

**PUBLIC LAW BOARD NO. 7633**

Case No.: 34/Award No.: 32  
System File No.: UP514JF13/1589277 MPR  
Claimant: R. L. Vincent, Sr.

UNION PACIFIC RAILWAY COMPANY )  
 )  
 -and- )  
 )  
 BROTHERHOOD OF MAINTENANCE )  
 OF WAY EMPLOYEES DIVISION )

**Organization's Statement of Claim:**

1. The discipline (dismissal) imposed on Mr. R. Vincent, Sr., by letter dated June 28, 2013, for alleged violation of Union Pacific Railroad (UPRR) Drug and Alcohol Policy and the General Code of Operating Rules (Rule 1.5) in connection with an alleged positive substance test on June 12, 2013 was without just and sufficient cause, unwarranted and in violation of the Agreement.
2. As a consequence of the Carrier's violation referred to in Part 1 above, Mr. Vincent, Sr. must now be compensated for all losses suffered as a result of the Carrier's unjust discipline and afforded any other remedy prescribed by Rule 22(f).

**Facts:**

By letter dated June 17, 2013, the Claimant was directed to attend an investigation and hearing on June 20, 2013 “on charges that you allegedly tested positive for a prohibited substance (Alcohol) in a Union Pacific Railroad (UPRR) follow-up test. The test was administered to you in accordance with UPRR Drug and Alcohol Policy at 0800 hours, on June 12, 2013, at Bryan, Texas, while you were working as a Trackman.” The Notice of Formal Investigation further indicated that the Claimant could be found in violation of the General Code of Operating Rules (GCOR), Rule 1.5 and that the proposed discipline under the UPGRADE policy was a Level 5, dismissal. The Notice confirmed that the Claimant was being withheld from service pending the investigation.

**Carrier Position:**

The Carrier has shown by substantial evidence, including the Claimant's admission, that he tested positive for alcohol. This was his second positive test in less than 10 years and there were no persuasive arguments advanced to mitigate the violation. The violation was serious.

particularly in an industry where safety is paramount and employees cannot work while under the influence of drugs or alcohol. Prior on-property awards confirm the appropriateness of the dismissal, which came after the Claimant received a fair and impartial hearing. The test showed a positive result obtained from a properly tested and calibrated device. The Breath Alcohol Technician was properly certified. There were no egregious errors that would require discipline to be set aside.

**Organization Position:**

The calibration records are inadmissible because they were submitted after the investigation, which is against the requirement that the Claimant receive a fair and impartial hearing. The inadmissible evidence means that the Carrier cannot establish that the Breathalyzer used to test the Claimant was functioning properly; thus the burden of proof has not been met. Even assuming that the Carrier has met the burden, dismissal is excessive because it is punitive rather than rehabilitative.

**Findings:**

The Board has not considered the calibration evidence submitted with K. N. Novak's August 20, 2013 reply to Jeffrey Finch's claim on Mr. Vincent's behalf because that evidence was not produced during the investigation and because there is ample precedent for excluding post-investigation evidence in order to protect the Claimant's right to a fair and impartial hearing. However, that determination changes nothing. In February 2010 the Claimant tested positive for marijuana. He took advantage of the opportunity to waive his right to a formal hearing and in lieu of dismissal elected to participate in an employee assistance education and rehabilitation program and thus to avail himself of a one-time return to service, knowing that a second positive test for drugs or alcohol within 10 years would result in dismissal.

Just over three years later, on June 12, 2013, the Claimant tested positive for alcohol. The Breath Alcohol Technician who administered the breathalyzer test was properly certified. The air blank tests performed on the testing instrument, with the air blank tests made known during the investigation, show proper calibration and the test and retest were administered in accordance with proper protocol. The Claimant's closing statement at the investigation can only be read as an implicit admission that there was alcohol in his system when he was tested. The 10-year rule is very clear and the awards submitted by the Organization have not convinced the Board that there is any basis for setting aside the dismissal. This is an industry in which safety must be paramount and in which employees must not work when their judgment and ability might be impaired by either legal or illegal substances.

**Award:**

Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



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Andrew Mulford, Organization Member



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Katherine N. Novak, Carrier Member



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I. B. Helburn, Neutral Referee

Austin, Texas  
April 15, 2015