PUBLIC LAW BOARD NO. 7660
CASE NO. 17

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 H. Baskette by letter dated December 18, 2013, in connection with allegations that he tested positive for a prohibited substance in an FMCSA Follow-up test in violation of UPRR Drug and Alcohol policy and General Code of Operating Rules (Rule 1.5) was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D-1348U-322/1597853 UPS).

2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier shall now return Claimant to service, remove any mention of the discipline from his personal record and compensate him for all straight and overtime hours lost as a consequence of the inappropriate discipline."

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 a System Laborer, who entered service on September 29, 2008. The September 13, 2013 Notice of Hearing charges Claimant with testing positive for a prohibited substance in an FMCSA follow up test administered in accordance with Carrier's Drug and Alcohol Policy on September 3, 2013. An Investigation was conducted on December 10, 2013. The December 18, 2013 Notice of Discipline finds him guilty of the charge and Rule 1.5 and, as a second time violator within a period of 10 years, assesses him a Level 5 dismissal. The instant appeal resulted.

There is no dispute that Carrier received a report from the Medical Review Office (MRO) dated September 10, 2013 indicating that Claimant tested positive for amphetamines and methamphetamines in a urine analysis drug test conducted on September 3, 2013. It is also undisputed that this was his second positive drug test for the same substances, the first occurring on January 13, 2012, after which he signed a Waiver/ Agreement Letter on February 7, 2012 and was returned to service on May 7, 2012 under the terms and conditions of Articles 21-23 of Carrier's Drug and Alcohol Policy. The primary issue presented in this case is the validity of the September 3 test results.

At the investigation, the Collector testified that she had been with ADTS since April, 2013, was a certified BAT and drug tester, and started testing on her own in June, 2013. She stated that she tested a few people on the morning of September 3 at Carrier's Valley Yard near Las Vegas, Nevada and, that Claimant was the first as his was the only test that was observed. Collector Evans testified that she went down her checklist containing the established protocol, performed all required tasks, and Claimant said that he knew what he had to do. Claimant testified that he had been tested a few dozen times since his return to work. He stated that this collector was very inexperienced and did not know what she was doing. Evans failed to have Claimant write his name and sign the Custody & Control Form in Step 5, so she submitted an Affidavit on September 3 indicating that she had omitted this Step and Step 1D, Testing Authority (which appears

to have been completed by the Observer), and identifying the authority as FMCSA and Claimant by name and employee ID number.

MRO Barnett stated that it is typical to get an Affidavit when there are omissions on the chain of custody form, and, when that occurs, he would follow up with the employee identified for confirmation, which he did in this case on September 10. He noted that while certain things can invalidate tests (ph factor, specific gravity and creatine, sample numbers not matching, bottles seals broken, etc.), failure to get a donor to sign the chain of custody form or identify the testing authority are not fatal flaws. Dr. Barnett stated that the instructions given at the time of collection indicate that once the donor urinates in the cup, it cannot leave the sight of the donor, the bottles and bag are to be sealed and initialed by the donor, and they cannot be tampered with by the collector thereafter.

Claimant testified that when he was called into the room, the collector did not have a black pen and he had to go out and get her one (because he understood it was required to fill out the form), he and the observer went down the hall into the washroom and there was no blue dye in the toilet bowl, he handed the cup with his urine to the observer to leave on the counter, they walked out of the washroom down the hallway and told the collector it was in there, and then he was called back into the room where the collector did the paperwork. Claimant stated that he did not witness her filling the specimen bottles or splitting the samples as he left the room again, and then came back to initial the seals. He was present when she put the bottles and paperwork into the shipping pouch. Claimant did not protest the manner of the testing at the time or until the results were returned positive, and he denied doing any drugs or being under the influence on September 3, 2013.

Evans testified that Claimant was in the room the entire time she handled his samples and completed her paperwork, and denied ever telling him he could leave and then calling him back. She noted that Claimant initialed the two vials of urine specimen when they were sealed and the mailing pouch. Evans denied ever opening that pouch in the presence of another employee after Claimant left the room.

Boom Truck Driver West testified that he was tested on September 3 immediately after Claimant and he recalled Claimant walking outside the testing room and the tester calling him back in. West stated that when she was doing his test, she forgot to put his paperwork in the pouch with his sample, opened a sealed envelope thinking it was his but said that it was the guy before him and resealed it, asking him to witness it, which he did. West recalled the collector putting his specimens and paperwork in a new envelope.

Carrier argues that there is substantial evidence in the record to support the charge that Claimant violated Rule 1.5 and its Drug & Alcohol Policy, having tested positive for the same drugs twice within a two year period, and that under such Policy and the terms of Claimant's Agreement Letter, dismissal is the appropriate penalty. It notes that there were no fatal flaws in the collection process, and Claimant's after-the-fact incredible attempt to negate the results of his test must fail, as he was well acquainted with the procedure and testing protocol and, if he left the testing site before completion of the protocol, he did not follow instructions and should not have initialed the samples and envelope. Carrier points out that the lab did not find any irregularities in the mailing pouch or samples that would have called into question the chain of custody of the samples. It maintains that the mailing envelope cannot be opened and then resealed without evidence of such having occurred. Finally, Carrier asserts that there was no evidence presented to show how this alleged tampering led to a positive result. It included written statements from both Evans as well as Claimant's Observer in its claim denial, which undermine Claimant's contention that he was permitted to leave the room

twice during the testing procedure, or that his samples were not handled in accordance with the required protocol.

The Organization contends that the compounding of mistakes made by the collector in this case constitutes a fatal flaw in the chain of custody, undermining the validity of the test results, upon which Carrier rests its entire case to support a Rule 1.5 violation. It points to Claimant's substantiated evidence that he left the collection site and was called back in by the collector, the fact that he was not asked to sign the paperwork, did not see the collector split his samples or seal the vials, and West's testimony that Evans opened Claimant's mailing envelope by mistake and resealed it in his presence, as proof that the requisite protocol was not followed. The Organization argues that once this has been shown, the test is invalid and it is not up to Claimant to show how these irregularities impacted the result of his drug test. The Organization takes issue with Carrier's attempt to add evidence not presented at the hearing (statements from the collector and observer) in its claim denial, asserting that the Board cannot give consideration to such documents which could have been brought forward during the Investigation, wherein both the MRO and Evans testified by telephone, but the observer did not. In the absence of a valid test result, the Organization posits that Claimant's discipline must be overturned, and he should be returned to work and made whole.

A careful review of the record convinces the Board that, although there was an omission on the chain of custody form, the matter of Claimant's identity and testing authority (which was apparently filled out by the observer, not the collector) was verified in the Affidavit submitted by the collector to the lab the same day as the samples, a process the MRO stated does not amount to a fatal flaw, is not unusual, and requires his follow-up with the employee, which Claimant admitted occurred in this case. Although Claimant testified that he was not present in the room when the collector took and split his sample, he does not dispute initialling the seals of the vials of his urine and shipping

pouch. For an employee who has gone through the testing protocol about two dozen times, knew enough to express his opinion on the lack of experience of the collector and what she allegedly failed to do, and to notice the absence of a black pen and secure one without being asked, the Board finds it difficult to accept that he would have willingly affixed his initials signifying his agreement to the identity and security of the samples if he had not been present to see them placed in their vials from his collection cup. Neither is it likely that Claimant would not have voiced a protest about the collector's failure to follow the protocol at the time, given his experience and knowledge of the procedures and instructions. Evans clearly testified that Claimant was present when she split the samples and secured the vials and shipping envelope.

As far as Claimant leaving the room, it appears from the evidence that the bathroom was down a hallway from the room where the paperwork is completed and sample secured, and that Claimant (and the observer) had to leave that room to collect the sample, and return down the hallway toward the lobby area (where West and others were waiting) to place the sample on the counter for processing. It is hard to imagine that Claimant would give up custody of his sample during transport or thereafter. He was called back into the room (as noted by West) when the collector was given his sample for processing.

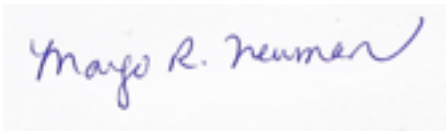
With respect to the contention that Evans opened Claimant's pouch by accident in the presence of West, and then resealed it with West as a witness, an assertion she firmly denied, the lab found nothing amiss about the packaging of Claimant's sample upon its receipt, which would have been discarded if there was evidence of tampering. The MRO testified that, even if the package is torn in transit, so long as the seal is in tact, it does not cause chain of custody concerns or affect the validity of the sample or results. West testified that he witnessed Evans open the pouch and discover a sample and paperwork from "the guy before me." West stated that he saw Evans place the items in the same

envelope and reseal it in his presence, without altering or tampering with the contents. While it may be a fatal flaw to tamper with the vials and pouch after they have been initialed, there is no actual evidence of tampering impacting Claimant's test sample, West did not see the name on the paperwork allegedly removed from the envelope and replaced prior to it being resealed, and the lab found the initialed seals to be in tact.

Although the Board is cognizant of Carrier's responsibility to fully comply with all aspects of the procedure and protocol for performing breath and urine tests of its employees under its Drug & Alcohol Testing Policy and Federal law, and the drastic consequences the positive result has on Claimant's employment, we are unable to conclude that the credible evidence establishes a fatal flaw in the testing on September 3, 2013. Since the positive test provides substantial evidence of Claimant's Rule 1.5 violation, Carrier has sustained its burden of establishing that Claimant had a second positive drug test within 10 years, and that dismissal was appropriate under its Drug & Alcohol Policy.

AWARD:

The claim is denied.



Margo R. Newman
Neutral Chairperson

Dated: May 28, 2016

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member