

PUBLIC LAW BOARD NO. 7660

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT**

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 64
Award No: 64**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. K. Manley, by letter dated on October 30, 2015, for allegedly testing positive during a Union Pacific Railroad Drug and Alcohol Policy test on October 21, 2015 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1648U-001/1646963 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall provide Claimant K. Manley returned to service with all rights and benefits unimpaired and compensated for time lost."

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employees Division – IBT (hereinafter referred to as the “Organization”) and the Union Pacific Railroad Company (hereinafter referred to as the “Carrier”). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Kenneth Manley, has been employed by the Carrier since August 22, 1979 and held the position of Assistant Steel Erection Foreman when he was charged with

violating the Carrier's Drug and Alcohol Policy General Code of Operating Rules ("GCOR") (Rule 1.5) on October 21, 2015 when he tested positive for a controlled substance after a follow-up drug and alcohol test. The Claimant had previously tested positive for a controlled substance and violated the GCOR. It is undisputed that the Claimant signed a Waiver Agreement, dated January 6, 2015, wherein he was granted a one-time return to work under Rule 21 of the GCOR and acknowledged that another positive result within ten years would lead to his termination without being afforded another formal investigation.

On October 30, 2015, the Carrier notified the Claimant in writing that his second positive drug test result violated his Waiver Agreement and he was dismissed from service. On January 4, 2016, the Organization appealed the Carrier's decision. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final decision on May 12, 2016. An appeal conference held on June 21, 2016 did not resolve the dispute. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier claims that it has established with substantial evidence that the Claimant violated its GCOR and the Waiver Agreement when he tested positive for a controlled substance on October 21, 2015. The Carrier asserts that the Waiver Agreement specifically stated that the one-time return to work after the Claimant's first positive drug test result was contingent on not having a second positive drug or alcohol test result within a ten-year period beginning on January 6, 2015. It cites several arbitral awards that support its contention that the Carrier retains the authority to dismiss employees who test positive for drugs and alcohol and that conditional return to work agreements, like the Waiver Agreement here, are self-executing and result in the immediate dismissal of the employee in violation of its terms.

The Organization maintains that the Claimant was not under the influence of drugs or alcohol while at work. It also asserts that the Claimant sought substance abuse treatment through a rehabilitation program. The Organization contends that the discipline imposed was unwarranted and excessive, given the Claimant's many years of service. It cites

numerous awards where a dismissal was deemed to be punitive and not progressive, leading to the penalty being reduced or dismissed.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence presented, the Board here finds that the Claimant violated the Waiver Agreement and the GCOR when he tested positive for drug use on October 21, 2015.

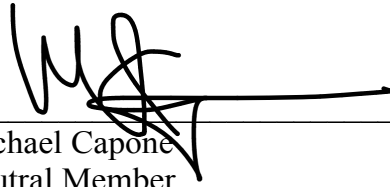
Given the specific facts and circumstances here, the Waiver Agreement negates the need to review the procedural objections found in the record. The Waiver Agreement and the Carrier's GCOR specifically provides that the Claimant's one-time return to duty was contingent on his not testing positive a second time for ten years from the date of the waiver. The record does not contain any evidence that the testing procedures or its results were in dispute. As such, we find that the Waiver Agreement is self-executing and that the Claimant had clear written notice that a violation of its terms would lead to his immediate dismissal and he would not be entitled to a formal hearing.

The Claimant tested positive for drug use less than 11 months after signing the Waiver Agreement. While the Board recognizes the significance and impact of losing one's job after 35 years of service, we are also guided by legions of arbitral awards in the industry that have consistently held that leniency is reserved to the Carrier where there is no abuse of discretion or where the penalty imposed is excessive. The record does not contain any evidence that the Carrier was arbitrary, capricious, or discriminatory in dismissing the Claimant. The Carrier acted within its authority to insure workplace safety.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has established with substantial evidence that the Claimant violated the Waiver Agreement and the GCOR pertaining to the prohibited use of drugs and alcohol.

AWARD

Claim denied.



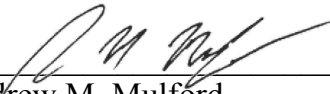
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18