specimens causing the low concentration of creatinine and thus, skewing the test results.

Claimant asserted that he did not know why the first two specimens were cold. He speculated that since it was cold outside, his urine must also have been cold.

After the investigation, the Carrier dismissed Claimant from service for improperly tampering with a drug test specimen.

In this case, the record does not contain any direct evidence that Claimant diluted the first two samples he provided to the collector on November 23, 1993. No one saw Claimant tamper

with the specimen. Nevertheless, there is a strong amount of circumstantial evidence that Claimant polluted the specimens. Circumstantial evidence is just as probative as direct evidence when the circumstances weave a tight web of guilt around Claimant. Furthermore, Claimant had a motive for tampering with the specimen since the third and untainted urine specimen revealed that he had used an illegal narcotic. Next, Claimant had the opportunity to dilute the sample inasmuch as nobody observed Claimant void the first specimen and his urination was not directly visible to the Foreman when Claimant gave the second sample. Moreover, the General Foreman observed Claimant digging in his pants which raises the inference that Claimant added a foreign substance to his urine. However, the strongest circumstantial evidence against Claimant is the temperature of the third specimen that he gave under the General Foreman's direct observation. The third time, Claimant did not have any chance to tamper with the specimen. Unlike the first two samples, the third specimen was within the proper temperature range and conformed with Claimant's body temperature. Claimant's flimsy excuse, that it was cold outside, neither explains why his body temperature was normal nor why his urine suddenly warmed from 88° to normal within a short time span. Finally, the laboratory's detection of a low concentration of creatinine shows that something was added to the urine to dilute the specimen. The totality of these circumstances constitute substantial evidence that Claimant tampered with the first two samples.

In this case, the Carrier gave Claimant ample opportunity to try to rehabilitate himself. Claimant returned to service after two positive drug test results. To make sure that Claimant fulfilled his promise to be drug free, the Carrier rightly placed him in the follow-up drug testing program. Knowing that he had ingested an illegal narcotic, Claimant attempted to conceal his

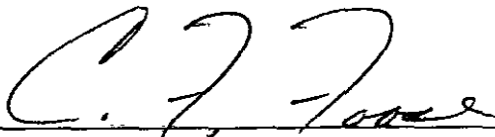
drug usage by tampering with the specimen. Such tampering not only violated his promise to fulfill his obligations under the follow-up drug testing program but it also constituted dishonesty.

Therefore, this Board must uphold the Carrier's decision to dismiss Claimant from service.

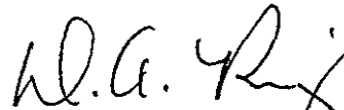
AWARD AND ORDER

Claim denied.

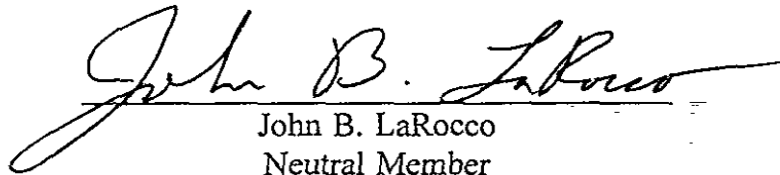
Dated: July 22, 1996



C. F. Foose
Employees' Member



D. A. Ring
Carrier Member



John B. LaRocco
Neutral Member