

PUBLIC LAW BOARD NO. 7660
AWARD NO. 189

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. D. Yazzie, by letter dated October 16, 2019, in connection with allegations that he failed to comply with Rule 1.6 Conduct - Insubordinate; Rule 1.5 - Drugs and Alcohol; CFR 49 Part 219, and CFR 49 Part 40 was excessive, arbitrary, disparate, imposed without due process, without the Carrier having met its burden of proof and in violation of the Agreement (System File MK-1948U-608/1729735 UPS).
2. As a consequence of the violation referred to in Part (1) above, Claimant D. Yazzie must now ‘...be offered a fair and thorough examination for shy bladder syndrome. Further we request that Claimant now be made whole by compensating him for all wage and benefit loss suffered by them for their Level 5 termination, based on the outcome of the requested evaluation.’ (Employees’ Exhibit ‘A-2’).”

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 has been employed by the Carrier since 1996 and worked as a Machine Operator at the relevant time. Claimant received a Notice of Investigation dated September 18, 2019, advising him that he was charged with refusing an FRA random test on August 27, 2019. The Investigation was held on September 26, 2019, and Claimant was served with a Notice of Discipline Assessed dated October 16, 2019, finding him guilty of the charge in violation of Rules 1.6 Conduct - Insubordinate; 1.5 Drug & Alcohol Policy, and 49 CFR Parts 40 and 219, and dismissing him from service. This claim protests such action.

The record reveals that Claimant has been employed by Carrier for 23 years, and was working as a Spike Driver/Gauge Operator on Tie Gang 9072 on August 27, 2019, when he was selected to take an FRA-mandated random Drug & Alcohol test at the job site. Claimant was unable to give an adequate urine sample within the 3 hour allotted time, he was given a Shy Bladder instruction form setting forth the procedure for him to follow (which includes contacting the Medical Director's office within 24 hours), and remained on the job. Claimant testified that he followed instructions and tried to urinate, but couldn't, perhaps due to the conditions of hot weather, being outside on the job site in a port-a-john on the tracks next to the job briefing area, with a few coworkers in close proximity.

Claimant was removed from the job on September 10, after Carrier's receipt of a letter from the Medical Review Officer (MRO) determining that he had refused to take the test on August 27, based on the results of a shy bladder evaluation without adequate medical basis. The actual evaluation was not placed in evidence, and the Engineering Department administrative assistant in charge of D&A violations stated that those documents are protected from disclosure by HIPPA, and are not shared with Carrier or made public. It was admitted that the MRO did not evaluate Claimant, but he was referred to a medical

professional locally. Claimant stated that such doctor did not collect blood or do any physical evaluation, the appointment lasted about 30 minutes, and Claimant did not request, nor receive, a summary of his visit. The MRO was not questioned at the Investigation.

The Carrier contends that it proved by substantial evidence that Claimant met the definition of having refused a test, based upon the appropriate Federal regulations and Carrier's policies, and that such refusal amounts to insubordination and a violation of Carrier's D&A policy. It maintains that a violation of Rules 1.5 and 1.6 result in a dismissal from service, and that Claimant was provided with all due process rights to a timely, fair and impartial investigation prior to any discipline being imposed.

The Organization argues that Carrier failed to meet its burden of proving that it provided Claimant with proper channels for diagnosing his shy bladder syndrome, which could definitely be brought on by the conditions of the testing on August 27, including the close proximity of co-workers to the outside collection site. It points out that Claimant did not refuse anything, and attempted to comply with the direction to give a urine sample, and that Carrier determined that his conduct equated to a refusal without being in receipt of his medical evaluation, which was never entered into the record for review or questioning. It also asserts that Claimant was denied due process since the Investigation was held outside of the 30 day time period required by Rule 48, and the primary expert witness concerning what occurred testified by telephone, impacting the Organization's ability to effectively cross-examine her. Finally, the Organization contends that the discipline issued was excessive and unwarranted for a 23 year employee with a good record. It requests that Carrier be directed to offer Claimant a proper medical evaluation prior to determining that he refused to take the test.

A careful review of the record convinces the Board that there was no denial of due process and that Claimant was provided with a timely, fair and impartial investigation.

Although the basic facts of the propriety of the testing are not in dispute, the record is devoid of any justification for the MRO's conclusion that there was not an adequate medical basis to determine if Claimant suffered from shy bladder syndrome. While Carrier's expert witness indicated that such information is protected by HIPPA and not shared, absent employee consent, there is no evidence that Claimant was asked for such consent, or told about the underlying finding from his medical evaluation. Although Carrier is bound to follow the decision of its MRO, when it dismisses a 23 year employee solely on a one line conclusion that the "shy bladder evaluation was without adequate medical basis," it must be able to establish that there are facts supporting such determination, if challenged. While Carrier is within its rights to dismiss an employee for refusing to take a federally mandated D&A test, when such refusal is based upon a possible medical condition, and the employee follows the required procedures, fundamental fairness dictates that the information upon which the conclusion is based be made available, assuming that Claimant consents to its release.

Under the particular circumstances of this case, Carrier is directed to offer Claimant a proper medical evaluation to test for the possibility of shy bladder syndrome, and to obtain his consent to review the findings of such evaluation. Claimant shall be placed on unpaid leave status during the pendency of this process. In the event that such condition is not medically confirmed, Carrier may reinstate Claimant under specific testing requirements over a designated period of time. In the event that it is determined that Claimant suffers from shy bladder syndrome, he shall be returned to service without delay, with full seniority but without compensation.

AWARD:

The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Chris Bogenreif

Chris Bogenreif
Carrier Member

John Schlismann

John Schlismann
Employee Member

Dated: August 25, 2022

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