

PUBLIC LAW BOARD NO. 7660  
AWARD NO. 192

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES  
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY  
(FORMER CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. G. Miller, by letter dated December 13, 2019, in connection with allegations that he failed to comply with Rules 1.5 - Drugs and Alcohol and 1.6: Conduct - Insubordinate 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 RI-2019C-801/1734446 CNW).

2. As a consequence of the violation referred to in Part (1) above:

‘.... discipline imposed upon Claimant Miller shall be overturned and cleared from his record and the Claimant shall be returned to service with all rights and benefits unimpaired. This includes compensation for:

- 1) Straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the Claimant while wrongfully removed from service);

- 2) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service;
- 3) Overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any Junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;
- 4) Health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service;
- 5) Also all months of service credit with the Railroad Retirement Board he would have accumulated had he not been unjustly removed from service;
- 6) All vacation restored and credit given for days missed had he not been unjustly removed from service.’ (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 for almost 20 years and worked as a Speed Swing Operator on Gang 3246 at the relevant time. Claimant received a Notice of Investigation dated December 3, 2019, advising him that he was being charged with refusing a UP Reasonable Cause D&A test on November 27, 2019 at 7 E. Lake St.,

Northlake, IL. The Investigation was held on December 5, 2019, and Claimant was served with a Notice of Discipline Assessed dated December 13, 2019, finding him guilty of the charges in violation of Rules 1.5 Drugs and Alcohol and 1.6 Conduct - Insubordination, and dismissing him from service. This claim protests such action.

Senior Safety Officer Cotton testified that on the morning of November 27, 2019 when he was leaving Carrier's 7 E. Lake St. facility driving his personal vehicle, a large Carrier truck made a left turn in front of his vehicle and cut him off. He turned around and followed the truck into the parking lot and beckoned Claimant over to his truck. Claimant testified that he was on duty and in a large boom truck, and had started to make his turn when he had a green arrow, but hadn't completed it when Cotton's truck came at him. Claimant walked over to Cotton's vehicle, not knowing who he was and believing that the driver had almost caused an accident. They got into a "pissing match" about who had the right of way. Cotton testified that Claimant got defensive and started to curse him, becoming irate and quarrelsome. Claimant admitted to mouthing off, not knowing who Cotton was, and it is undisputed that Cotton did not identify himself prior to that point. Cotton then told Claimant that he was citing him for a rule violation and notifying him of a Reasonable Cause drug test. Claimant then recognized Cotton as a manager, and said that was fine, he had been taking those tests for 20 years and there was no problem.

According to Cotton, he told Claimant that he was not to go anywhere, Claimant cursed him and started to walk away into the building. Cotton testified that he told Claimant that he needed to stay with him and if he left it was going to be considered a refusal of a drug test, and that he walked away and into the building. Claimant testified that they were talking over each other, that he did not hear Cotton tell him that he needed to remain there, and that he told Cotton that he would be on the second floor, which is where they normally administer the D&A tests at that facility. Claimant testified that he was headed to his

supervisor's office for a one-on-one meeting and needed to use the washroom first. He stated that when he has taken other tests, he was not under 100% supervision, and was permitted to go elsewhere in the building awaiting the tester, and repeated that he never heard Cotton say to stay there or it would be deemed a refusal.

Claimant's supervisor Mueller was in the parking lot and testified that she only heard the tale end of their conversation outside the building and yelling. She approached Cotton's vehicle and Claimant had already walked away and into the building. Cotton informed her what had occurred, and that Claimant walked away after he was told of a Reasonable Cause drug test and to remain. Another Manager (Davis) was on the telephone with Cotton during some of the interaction, and he testified that he heard Cotton say that he was to stay right here, he was going to be drug tested, and that if he walks away it means he is refusing the test. The Manager indicated that Cotton told him on the phone that Claimant had walked away.

There is no dispute that Claimant never left the 7 E. Lake St. building or vicinity after he entered it, went to the office on the second floor to look for his supervisor, saw another supervisor there and explained that he had run into a manager from another craft who was wanting to do a drug test and he told him he was coming upstairs, and they called his supervisor, who entered the office with Cotton. Claimant's supervisor ordered him out of the office since he had been insubordinate by ignoring an order of a manager. After sitting in his truck in the parking lot for 10-15 minutes, Claimant returned to his supervisor's office and asked her to arrange for him to be tested. She indicated that he had already been deemed to have refused a test when he left the viewing of the requesting manager. No tester was ever called to the facility to perform D&A testing on Claimant.

Carrier's D&A Policy Expert testified to the applicable provisions of the policy in this case. She noted that under 13.3 Reasonable Cause Drug and Alcohol Testing of the UP Policy, which may be conducted based on a manager's good faith belief that an employee may have violated a safety rule, such testing must begin no later than 8 hours after the incident. She also pointed to 21.2 Refusal to Test and Tampering, which applies if Claimant was off duty but on UP property, and 21.0 Refusals to Permit Testing and Tampering, bullet point #3, if he was on duty at the time. She indicated that if an employee leaves the testing area after being directed to test, it is considered a refusal. D&A Policy Rule 21.0 #3 states, in pertinent part, that 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.

The Carrier contends that it proved by substantial evidence that Claimant violated Rule 1.5 and its D&A Policy when he left the viewing area of a manager who had requested a Reasonable Cause test, thereby refusing to be tested, which is also a violation of Rule 1.6 Insubordination. It notes that Claimant was admittedly quarrelsome when he cursed out and argued with Manager Cotton, and that the penalty for the proven violations is stated to be dismissal. The Carrier maintains that the remedy requested by the Organization is improper and excessive under the Agreement.

The Organization argues that Carrier failed to meet its burden of proving that Claimant ever refused to be tested, since he agreed to take the directed test, went to the second floor of the building where the testing is normally administered, and never left Carrier's property during the time. It points out that Claimant did not hear Manager Cotton direct him to stay and not leave his view, continued into the building to see his Manager, and when he was informed that they deemed it a refusal, he went back to his Manager to ask to be tested. The Organization contends that what occurred here is neither a refusal nor insubordination, since Claimant never left the facility where the testing occurs and did not hear the manager direct him to stay with him. It asserts that, at best, Claimant was

quarrelsome with an individual in the parking lot who turned out to be a manager, and the discipline imposed was arbitrary and excessive under the circumstances, where Claimant's actions showed he was more than willing to take the requested drug test.

A careful review of the record convinces the Board that this is not the classic case of an employee refusing to take a drug test when requested to do so. There is no question that Manager Cotton was within his right to request a Reasonable Cause drug test based upon what he viewed as Claimant engaging in a safety violation, and the Organization does not question his entitlement to do so. It is also admitted that Claimant knew that Cotton was a Manager when he made such request, and was obliged to participate as directed. What is in dispute is whether Claimant's actions in leaving Cotton in the parking lot and going into the building after receiving such instruction constitutes a refusal under the D&A policy and/or insubordination. Claimant contends that, because they were talking over each other, he did not hear the direction to remain with Cotton or the consequences of failing to do so. On the other hand, both Cotton and Davis testified that such instruction was given and its consequences made clear. While Claimant may have intended to de-escalate the situation by walking away from Cotton rather than continuing to be quarrelsome and argumentative, when he did so he was no longer within sight of a manager after having been directed to take a test.

UP D&A Policy 21.2 states that an employee who fails to remain available after an incident is considered a refusal and insubordinate under UP rules, and that an employee is required to "immediately" participate in a test as directed or it will be considered a refusal. The Organization asserts that, since Claimant agreed to take the test, remained on the property and went to the location that testing is normally conducted, and did not hear or understand that he needed to stay in sight of the manager at all times, he cannot be considered to have refused to take a test. However, if Claimant had listened more, and

yelled less, he would have heard the direction to remain on site with Manager Cotton, and the consequences of not doing so. Claimant knew that he had walked away from a manager who insisted on a Reasonable Cause drug test, and reported as much when he got to the second floor office. The supervisor present immediately saw the concern and called Claimant's supervisor, who came to the office with Cotton, and acted in accordance established procedure by informing Claimant that he had already been deemed to have refused and needed to leave the premises.

Under these unfortunate circumstances, Claimant must be held accountable for disobeying a manager's instructions, and leaving the situation, rather than attempting to clarify where he should be while he was awaiting testing. I cannot credit that a long service employee like Claimant, who claims to have been subject to testing many times during his employment, did not understand the importance of remaining in the control of the manager demanding such test, at least until receiving specific permission to go elsewhere to wait for the tester. Accordingly, the Board finds that Carrier met its burden of proving that Claimant violated Rules 1.5 and 1.6, and that the appropriate penalty for such violations was dismissal.

AWARD:

The claim is denied.

*Margo R. Newman*

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Margo R. Newman  
Neutral Chairperson

*Chris Bogenreif*

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Chris Bogenreif  
Carrier Member

*John Schlismann*

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John Schlismann  
Employee Member

Dated: August 25, 2022

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