

PUBLIC LAW BOARD NO. 7633

Parties to Dispute:

Brotherhood of Maintenance of Way Employees)

Division – IBT)

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Award No. 185

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and

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Union Pacific Railroad Company (former)

Missouri Pacific Railroad Company))

Statement of Claim: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. R. Hadnot, by letter dated September 4, 2020, for an alleged violation of Rule 1.5: Drugs and Alcohol was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP517JF2020/ 1742939 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant R. Hadnot have:

“...the discipline of dismissal to be removed from the Claimant’s Personnel Record. Also, to be paid and compensated for any and (sic) lost time at the Claimant’s respective straight time rate of pay, and any and all overtime to be paid at his respective overtime rate of pay that the Gang the Claimant was assigned to and the employee performing the Claimant’s highly recognized work the Carrier afforded the opportunity for had the Claimant not been unjustly and excessively disciplined.

Also, to be returned to active service with all seniority unimpaired, to include any and all holidays, and all lost time to be credited to Railroad Retirement, hospitalization to include physician office visits, dental, prescriptions and vision beginning September 17, 2020 through and including on a continuous basis until this matter is settled. Also, to include any and all expenditures the Claimant may have acquired to include meals, lodging and mileage at the negotiated rate of (sic) \$.58 cents a mile from Mr. Hill’s (sic) place of residence, 8715 Roaring Point, Houston, Texas 77088-8028 to the Holiday Inn, 1311 Wet and Wild Way, Arlington, Texas

and returning to the Claimant's place of residence for his attendance at the Formal Investigation held on August 17, 202 (sic), account the Carrier unjustly and excessively charged and disciplined the Claimant without sufficient supportive evidence forcing Mr. Hadnot in a worse position. Causing him financial hardship.

* * *

We now request that all charges be dismissed, the discipline of dismissal be removed, the Claimant be returned to active service immediately and the Claimant be paid and compensated as outlined in the first paragraph of this letter in addition to any and all other compensation the Claimant may have received for the before mentioned date and continuing.

The Organization also requests that within such time in which the Claimant is reinstated to active service he would not be subject to any additional probation under the Current Union Pacific MAPS Policy, specifically "Rule 3.7 Arbitration Decision" in which case the Carrier can revert the employee's status to a second triggering/training event with a thirty-six (36) month retention period." (Employees' Exhibit 'A-2')

Findings

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934; the Board has jurisdiction of the dispute herein; and the parties were given due notice of hearing and participated.

Following an investigation, on September 4, 2020 the Claimant was permanently dismissed from service and found guilty of the following:

"On 07/17/2020 UPRR received notice that on 07/03/2020, while employed as a Front End Loader Operator, you allegedly refused a UP Reasonable Cause test. The test was triggered pursuant to Union Pacific Railroad (UPRR) Drug and Alcohol at 701 Le Blanc, Port Allen, LA.

1.5 Drugs and Alcohol"

The Organization appealed the dismissal and that appeal was denied. The parties were otherwise unable to resolve the dispute through a conference and it is now pending before the Board for a final and binding resolution.

Claimant Hadnot has been employed by the Carrier for 28 years. The Claimant has no record of current discipline nor any evidence of any prior drug or alcohol abuse. The record reveals that since 2002, the Claimant has taken random drug and alcohol testing with no positive results.

On July 3, 2020, the Claimant was involved in an accident where Carrier equipment was damaged in excess of the FRA regulations of \$10,700.00. The Claimant was not charged with culpability for the accident. However, he was required to undergo a “reasonable cause” drug and alcohol test that day. He submitted to a breathalyzer (BAT) test for alcohol, which was negative. However, he did not provide a urine sample. He claimed that he had recently urinated and he was unable to provide a sample, despite drinking the requisite 40 ounces of water over a three hour period. He was released and returned to work, but with written instructions to contact the Carrier’s Medical Director so that he could be directed to a licensed physician to evaluate whether a medical condition prevented him from providing a urine sample.

There is no dispute that the Claimant complied with the instructions pursuant to the Carrier’s Drug and Alcohol Policy. He was evaluated by a licensed provider on July 9, 2020. He was also drug-tested on July 9, 2020 and those test results were negative. The Claimant had been treated since at least May 15, 2020 for bladder problems diagnosed on that date as benign prostatic hypertrophy. On July 9 the doctor provided notes about further treatment for this condition.

On July 17, 2020, the MRO (Medical Review Officer) advised the Carrier that the status of the Claimant’s drug test was “Refusal to Test – Shy Bladder Evaluation without adequate medical basis.” A refusal to test is handled the same as a verified positive test, under the Carrier’s policy. Claimant was removed from service that day.

The Carrier’s Drug and Alcohol Policy is based in large part upon the requirements of Title 49 of the Code of Federal Regulations. In relevant part, Section 18.2 of the Policy states:

- The MRO will make the final decision after receiving documentation from the medical evaluator. If the MRO decides the employee had a legitimate reason for the shy bladder the employee will be immediately reinstated if out of service.
- If the MRO determines the test to be a refusal, no legitimate medical explanation found, the employee is subject to discipline up to and including dismissal and disqualified from any FRA regular service for a period of nine (9) months.”

Section 22.3 of the policy provides that discipline up to and including dismissal may result if it is determined that an employee violated the Policy and also states that refusing a drug or alcohol test is a level 5 dismissal. The Carrier’s MAPS policy also states that termination is the penalty for a violation of Rule 1.5.

The Carrier maintains that it has met its burden of proof by substantial evidence. The Claimant failed to provide an adequate specimen for the reasonable cause drug test. The Carrier’s MRO determined he had engaged in a “refusal to test” under the Carrier’s policy and governing regulations because his “shy bladder” claim was found to be “without adequate medical basis.” The Carrier argues that the Claimant’s medical condition is a “red herring” and Claimant’s own documents show that his medical condition had resolved. In the Carrier’s view, the discipline was warranted under the Carrier’s Drug and Alcohol Policy which regards an inability to provide a sufficient sample as a “refusal” subject to dismissal, citing arbitral precedent upholding dismissal in situations similar to the Claimant’s.

The Carrier maintains there was no denial of due process, and that the Claimant received a fair and impartial hearing. The Organization's procedural arguments have no merit and the dismissal should stand.

The Organization contends that the Carrier's burden was to prove that Claimant used or possessed drugs or alcohol that may have impeded his safe performance of the job and the Carrier's evidence fails to meet that burden. The Claimant was not removed from service on the day of the incident and his supervisor testified that the Claimant was not showing any signs of impairment. The Claimant was diagnosed with a medical condition that predated his testing on July 3, 2020. The Claimant at no time refused to test. The Organization argues that MRO Hellings' one sentence determination that an adequate medical basis did not exist for Claimant's inability to produce an adequate sample is not sufficient to support the Carrier's substantial evidence burden of proof for a long-term employee.

Moreover, the Organization argues that the Claimant was not provided a fair and impartial hearing when the Carrier failed to put the Claimant on notice of the "precise charges" that were being levied against him. The Claimant was not charged with a violation of the Carrier's Drug and Alcohol Policy, but with a violation of GCOR Rule 1.5. This was an improper expansion of the charges, under Rule 22 (c)(1). The Organization also objects to the telephonic testimony of Carrier witness McMillan that denied the Claimant the opportunity to face his accuser.

The Board has carefully reviewed the entire record and all the arguments advanced by the parties and concludes that the Organization's procedural arguments do not provide a basis for sustaining the claim. However, the Board concludes that the Carrier has failed to meet its burden of proof. In addition, we find the penalty of dismissal to be arbitrary and not justified by the circumstances of this case.

Documentary evidence in the file corroborates the Claimant's testimony that he had a medical condition, the symptoms of which include obstructions to urinating and problems with emptying his bladder. The records show that he was being treated for this condition since at least May 15 of 2020, or about six weeks before the testing incident at issue here. Although the Carrier argues that his medical records show that his difficulty in urinating had been "resolved," there is other evidence in his medical records that treatment for his medical condition causing these symptoms was ongoing, including evidence of additional medical testing, treatment and medication prescribed for it.

The record is devoid of the evidence that the Medical Review Officer relied upon to conclude that there was no medical evidence sufficient to justify an exemption. Under these circumstances, the unexplained conclusion of the MRO does not support the Carrier's burden, at least with regard to a long-term employee with no history of a drug problem, no history of refusing drug tests and a documented medical condition affecting his ability to urinate. As stated in PLB 7660, Aw. 189 (Newman, Arb.),

“Although Carrier is bound to follow the decision of its MRO, when it dismisses a 23-year employee solely on a one-line conclusion that the “shy bladder evidence was without medical basis” it must be able to establish that there are facts supporting such determination if challenged... when such refusal is based on a possible medical condition, and the employee follows the required procedures, fundamental fairness dictates that the information upon which the conclusion is based be made available...”

We understand the Carrier’s desire to apply the Policy consistently to all employees, and to uniformly accept the MRO’s simple conclusion about whether an employee’s shy bladder has a medical basis. However, under the just cause standard, there are individual circumstances which require a fuller explanation in order to meet the Carrier’s burden of providing substantial evidence of the violation and a fair penalty. Under the circumstances present here we conclude that the penalty of dismissal is unduly harsh.

There was no evidence that the Claimant, a 28-year employee, was impaired in any way on July 3rd, according to the testimony of the Carrier’s witness. Nor is there any evidence that he had any history of alcohol or drug abuse. These factors set the Claimant’s case apart from cases cited by the Carrier. The triggering event for testing was the accident and damage to the Carrier’s equipment that exceeded the FRA threshold, an event for which the Claimant was not charged.

The evidence was uncontroverted that Claimant has undergone many random drug tests and has never had a positive test result. There is no evidence that the Claimant actively refused to take the drug test. He complied by taking the BAT test, which was negative. He testified that he simply could not supply urine for testing. The Claimant complied with all Carrier instructions during and after the test and underwent the medical evaluation. There is evidence in the record that his failure may have been related to a medical condition and the Carrier has not presented any evidence of the information on which the MRO based their conclusion that the Claimant’s shy bladder on the day in question was not medically based. Under these circumstances, the Claimant shall be reinstated and made whole for all backpay, except to the extent that there was any period when he was legally prohibited from working.

AWARD

The claim is sustained. The Claimant shall be reinstated and made whole for all backpay and other losses resulting from his dismissal, other than any period during which he was legally prohibited from working. The Carrier is directed to comply with this Award on or before 30 days following the date by which any two members of the Board have affixed their signatures hereto.

Signature 

Jeanne M. Vonhof
Neutral Member



John Schlismann
Employee Member
Date: November 22, 2023



Chris Bogenteif
Carrier Member
Date: 11/27/2023