

PUBLIC LAW BOARD NO. 7660
CASE NO. 18

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
[FORMER SOUTHERN PACIFIC TRANSPORTATION
COMPANY (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant C. McAlpine for violation of the UPRR Drug and Alcohol Policy and General Code of Operating Rules (Rule 1.5) in connection with allegations that he refused a follow-up test on September 25, 2013, is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File RC-1345S-602/1596384 SPW).
2. As a consequence of the Carrier’s violation referred to in Part 1 above, Claimant C. McAlpine ‘... be immediately reinstated to service of the Carrier to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal be expunged from his personal record. In addition, Claimant McAlpine shall be made whole and compensated for net wages lost, both straight time and overtime, and benefit loss suffered by him since his wrongful and unwarranted removal from service and subsequent dismissal.’”

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 Track Inspector with seven years of service. The October 3, 2013 Notice of Investigation charges Claimant with refusing a FRA follow-up BAT test administered on September 25, 2013 in Palmdale, California. An Investigation was conducted on October 23, 2013. The November 1, 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 under its Drug and Alcohol Policy, assesses him a Level 5 dismissal. The instant appeal resulted.

Claimant tested positive for alcohol on January 23, 2012 and accepted the one-time return to service agreement, returning on May 4, 2012. On September 25, 2013 Claimant was requested to take a follow-up test, and at 7:13 a.m., his Breath Alcohol Test (BAT) registered .043. Collector Brown explained to Claimant that after a positive test, the machine locked them out for 15 minutes, and that they had to wait 15 minutes to do a confirmation test. Brown testified that he told Claimant that for that period they would stay in the room, he could not drink, smoke or belch, and that Brown was required to call his supervisor to advise him of a positive test. According to Collector Brown, Claimant asked him not to call because he had his wife and children to take care of. Claimant walked outside the room into the bullpen area, and went to the company truck he had been driving. Brown stated that he went behind him and told him that he cannot leave, he was jeopardizing his job, he still had time, and asked him to come inside.

When Claimant walked toward the far area of the compound, Brown went to get Claimant's Manager Smith, who was conducting his job briefing, and told him about Claimant. Smith testified that he stopped what he was doing and went to get Claimant,

finding him on the other side of the compound, and brought Claimant back into the room with the Collector. Smith noted that Claimant was not attempting to leave the area and willingly came with him. Claimant testified that the collector told him not to leave the premises, but did not say to stay in the building. He stated that he was walking around the parking lot and that, after the positive test, both he and the collector left the room, with the collector saying they had 15 minutes, while he was talking on his phone. Claimant said he willingly came back to complete the test, and never refused to do so, but when he got back into the room the collector told him that he was instructed not to complete the test. Claimant recalled the collector calling Omaha saying that he was there to complete the test, and trying to get them to let him complete it.

Collector Brown testified that, after he had made contact with his supervisor, he received a phone call from a Carrier official in Omaha, Nebraska asking him if he told Claimant not to leave, which he confirmed, and telling him that since 15 minutes had passed, he could not do any more testing. Brown stated that he was told that because Claimant left, it is considered a refusal to test, and that an employee must do both parts of the BAT in order to have a completed test. Collector Brown noted that Claimant and Smith returned to the room shortly after the 15 minutes had passed, but he was not able to complete the test, in accord with his instructions from Omaha, Nebraska.

Carrier argues that there is substantial evidence in the record to support the charge that Claimant violated Rule 1.5 and Section 16.1.1 of its Drug and Alcohol Policy, when he failed to remain at the testing site until the process was complete and failed to follow the collector's instructions - which amount to a refusal to take a test - and that under such Policy and his one-time return to service agreement, dismissal is the appropriate penalty.

The Organization contends that the evidence establishes that Claimant never refused to take a drug and alcohol test on September 25, 2013, and he presented himself

willingly to both the initial BAT as well as the confirmation test, as noted by his Manager and the Collector. It asserts that Carrier failed to meet its burden of proving a violation in this case, since the on-site witnesses made clear that Claimant did not abandon the test or refuse to be tested, and the decision not to administer the confirmation test was made by off-site personnel who did not know the physical layout or set up of the facility, where Claimant remained throughout the waiting period. The Organization argues that Claimant did follow the Collector's instructions to remain on the premises and not eat, drink or belch, since he did not, and never intended to, leave the compound area. It avers that Claimant remained at the testing site as he understood the instruction, and Carrier should not be permitted to rely upon a technicality to support his dismissal from service in this case.

The issue raised in this case is whether the facts presented make out a refusal to test by Claimant. As noted by Carrier, Section 16.1.1 of its Drug and Alcohol Policy states, in pertinent part:

An employee is considered to have refused to take a drug test if the employee:

* * * * *

Fails to remain at the testing site until the testing process is complete.

* * * * *

Fails or declines to take a second test the employer or collector has directed the employee to take.

A careful review of the record convinces the Board that, although Claimant left the exact room where the test was administered and walked through the parking area within the compound while waiting out the 15 minute period for retesting, we cannot say that these actions alone exhibit an intention to leave the premises or facility within which the testing was done. It was obvious that Claimant was upset that he had tested positive, stating that he did not have alcohol in his system but was using mouthwash for a gum infection, and understood the consequences of a second positive test. Collector Brown

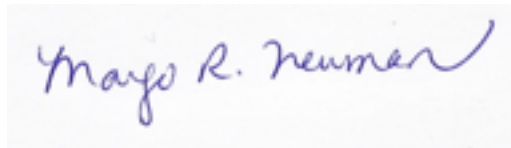
testified that he followed Claimant to his truck while telling him that he could not leave and was jeopardizing his job, and trying to talk him into returning to the room with him. By the Collector following him out of the room and urging him not to leave, Claimant could well have understood that he was okay as long as he did not get in the truck and drive away or leave the compound.

While Claimant was not in view of the Collector when he went to solicit the help of Claimant's supervisor to bring him back in for testing, Manager Smith said he found Claimant on the far end of the compound and that he willingly returned to the room with him to be retested. Collector Brown did not rebut Claimant's evidence that he attempted to get the official in Omaha to allow him to administer the confirmation test when Claimant appeared shortly after the 15 minutes had elapsed, but that he was told not to administer the test because leaving the testing site, when instructed not to, constituted a refusal.

Under the particular facts of this case, where there was apparently some misunderstanding about the scope of the testing site, the Board cannot say that Carrier has sustained its burden of establishing that Claimant left the testing site, as he understood the instructions, or otherwise refused to take the confirmation test, which it considered a second positive drug test within 10 years justifying dismissal. Since Claimant did not heed the Collector's instructions to return with him to the testing room when he followed him to the truck, he must bear some responsibility for any arguable misunderstanding after that point. Therefore, we direct Carrier to reinstate Claimant to his position at the same point he would have been under the terms of his one-time return to service agreement at the time of his dismissal, with full seniority and benefits, but without back pay.

AWARD:

The claim is sustained, in part, in accordance with the Findings.



Margo R. Newman
Neutral Chairperson

Dated: May 28, 2016



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member