

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7437**

**AWARD NO. 1, (Case No. 1)**

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

**vs**

**THE ALTON & SOUTHERN RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: September 22, 2010

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

1. The discipline (dismissal) imposed upon Mr. D. Hayes by letter dated January 18, 2010, for alleged violation of Rule 1.5 of the General Code of Operating Rules and The Alton & Southern Railway Company's (A&S) Drug and Alcohol Policy in connection with alleged refusal to take an A&S follow-up alcohol test on January 14, 2010, at East St. Louis, Illinois, was unjust, on the basis of unproven charges and in violation of the Agreement (Carrier's File 1529505).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Hayes shall now receive the remedy prescribed by the parties in Rule 20(d)."

**FINDINGS:**

Public Law Board No. 7437, 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 instant case concerns the Claimant who tested positive for drugs and/or alcohol while on company property and in accordance with the Carrier's Companion Agreement, he was offered the opportunity to participate in a 12 month rehabilitation and education program. Claimant accepted the Carrier's offer to enter the program on July 24, 2009. The Agreement he signed required him to fully participate for 12 months and if he withdrew or was removed from it, the Agreement stated he would be returned to the status of a dismissed employee without any further disciplinary proceedings.

Claimant was returned to service on September 14, 2009, and was subject to the Leniency Agreement he signed on July 24th, and as part of the treatment program he was subject to random drug and alcohol testing for a period of 12 months following his return to service.

It is the Organization's position that the Carrier erred in returning the Claimant to a dismissed status for alleged refusal to provide an adequate alcohol breathalyzer sample on January 14, 2009, which according to it was no fault of his, but instead was the result of a faulty breathalyzer machine's malfunction.

It argued that the breathalyzer in question yielded an inconclusive "NOGO" result six times and the Test Administrator took no remedial action to attempt procurement of a different conclusive result. It further argued he only took such action, in the course of testing the next employee in line, who vouched that the Test Administrator admitted that he did not know what was going on with the breathalyzer when it ceased working altogether in the next employee's presence.

It pointed out that the Claimant was tested in an effort to see if his inconclusive test results were due to some physical incapacity of his to give an adequate breath that was readable by the breathalyzer in question. The doctor concluded that there was nothing wrong with the Claimant to prevent him from giving an adequate breath sample, therefore, it reasoned that the machine should have been tested as well and at the very least he should have been retested after the battery had been changed in the machine. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant refused on six occasions to provide an adequate sample to a breathalyzer machine, which was a requirement of his return to service treatment program. It argued that the Test Administrator provided the Claimant an additional three opportunities (six total) and he still failed blow hard enough into the machine for an adequate sample to register. It reasoned that he purposely did not blow hard enough.

The Carrier further argued that the Claimant did not object to his failure to provide an adequate sample at the time he was removed from service and it was only after another employee told him the machine had a problem in a later breathalyzer test did the Claimant assert the issue was with the equipment and not his lack of cooperation. The Carrier asserted that no technical proof was offered by the Organization that the machine malfunctioned and in fact its Tester of the Claimant stated the machine was fine and the changing of the battery after the Claimant was tested was routine and is no proof that the machine did not properly function. It asked that the Claimant's status remain that of a dismissed employee and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that the issue in dispute is whether or not the Carrier satisfied its burden of proof in returning the Claimant to a dismissed

status for an alleged refusal to provide an adequate alcohol breathalyzer sample. The Organization argued that the "breathalyzer machine" malfunctioned which was verified by another employee (S. Maloata) immediately following the Claimant that noted that the Tester was allegedly having problems with the breathalyzer and was required to change its battery. After the Organization made the assertion that the machine malfunctioned, the Carrier contacted the Tester, Paul Deason, who responded in writing in regards to the testing of the Claimant. He stated in pertinent part the following:

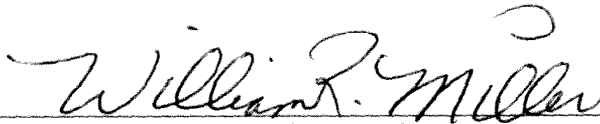
**"...The donor that followed Mr. Hayes noticed that I changed the batteries with his test. I did this because the BAT was illuminated on the AS-IV. Noted in the instruction manual "BAT: The 9-volt alkaline battery should be changed. If this display is followed by normal operations, the battery must be installed. Good practice demands that the battery be changed at the end of the first test where "BAT" appears." The BAT appeared first on test #0870 not on test #0868 and #0869. The machine was working functionally normal during Mr. Hayes' tests." (Underlining Boards emphasis)**

The record substantiates that the Tester, P. Deason, completed the Alpha Pro Solutions Breath Alcohol Technicians CBT Training Course. Additionally, it indicates that he was certified by Intoximeters, Inc. as a Factory Authorized Calibration Technician and is recognized by the Gateway Regional Medical Center as a regional Certified Professional Collector Trainer. There is nothing to indicate that Deason had any reason to make an inaccurate description of the circumstances surrounding the testing of Claimant and the un-refuted record further verifies that employee S. Maloata was not in the room when the Claimant was tested. Claimant's tests were #0868 and #0869 and it was reported the machine functioned normally during those tests. It is also clear that at the time of the testing the Claimant took no exception to the machine's functionality.

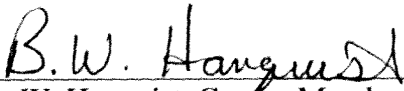
Based upon the Tester's confirmation that the machine did not malfunction during the Claimant's testing, coupled with the fact that a doctor examined him and determined there were no medical reasons as why he could not have activated the machine the Carrier reasonably concluded that the Claimant purposely failed to provide an adequate sample for testing purposes. Therefore, the Board finds and holds that the Claimant failed to comply with the terms of his Reinstatement Agreement and he was properly returned to a dismissed status in accordance with the parties Prevention Program Companion Agreement.

**AWARD**

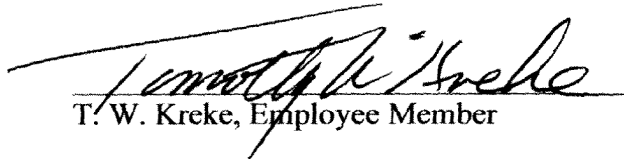
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Nov 23, 2010