

PUBLIC LAW BOARD NO. 7660
CASE NO. 52

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 dismissal of Mr. D. Young, by letter dated February 11, 2015 for alleged testing positive for prohibited substances during a UP follow-up test on February 4, 2015 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File RC-1545S-703/1624957 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant D. Young shall now be immediately reinstated with seniority and all other rights restored, unimpaired, and that the letter of dismissal expunged from his personal record. In addition, Carrier shall make Claimant D. Young whole and compensate him for net wages lost, both straight time and overtime, and benefit loss suffered following his dismissal from service.”

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.

On February 25, 2014, Claimant, a 10 year employee working as a Machine Operator, signed a Waiver/Agreement Letter, accepting responsibility for a positive drug test, electing to participate in EAP and, upon release, returning to service on a leniency reinstatement basis, with a 12 month probationary period, during which failure to comply with the conditions of the Waiver and Companion Agreement “may result in immediate return to dismissed status without benefit of a formal hearing, under your collective agreement.” The Waiver Agreement also contained the following language:

I understand that if I deny the validity of a non-negative drug or alcohol test result, conducted under UPRR or federal authority, I may petition for a Post-suspension Hearing under the provisions of 49 CFR 219.104. NOTE: All petitions must be submitted in writing within ten (10) calendar days of receipt of this letter to: Drug and Alcohol Testing

Claimant was returned to service on March 27, 2014. On February 4, 2015, Claimant tested positive for benzodiazepine in a UPRR Follow-up drug test. He was dismissed by letter of February 11, 2015 for a second positive test/violation of his Waiver. The Organization’s request for a hearing on February 25, was denied by Carrier the following day, noting that Claimant was not tested under the provisions of 49 CFR 219.104, which do not apply to him, and had waived his right to a formal hearing under the Agreement. Claimant requested split sample testing. By letter dated March 11, 2015, he was notified by the Medical Review Officer (MRO) that the split sample was sent for testing at Quest - Norristown, and that the original positive finding was reconfirmed. Documentation from the lab show a positive result for nordiazepam, oxazepam and temazepam, all of which are listed as benzodiazepines.

The correspondence on the property shows that Claimant submitted a list of all his prescriptions to the MRO, including a note from his family doctor dated 2/19/15, stating that Claimant was prescribed Lorazepam (Ativan) by his office on 6/11/14, and that it will show up in a drug screen as benzodiazepine. The MRO worksheet also shows an interview with Claimant including discussion of his prescription medications, and furnishing him an opportunity to contact his dentist to get a list of treatments given. A statement from the Senior Manager of Drug Testing sets forth the process followed by the MRO for legitimizing prescriptions, including verifying the dates and authenticity, as well confirming its relation to the positive result. She stated that none of Claimant's medications were legitimized by the MRO office, so the positive test result finding was not changed.

Carrier argues that Claimant was properly reverted to dismissed status when he tested positive on February 4, 2015 for the second time, in violation of his one time return to service Waiver and Companion Agreement. It asserts that there is no challenge to the accuracy of the test result, and no acceptable excuse or explanation submitted by Claimant undermining its ability to rely upon the positive result. Carrier maintains that it was not obliged to give Claimant a Post-suspension hearing in this case, as he did not qualify for one under the applicable federal rule - 49 CFR 219.104 - which was the only opportunity reserved for him in his Waiver Agreement. It posits that the MRO engaged in her normal process in reviewing what Claimant submitted, and he was given the opportunity to present all of his prescriptions and everything he would have in a hearing, which were thoroughly reviewed and considered before the validity of the application of positive test result was reconfirmed.

The Organization contends that Claimant was denied due process and his right to a fair hearing, which was not forfeited in his Waiver Agreement. It asserts that Claimant's doctor explained that his prescription medication could account for the positive drug

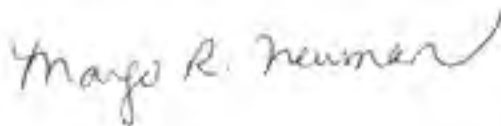
screen, showing that Claimant was not involved with an illegal or prohibited substance. The Organization alleges that Carrier failed to meet its burden of proving a violation of Rule 1.5 or Claimant's Waiver Agreement since there was no hearing in which to present its evidence, or permit Claimant to establish the validity of his prescription resulting in the positive test result.

On the basis of the entire record, the Board concludes that Carrier's explanation for why it was not obliged to provide Claimant with the requested Post-suspension hearing - that he did not qualify under 49 CFR 219.104 since he was not an hours of service employee - was rationally based. Additionally, there was proof that the MRO gave Claimant the opportunity to present any documents he wished and provide a verbal explanation, which is what would have been provided to him at a hearing, so there was no prejudice resulting from the failure to conduct a hearing.

A review of the evidence reveals that Carrier established the normal process by which the MRO reviews prescriptions and other information furnished attempting to explain a positive drug test, and that she followed that procedure in this case. Claimant never took issue with the validity of the test results or that he had a positive test. Rather, the focus was on why that result could be explained by prescription medication he was taking. Since Claimant's medical note and list of prescriptions were for a different classification of benzodiazepine than the lab results confirm were present, we cannot find that the MRO conclusion that his prescriptions did not legitimize the positive test result was arbitrary or an abuse of discretion. Under such circumstances, Claimant's second positive test was a violation of his Waiver and Companion Agreement, and justified his reversion to dismissed status.

AWARD:

The claim is denied.




Margo R. Newman
Neutral Chairperson

Dated: 2/12/2018



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member