

PUBLIC LAW BOARD NO. 6159

Case No. 2
Award No. 2
Carrier File No. 1116816
UTU Case No. 240-57-5437.98D
Claimant: C. L. Dischner

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION

AND

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

Appeal of Conductor C. L. Dischner, West Colton Division, for reinstatement to service with seniority unimpaired, and for replacement of wage loss resulting from his suspension from service on November 5, 1997, and his subsequent dismissal from service on December 24, 1997, until returned to service. In addition, we request his wage loss resulting from attending an investigation on December 17, 1997. Finally, we ask that this incident be expunged from Mr. Dischner's personal record.

FINDINGS:

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and the subject matter.

The Claimant was a Conductor on the Los Angeles Division. On May 3, 1995, he was selected for a Dot random drug test. He tested positive for alcohol and was dismissed. On August 25, 1995, he was reinstated on a conditional reinstatement and signed what has become a standard conditional reinstatement agreement. Parts of the agreement included the Claimant's agreement he would abstain from alcohol or other drugs, he would submit to random testing, he would participate in a rehabilitation program, and would be in probationary status for at least two years. At the end of the two years, "the Employee Assistance Manager will make a recommendation to continue or terminate your conditional reinstatement.

In the interim, the Union Pacific acquired the Southern Pacific Railroad Company. The SP employees were given notice on March 1, 1997, that they would now fall under the rules of the Union Pacific Railroad Company. On November 5, 1997, approximately two months after his two year probationary period could have ended, the Claimant was pulled out of service for an unannounced "follow-up" test. He tested positive for alcohol and was charged. Following the formal investigation which was held on December 17, 1997, the Claimant was permanently removed from service.

CARRIER'S POSITION

The Carrier suggests the issues to be decided in this case are: 1) Did the Claimant have a measurable amount of alcohol in his system while on duty at Genco, California on November 5, 1997? 2) Provided Issue 1 is answered in the affirmative, under these circumstances, was Carrier's dismissal of Claimant reasonable and properly within the discretion and prerogative of management to discipline its employees? They assert the answer is yes in both cases.

The Carrier argues that the Claimant was subject to follow-up testing. At no time, they contend, was the Claimant removed from his probationary status. His conditional reinstatement agreement provided that his probationary status would continue at least two years. At no time did the Carrier advise him that his probationary status was terminated. Furthermore, all employees were notified on March 1, 1997, that they would be covered under the rules of the Union Pacific Railroad Company. Those rules automatically set the follow-up testing period for conditional reinstatements following drug abuse at three years. The Carrier asserts that at no time during the testing did the Claimant indicate he was not eligible for the testing. In addition, he knew it was a follow up because he was the only one tested.

The Claimant was discharged for violating Rule 1.5. The Carrier insists the current rule infraction happened less than three years after the first. The Claimant, they assert, admitted to having an alcohol problem, and a second offense within a ten year period warrants dismissal under the Union Pacific Railroad's policy.

ORGANIZATION'S POSITION

The Organization points out that while the Carrier did not terminate the probationary period, they did not notify the Claimant that it was extended. They proffer the agreement which provided that the Employee Assistance Manager would make a recommendation after the two year period on whether to extend or end the conditional reinstatement. The Organization asserts that when the Claimant heard nothing, he had every reason to believe

he was no longer in a conditional status. Therefore, they insist, the Carrier had no prerogative to conduct an unannounced follow-up test. They argue that this test should be disregarded since it was not a proper test.

The Organization also argues that the Carrier's contention that the Union Pacific policy supersedes the bilateral agreement between the Claimant and Southern Pacific is flawed. They assert, the Carrier cannot place new conditions on an agreement that was signed nearly two years before. When the Union Pacific acquired the SP, they took on all its obligations, including the agreement with the Claimant.

The Organization also contends the Carrier prejudged the Claimant when they withdrew any opportunity for him to use the EAP to correct his condition and seek reinstatement. Added to this, they argue, was a flawed transcript of the hearing. The Carrier did not provide a complete and accurate transcript which could have been reviewed by the Board, which is a fatal error.

The Organization also argues that the test and the equipment used were flawed and cannot be trusted to be accurate.

Finally, the Organization asks the Board to consider the Claimant's statement at hearing. They point out that the Claimant believes a better rehabilitation program would have prevented his recidivism. They also believe the Claimant shows remorse, believes he is a good employee and wants the chance to prove himself with one last chance.

DECISION

This Board has reviewed the record and believes the Carrier was within its rights to test the Claimant for a follow-up test. Any question in this regard must be decided in favor of the Carrier. Admittedly the Claimant did not receive word that he was being continued on conditional status, however, he was not told he was returned to regular employment status. If he had any doubts, he should have asked his EA Counselor or contact.

What's even more damning to the Claimant is the fact that he apparently abstained from alcohol use during his two years, but, once he allegedly thought he was clear of these follow-up tests he once again began drinking. While his rehabilitation program may not have been as good as the one he participated in most recently, it was good enough to keep him sober for over two years. At some point, an employee must assume responsibility for his/her own behavior. It doesn't matter, that no one has been injured on his crews in 28 years, he may have been just lucky if he reported to work with measurable alcohol in his system at any time. The reason for the rule is to protect the safety of employees and prevent unnecessary damage to property.

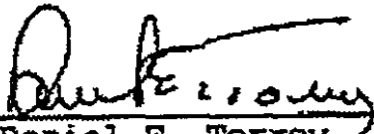
One troublesome question for this Board is whether the Claimant's 28 years of service is a mitigating factor. Certainly, the Claimant is approaching the time in his life when he will have difficulty obtaining other employment. Furthermore, his record, except for these two incidents, appears to be very good. There are only two other disciplinary actions on his record; for one he was counseled and for the other he received a Letter of Reprimand. Those both happened in 1991. For these reasons, the Board does feel the Claimant deserves another chance. However, he should be aware that this will be a conditional last chance reinstatement, without pay, but, with his seniority unimpaired. This Board proposes no time limits on the Carrier's right to subject the Claimant to unannounced follow-up drug/alcohol tests.

AWARD

The claim is sustained to the extent outlined above.



Carol P. Camperini
Chairman and Neutral Member



Daniel E. Torrey
Carrier Member



J. Kevin Klein
Employee Member

This 29 day of January, 1999.
Denver, Colorado