NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 139
and	)
	) Award No. 124
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: February 7, 2008

STATEMENT OF CLAIM:

(1) The discipline assessment (dismissal) issued to Mr. D. L. Tyler in connection with a violation of Rule 1.5, a violation of Carrier's Drug and Alcohol Policy and a violation of Items 8 and 9 of the "conditions for Return to Service and Remaining in Service" agreement he signed on July 15, 1998 when he tested positive for an illegal substance in a drug screen administered on August 7, 2006 was without justifiable reason.

(2) As a consequence of the violation referred to in Part (1) above, the Organization requested that Claimant be immediately reinstated to service with all seniority, vacation and Agreement rights unimpaired. That he be compensated for all time lost from the date of removal from service including all straight time and overtime hours he would have worked.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

On August 26, 2006, Claimant was directed to report for an investigation on September 22, 2006, concerning his alleged positive test for an illegal substance on June 5, 2006, it being his second positive within ten years. On September 17, 2006, Carrier sent a corrected letter of charges, changing the date of the alleged positive drug test to August 7, 2006. The hearing was

held as scheduled. On October 9, 2006, Claimant was advised that he had been found guilty of the charge and dismissed from service.

The record reflects that on August 7, 2006, as part of a physical examination in connection with the process of being certified as a crane operator, Claimant was administered a drug test. Claimant tested positive for marijuana. Claimant had previously tested positive for illegal drugs on June 26, 1998. On July 15, 1998, he signed a one-time return to service agreement wherein he agreed, among other things, to remain drug free indefinitely upon return to service and to avoid any violation of Company rules with reference to drugs or alcohol. In practice, these conditions on return to service operate to deny a second chance to any employee who has a second positive drug test in the ten years following his return to service.

The Organization contends that Claimant's due process rights under Agreement Rule 48 were violated because the original notice charged that the test was administered on June 5, 2006, and both the original and corrected notices charged that the test was administered in a Carrier Health Van when in fact it was administered in a clinic. We do not agree. The corrected notice fixed the error with respect to the date and there is no evidence that Claimant was prejudiced by the typographical error. Indeed, at the hearing, when the Organization objected to the late correction of the date of the test, the hearing officer offered Claimant and his representative a recess if they required additional time to prepare in light of the change in the date in the charges. Claimant and his representative declined the offer. Furthermore, there is no evidence of any prejudice to Claimant by the indication in the notice of charges that the test was administered in a health van instead of a clinic. Claimant certainly knew where the test was administered.

We further find no irregularities in the testing that would call the test result into question. The Organization observed that the test report erroneously classified the test as a random drug screen when, in fact, it was part of a physical exam in connection with certification as a crane operator. We fail to see how this impugns the accuracy of the test result. The Organization also objects that the split sample was not tested but the record does not establish that Claimant made a timely written request to have the split sample tested. We conclude that Carrier proved the charges by substantial evidence.

We turn to the discipline imposed. The Organization attacks the penalty of dismissal as excessively harsh, particularly in light of the eight years that passed since Claimant's prior positive test, testimony from his supervisor that he always reported timely and sober, and Claimant's 32 years of service. However, in his return to service agreement, Claimant agreed to remain drug free indefinitely and the practice on this property is to interpret that agreement to preclude a second chance where there is a second positive drug test within ten years of the first one. We lack the authority to rewrite the parties' agreement and overturning the discipline would do just that.

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AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring
Carrier Member

T. W. Kreke, Employee Member
Employee Member

Dated at Chicago, Illinois, May 31, 2008