

PUBLIC LAW BOARD NO. 7660
CASE NO. 16

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant J. Read by letter dated August 6, 2013, in connection with allegations that he violated the UPRR Drug and Alcohol Policy and GCOR Rule 1.5 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1348U-201/1591861 UPS).
2. As a consequence of the Carrier’s violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant J. Read’s personal record, fully reinstate him along with all vacation, insurance and retirement benefits, along with compensation for all straight and overtime work opportunities missed as a result of the inappropriate discipline and any other relief under Rule 48(h).”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was an Assistant Foreman in Denver, Colorado, who had entered service in November, 1991. The June 21, 2013 Notice of Hearing charges Claimant with violating Carrier's Drug & Alcohol Policy and Rule G (1.5) by having a positive result in a June 18, 2013 Breath Analyzer Test (BAT) which was a follow-up alcohol test conducted under the terms of his September 1, 2011 Waiver Agreement and One Time Return to Service. The August 6, 2013 Notice of Discipline finds him guilty of the charges and assesses him a Level 5 dismissal. The instant appeal resulted.

There is no dispute that Claimant signed a Waiver Agreement on September 1, 2011 after having tested positive for alcohol, and returned to work being subject to the terms of the Waiver including follow-up testing for a 60 month period. The July 25, 2013 Investigation reveals that Claimant reported to work at 6:00 A.M. on June 18, 2013, put up the Form B boards and went to breakfast with his Foreman, had a job briefing with his men and was then taken by a Supervisor to the Denver shop for a follow-up BAT test. Claimant testified that the test was performed by the daughter of the testing company's supervisor, and she did not know what she was doing and had to ask her supervisor every step of the way. He recalled the tester not complying with protocol in failing to ask him to sign any documents until after the test was administered, not giving him a choice as to which tube to put in the machine, not performing an air blank test before administering either test, and not explaining the proper procedures for the confirmation test after the initial test taken at 8:52 A.M. resulted in a .034 reading.

Claimant testified that the tester just told him to sit in a room for 15 minutes and not move or use the bathroom, and did not make mention of not belching or having anything in his mouth. He stated that he suffers from acid reflux and that, during the 17 minute period he was waiting for the confirmation test, he belched repeatedly, a fact not noted by the tester on the form she signed. The second test taken at 9:09 A.M. had a .044 reading, which was higher than the first, despite Claimant testifying that he was not under

the influence of alcohol or drugs on June 18, 2013. He could not explain the rise in reading, except for the possible impact of his belching on the results.

Despite the request from the Organization, the tester (M. O'Leary) was not available to give evidence at the investigation. Her supervisor, K. O'Leary, testified as Carrier's expert witness, concerning the training of the tester, the proper documentation on the calibration of the machine and test results, and her opinion that the results showed that Claimant's blood alcohol level was rising. The supervisor was not present in the testing rooms with Claimant and the tester. The Hearing Officer denied the Organization's attempt to ascertain the supervisor's opinion of what could account for the rise in results, and did not agree to call the tester as a witness in the investigation, a fact repeatedly objected to by the Organization.

Carrier argues that there is substantial evidence in the record to support the fact that Claimant violated Rule G (1.5) and the terms of his Waiver Agreement by testing positive for alcohol within a 2 year period from his first positive BAT result. It contends that the precedent is clear in upholding the terms of the Policy providing that a second such positive test within a ten year period results in dismissal, citing Special Board of Adjustment No. 998, Case 998; Public Law Board No. 6764, Award 57; Public Law Board No. 6833, Award 133; Public Law Board No. 7139, Award 7. Carrier notes that Claimant did not complain to the supervisor, who was present during the testing, about anything regarding the protocol not being followed or actions of the tester.

The Organization initially contends that Claimant was denied a fair and impartial investigation when the Hearing Officer failed to call all pertinent witnesses, including tester M. O'Leary, especially where Claimant questioned the testing protocol, as well as the Foreman, who would have relevant evidence on Claimant's alcohol consumption or signs of intoxication after arriving at work at 6:00 A.M. that morning. It points out that Carrier chose to rely on a supervisor who played no role in the actual testing of Claimant, and was not even in the rooms during the testing process. The Organization points out

that the Hearing Officer prohibited it from questioning this “expert” witness regarding the test results. It asserts that these actions constitute a material procedural error which denied Claimant his contractual right to a fair and impartial hearing, citing Public Law Board No. 5681, Award 2 and Public Law Board No. 6402, Award 171.

The Organization maintains that the evidence reveals that the tester failed to comply with BAT procedural safeguards invalidating the test and its results. It asserts that, in the absence of the tester, Claimant’s evidence concerning what occurred is unchallenged in the record, thereby negating any proof of the charges since Carrier chose to rely totally on the BAT results without further testimony, and without any explanation for the increased result in the confirmation test. The Organization contends that the absence of due process, as well as the lack of any valid evidence of intoxication, requires that the discipline be overturned, relying on Third Division Award 33858 and Public Law Board No. 7529, Award 22.

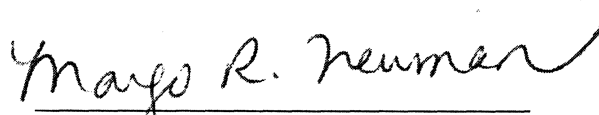
A careful review of the record convinces the Board that, under the circumstances of this case, it was a fatal flaw for Carrier not to bring M. O’Leary into the investigation to testify about the procedures she followed, and to give evidence with respect to Claimant’s assertion that he belched repeatedly during the 17 minute waiting period prior to the confirmation test, which she did not note on the documentation, or to explain what, if any, effect such situation would have on any eventual reading. The fact that the confirmation test result showed an increase in blood alcohol level after Claimant sat and waited for 17 minutes without evidence of ingesting anything that might explain such result, coupled with both the absence of the tester and the refusal of the Hearing Officer to allow questioning of its “expert” witness on such result, present what we believe to be a material procedural error denying Claimant his right to a fair and impartial investigation. See, e.g. Public Law Board No. 5681, Award 2; Public Law Board No. 6402, Award 171. It also undermines Carrier’s ability to rely on the test results in

meeting its burden of proving a violation in this case. See, Public Law Board No. 7529, Award 22.

Under these circumstances, the Board overturns the discipline, and directs that Claimant be returned to work after an evaluation by an EAP counselor, in the same follow-up protocol position he was in under his Waiver Agreement at the time of his dismissal. Claimant shall be compensated for the loss of earnings and benefits directly resulting from his August 6, 2013 dismissal.

AWARD:

The claim is sustained in accordance with the Findings.



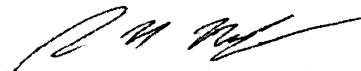
Margo R. Newman
Neutral Chairperson

Dated: 1/15/2016



K. N. Novak
Carrier Member

Dated: 1/15/2016



Andrew Mulford
Employee Member

Dated: 1/15/2016