

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 72
Award No: 72**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant J. Ortiz, by letter dated March 21, 2016, for alleged violation of UPRR Drug and Alcohol Policy and Rule 1.5 of the General Code of Operating Rules (GCOR) was unjust, unwarranted and in violation of the Agreement (System File B-1648U-206/1656647 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Ortiz must be reinstated to service, must have the matter stricken from his disciplinary record and be compensated for all losses."

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, Jeffery Ortiz, has been employed by the Carrier since April 12, 1993 and held the position of System Tie Plug Insertter when he was charged with violating the Carrier’s Drug and Alcohol Policy and General Code of Operating Rules (“GCOR”) (Rule

1.5) when he tested positive for a controlled substance after a drug and alcohol test on February 5, 2016.

On February 18, 2016, the Carrier notified the Claimant to appear for a hearing and investigation, which was held on March 4, 2016. On March 21, 2016, the Carrier notified the Claimant that he was found guilty of the charges and dismissed from service. On April 7, 2016, the Organization appealed the Carrier's decision. An appeal conference held on September 1, 2016 did not resolve the dispute. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final decision on September 23, 2016. 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 his Waiver Agreement, dated October 28, 2014, when he tested positive after a follow-up test for a controlled substance on February 5, 2016. 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.

The Carrier asserts that there is no dispute over the specimen collection or the chain of custody related to the drug test. It maintains that there is no evidence to support a conclusion that the positive result was due to faulty testing equipment or second-hand smoke. As such, the Carrier contends it is well established that permanent dismissals are warranted where an employee violates the second chance provided by a waiver agreement for a previous drug and alcohol policy violation.

The Organization claims the Carrier did not provide the Claimant with a fair and impartial hearing in violation of Rule 48 of the Agreement. It alleges that it was not provided with documents and a witness list in advance and therefore it was unable to prepare a proper defense. The Organization contends it was given only 15 minutes to review the documents before the hearing, which was not adequate for a proper review. Further, the Organization maintains that the hearing officer and charging officer colluded in

the presentation of evidence before the hearing began.

The Organization argues that the Claimant did not meet its burden of proof that the Claimant knowingly used a prohibited substance. While it does not dispute the Carrier's evidence of a positive test result, it claims there are mitigating circumstances that put the validity of those results in doubt. The Organization submits that the results indicate a low level of a prohibited substance and the drug tests from the previous and following day, February 4 and 6, respectively, were negative. Given these factors, the Organization avers that the Carrier's decision to dismiss the Claimant is arbitrary and an abuse of discretion.

The Board does not find any procedural errors in the record that requires dismissal of the charges. The Organization's assertion that the Claimant was deprived of a fair and impartial hearing in violation of Rule 48 is rejected. There is no express language in the Agreement that requires the Carrier to provide the Organization with advance documentation or a witness list. The purpose of the hearing and investigation is for each party to hear and review all relevant evidence that pertains to the dispute. The record indicates that the hearing officer offered a recess when it heard the Organization's objection. The recess was not pursued and the hearing continued. Once the record is established, the Board is empowered to review its contents, which include the subsequent on-property handling of the claim. Based on the record we find that the Claimant was provided with a fair and impartial investigation, and that the record supports none of the other objections.

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, the GCOR, and the Drug and Alcohol Policy (hereinafter referred to as the "Policy") when he tested positive for marijuana on February 5, 2016.

The Manager of Operating Practices, Kenneth Benjamin, testified that the Claimant tested positive for marijuana on February 5, 2016. The record does not contain any evidence that the specimen collection process or the applicable chain of custody process

were compromised. The positive test result violates the Carrier's Policy and the Waiver Agreement of October 28, 2014. At that time the Claimant accepted a one-time opportunity to return to work subject to section 21.1.2 of the Policy, which provides that a subsequent violation within a ten-year period will result in permanent dismissal. Here, the Claimant's second positive result was less than two years later.

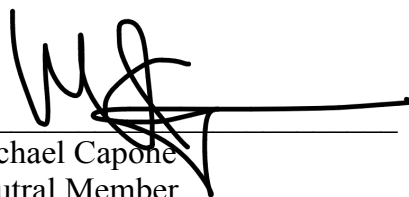
The Organization's valiant effort in contending that the negative test results on the days immediately before and after the February 5 test should be considered mitigating circumstances is rejected. There is no support for the conclusion that two negative test results negates a positive finding. The Organization's reliance on Award No. 39 issued by Public Law Board No. 7633, to show that positive test results can be overturned, is inapplicable to the facts here. In that matter, there were material issues in the record regarding the specimen collection for a breath alcohol test. Nothing in the record here indicates an issue with the specimen collection.

Absent evidence that the positive test was not collected in accordance with the applicable Policy or regulations, the Board cannot ignore the result as being in violation of the applicable rules. Further, nothing in the Follow-Up Testing Program section of the Policy limits the Carrier from conducting follow-up testing on consecutive days. Lastly, any doubt as to the validity of the positive test result was waived by the Claimant who testified that the Medical Review Officer offered him to have the "split sample" tested. The record does not indicate that the Claimant opted to have the retest performed.

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, the GCOR, and the Policy pertaining to the prohibited use of drugs and alcohol.

AWARD

Claim denied.



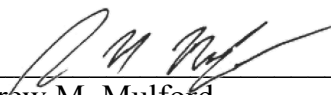
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18