PUBLIC LAW BOARD NO. 7660
CASE NO. 25

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 F. Reza by letter dated January 21, 2014, in connection with allegations that he tested positive for a prohibited substance in a follow-up test in violation of UPRR Drug and Alcohol Policy and General Code of Operating Rules (GCOR) Rule 1.5 was arbitrary, unwarranted and in violation of the Agreement (System File D-1448U-303/1601452 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now return Claimant F. Reza 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, a System Spike Puller Operator with 10 years of service, was issued a Notice of Investigation dated December 17, 2013 on charges that he tested positive for alcohol in a UPRR Follow-up test on December 15, 2013. The January 21, 2014 Notice of Discipline finds Claimant guilty of the charge in violation of the UPRR Drug and Alcohol Policy and GCOR Rule 1.5, and assesses him a Level 5 dismissal. The instant appeal resulted.

Claimant had a first positive alcohol test on March 10, 2012, entered into a Waiver/Acceptance of Discipline-EAP Agreement agreeing to be free of prohibited substances as determined by follow-up tests. After attending EAP, Claimant returned to work on May 14, 2012. On December 15, 2013, in a follow-up BAT, Claimant tested positive for alcohol at .036 BAC in his first sample at 8:06 a.m.; 20 minutes later, he blew a .024 BAC in a confirmation test. In accord with the Carrier's One Time Return to Service and Ten-Year Drug and Alcohol Policy, Claimant was removed from service as a result of the second positive test within a 10 year period. At the investigation Claimant stated that he smoked a menthol cigarette right before his first BAT test. He testified that he had consumed 3 beers the night before but had not been drinking after about 10:00 p.m. At the Investigation, the Organization objected to what it perceived as the Hearing Officer (HO) reading from a prepared script when he questioned (by telephone) the same Carrier witness (Pritchett) who routinely is called as its expert in Drug and Alcohol cases. Pritchett stated that he was reading from his personal notes while testifying.

During the on property correspondence, the Organization included various internet information concerning the possible effects of menthol on testing results, and the Carrier submitted an information sheet from MRO Hayes supporting its contention that, if there was even an arguable impact on the initial BAT (which was unlikely), it would have been effectively eliminated by the time of the confirmation test. Additionally, at the conference, the Organization submitted a written script entitled "Personal Notes" that had

been taken from a post-suspension hearing of a different employee, where Pritchett testified concerning the process of drug testing followed by the Carrier and the specific results of the employee involved. The document had two columns, with the left side setting forth the questions, and the right side the responses by Pritchett. The Organization posited that this was an example of the scripted testimony repeatedly given by Pritchett and the assigned HO during Drug and Alcohol testing cases, and opined that, although it could not get the actual document that Pritchett was using in this case since he testified by telephone, his testimony clearly resembles that which is represented in this document.

The Carrier argues that the Claimant was afforded a fair and impartial hearing, pointing to the fact that Manager Pritchett denied using a script for his testimony, and only affirmed that he used his own personal notes to assure that his testimony was complete and accurate. It asserts that Claimant was provided a full opportunity to present and question witnesses and give evidence in his own defense. The Carrier contends that the BAT test results reveal that Claimant exceeded the threshold of .02 BAC, which is admittedly his second positive test within a 2 year period, and that these facts meet its burden of proving Claimant's guilt and his violation of the Waiver Agreement he signed in March, 2012 and its Drug and Alcohol Policy. Finally, the Carrier asserts that the penalty of dismissal for a second positive drug or alcohol test within a 10 year period has been repeatedly held to be the appropriate disciplinary response, relying on Public Law Board No. 6459, Award 64; Special Board of Adjustment No. 279, Award 819; Third Division Award 36030.

The Organization initially contends that Claimant was denied a fair and impartial hearing, as there was collusion between the Carrier's witness and the HO, as evidenced by the scripted testimony revealing that the matter was prejudged and the result predetermined, which is a denial of Claimant's due process rights, citing Public Law Board No. 6302, Award 195; Third Division Awards 30601, 41244. The Organization

argues that the Carrier failed to meet its burden of proving the charges, since it established reasonable doubt as to the accuracy of the testing device, the test itself, and that the menthol cigarette smoked by Claimant immediately before the first BAT was taken could affect the validity of the results. Finally, the Organization contends that dismissing Claimant, an admittedly hard-working and well respected 10 year employee, for a result that is marginally above the .02 BAC limit, is excessively harsh and unwarranted under the circumstances.

The Board will first address the Organization's contention that Claimant was denied a fair and impartial hearing because of the apparently scripted evidence between the HO and Carrier witness Pritchett, who often serves as its expert in Drug and Alcohol testing cases. First, there is no direct evidence that the HO and Pritchett were actually working from a script prepared by one or the other of them prior to the hearing, as Pritchett testified by telephone, admittedly from his "personal notes." Second, even if the HO had a list of questions he would ask (and expected responses prepared by Pritchett) to guide his conduct of the Investigation, there is no evidence that the HO coached Pritchett in what he was to say or curtailed the evidence to support a predetermined result. Third, unlike the situation in the cases cited by the Organization, the HO in this case did not serve multiple roles, or make the final determination as to guilt and the penalty to be imposed. See, e.g. Public Law Board No. 6302, Award 195; Third Division Awards 30601; 41224.

We cannot forget that the substance of an expert witness' testimony concerns the process by which the Carrier conducts its alcohol or drug testing, the outline of which does not vary from case to case, and sets the record by which the individual circumstances can be assessed to assure or determine compliance. There is no evidence in this record from which to conclude that the notes used by both the HO and Pritchett were anything other than an outline of background and facts to be covered in this (and any)

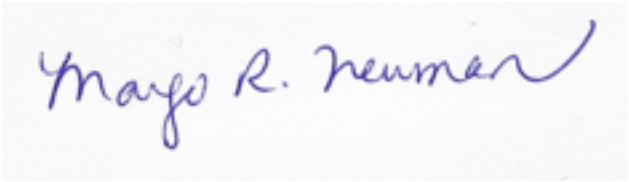
alcohol testing case. The excerpt of Pritchett's "script" from another drug testing investigation submitted by the Organization at the conference on the property is not identical to what he testified to during Claimant's investigation. Pritchett did not give an eye witness account of what occurred during the testing, as he was not present, but identified the pertinent BAT documents qualifying both the technician and machine (from their certifications) as well as identifying the results obtained at the time of Claimant's tests on December 15, 2013. There is no factual dispute as to what these results say.

Under these facts, the Board is unable to conclude that Claimant was denied a fair and impartial hearing as required by Rule 48. The Organization was permitted to fully cross-examine Pritchett and offer whatever evidence it wished to question the accuracy of the testing results. The HO in no way prevented the Organization from creating a full record in this case.

With respect to the merits, the Organization's efforts at undermining the accuracy of the testing results, by pointing to the fact that Claimant was permitted to smoke a menthol cigarette prior to his first BAT, is insufficient to prove that, at the very least, Claimant's confirmatory test where he blew .024 BAC is unreliable. In a case such as this, where an employee is a second time violator of the Carrier's Drug and Alcohol policy by testing positive for a prohibited substance within 10 years of his Waiver Agreement returning him to work after an initial positive test, the cases uniformly support the Carrier's imposition of the dismissal penalty, which is set forth as the appropriate discipline in both the Carrier's policy and the Waiver Agreement signed by Claimant. See, e.g. Public Law Board No. 6459, Award 64; Special Board of Adjustment No. 279, Award 819; Third Division Award 36030. Accordingly, the claim is denied.

AWARD:

The claim is denied.



Margo R. Newman
Neutral Chairperson

Dated: August 2, 2016

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member

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