

Public Law Board No. 7633

PARTIES **) Brotherhood of Maintenance of Way Employes Division**
) – IBT Rail Conference
TO **)**
) and
DISPUTE **)**
)
) Union Pacific Railroad Company (former Missouri Pacific
) Railroad Company)

Board Members:

Jeanne M. Vonhof, Chairman and Neutral Member
Chris Bogenreif, Carrier Member
John Schlismann, Employee Member

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. S. Kelly, by letter dated June 8, 2021, for an alleged violation of Rule 1.5: Drugs and Alcohol and Rule 1.6: Conduct – Insubordinate was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP510KL21/1760236 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Claimant S. Kelly shall now:

 ‘... be allowed to return to work with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of June 08, 2021, be removed from his personal record, that he be made whole for all time lost due to discipline issued in connection with these charges, and that he be reimbursed for an additional expenses, including those requested in the May 27, 2021

hearing, incurred that would have normally been covered by Carrier benefits, account the Carrier violated Rule 22, of the Agreement.

* * *

*** We are requesting that Mr. Kelly be afforded the opportunity to get retested. Also, he should be compensated for all lost wages, vacation, and other expenses he has occurred during the time he has been out of work, not limited to travel expenses, medical expenses and any items lost due to being out of work such as his home, vehicles or any item lost due to his unemployment.’ (Employees’ Exhibit ‘A-2’).”

Findings of the Board

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended and that the Board has jurisdiction over this dispute.

The Claimant, Sammy D. Kelly, was provided with notice that he was being investigated to determine his responsibility for allegedly refusing an FRA Random Test on May 19, 2021, under the UPRR Drug and Alcohol Policy. The investigation was held on May 21, 2021, and, via letter dated June 8, 2021, the Claimant was dismissed. The Carrier concluded from the evidence provided at the investigation that Claimant refused the test in violation of MWOR 1.5 Drugs and Alcohol and MWOR 1.6 Conduct – Insubordinate.

The Claimant was instructed to take a follow-up drug and alcohol test on May 18, 2021, after a random screening he had taken on May 7 provided results which were “inconclusive.” He was ordered to participate in an observed test. The protocol for such a test requires the employee to be observed with his pants pulled down below his knees, his shirt pulled up, and slowly rotating his body, so that the observer can be certain that he does not have any hidden source of urine. According to the report and testimony of Collection Agent Tom Scott, who works for Midland Testing Services, the Claimant asked him if Scott could observe the urine coming out of the Claimant’s penis, without him lowering his pants, and Scott replied that he could not do so. Scott stated that after about a five-minute standoff, the Claimant then told him that Claimant had someone else’s urine on him. The Collection Agent said that he then consulted his manager and then had the Claimant follow him to MTO Kurt Bigler’s office, where Scott reported the incident. Scott testified during the investigation, reporting the same sequence of events as he described in his written report.

The Organization objected to certain procedures involved in administering the test. The Organization argued that the Claimant’s privacy was not protected while he was asked to provide a sample, in contravention of the testing policies. Scott testified that the bathroom was very small,

and he stood in the doorway, blocking it, so that no one could enter while the testing was ongoing. He also testified that there was only one other person present in the building, the Manager on Duty, Mr. Kurt Bigler, who was in his office. Scott testified that the Claimant did not state during the testing that he was refusing to provide a sample because of lack of a privacy. However, the Board concludes that there were no procedural problems with the testing that were so significant that they justify the Claimant's failure to test.

The Claimant testified that he never told Scott that he had a bag of someone else's urine on him. Scott said that he did not collect any receptacle of urine from the Claimant and that the Claimant never lowered his pants. However, Scott said that he reported the Claimant's statement that he had someone else's urine with him to Bigler in the presence of the Claimant immediately after the attempted test. Bigler testified that he had Scott repeat this statement twice and the Claimant did not deny at the time that he had a bag of someone else's urine on him.

The Claimant testified during the investigation that he was sexually abused as a child and when he was ordered to perform the observed test, he began having a panic attack. He said that although he remembers following Scott to Bigler's office, he does not remember anything they said. He said that he did not hear Scott tell Bigler that Claimant had told him that he had a bag of someone else's urine with him at the test.

The Board has no reason to disbelieve the Claimant's testimony about childhood abuse. However, it is difficult to see how that would explain why he told the Collection Agent that he had a bag of someone else's urine on him. There is no convincing reason for the Collection Agent, who does not even work directly for UP, to fabricate such a claim.

Under the UP Policy covering Drug and Alcohol testing, the procedures are generally determined by federal regulations for these federally-mandated tests. Under the UP policy, the employee is deemed to have refused to take the test if he,

“For an observed collection, fails to follow observer's instructions or to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.”

In addition, under the policy, the employee is considered to have refused to test if he is found to be “tampering or attempting to tamper, with a sample in order to prevent a valid test (e.g. through substitution, dilution or adulteration)…” Furthermore, an employee “possessing...a specimen substitution ... on company property will be considered to have refused testing.” Employees who refuse to test are subject to discipline for insubordination, under Union Pacific rules.

The Board concludes that there is substantial evidence that the Claimant violated MWOR 1.5 Drugs and Alcohol and the UP Drugs and Alcohol Policy, when he attempted to tamper with the sample in order to prevent a valid test. There is also substantial evidence that the Claimant

violated MWOR 1.6 – Insubordinate, because his actions constitute a refusal to test, under the procedures of the program. Failure to take a required drug and alcohol screen is a very serious rule violation in the railroad industry, as the safety operation of equipment in the industry is highly-regulated, and the Carrier has an important interest in ensuring that its employees are working drug-free. The Board cannot conclude, on this record, that the penalty of dismissal was arbitrary or excessive.

Award

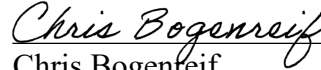
Claim denied.



Jeanne M. Vonhof
Neutral Board Member



John Schlismann
Employee Member



Chris Bogenreif
Carrier Member

Dated: July 11, 2024