

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 86
Award No: 86**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Mr. D. Jolly, by letter dated August 12, 2016, for violation of the UPRR Drug and Alcohol Policy, General Code of Operating Rules (Rule 1.5) and Rule 1.6: Conduct - Insubordinate in connection with allegations that he refused a UP Random Test on May 23, 2016 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File MK-1648U-601/1671653 UPS).

2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant D. Jolly's personal record, fully reinstate him along with all vacation, insurance and retirement benefits, along with compensation for all straight and overtime work opportunities missed as a result of the inappropriate discipline and any other relief under Rule 48(h)."

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, Dana Jolly, has been employed by the Carrier since April 7, 1997 and held the position of Bridge and Building (“B&B”) Carpenter when he was charged with violating the Carrier’s Drug and Alcohol Policy General Code of Operating Rules (“GCOR”) (Rule 1.5) and Rule 1.6: Conduct – Insubordination when on May 23, 2016 he allegedly tampered with a urine specimen he was to provide as part of a random drug and alcohol test.

On May 31, 2016, the Carrier notified the Claimant in writing to appear for a hearing and investigation on June 7, 2016. After a postponement the hearing was held on June 10 and July 28, 2016. On August 12, 2016, the Claimant was notified that the Carrier found him guilty of the charges and he was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on January 5, 2017. An appeal conference held on March 22, 2017 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 when he tampered with the urine specimen on May 23, 2016. It alleges that the collector, Gina Hinz, who saw “hot packs” or hand warmers on the floor in the restroom stall where the Claimant provided the urine sample, noted the specimen as being hot to the touch. The Carrier maintains that the temperature strip confirmed that the urine was above normal temperature. According to the Carrier, while the collector was making arrangements for a direct observation and awaiting further instructions, she left the Claimant in a conference room where the collection kit with his urine specimen was located. The Carrier contends that when the collector returned to the room the urine specimen was missing. It argues that the Claimant tampered with the specimen and that under its Policy a direct observation of another specimen collection was not required and the Claimant was removed from service.

The Carrier avers that its Policy describes tampering with a specimen as a refusal to participate in a required drug and alcohol test, which results in discipline up to and including dismissal. It maintains that various arbitration tribunals have upheld its Policy when it has

dismissed employees for refusing to submit to a drug and alcohol test.

The Organization maintains that the Carrier failed to provide the Claimant with a fair and impartial hearing. It claims that the Carrier relied on a written statement from Ms. Hinz presented during the investigation but did not produce her as a witness. As such, argues the Organization, the Claimant was not afforded the opportunity to cross-examine the primary witness to the events of May 23, 2016 and deprived him of due process provided by the Agreement. It cites Award No. 16 of this Board where the failure to produce the collector administering the drug and alcohol test led to the dismissal of the charges.

With regard to the merits, the Organization asserts that the Carrier did not meet its burden of proof that the Claimant refused to take the drug test as alleged. It maintains that the Claimant followed the instructions given to completing paperwork and supplying the urine specimen. The Organization argues that when the Claimant was informed of the missing specimen he was willing to submit to a second test under direct observation but was refused. It contends that there is a well-established principle in the industry that substantive evidence requires more than speculation or conjecture about tampering with a specimen when imposing discipline.

The Organization avers that should the Board find that discipline is proper, the decision to dismiss the Claimant is arbitrary and excessive given his 20 years of service and no prior discipline in his record. It cites numerous awards where boards have reduced penalties when employees were reinstated after being found guilty of the charges.

The Board finds that the Claimant was not deprived of a fair and impartial hearing. The record indicates that the Carrier made efforts to produce Ms. Hinz, including postponing the hearing from June 10 to July 31. It was established that she was unavailable due to surgery and a serious medical condition. In the absence of her testimony a detailed written statement was entered into the record. Such documentary evidence, while admissible hearsay, is given limited weight and alone usually insufficient to prove facts being asserted to establish guilt. Here, however, the testimony of the Manager of Terminal Operations Dustin Disney and Foreman Dennis Stefani conclusively establishes the material

allegations in Hinz's statement that the Claimant tampered with the specimen and caused it to disappear. Based on corroborating testimony, Hinz's written statement is reliable and suffices as her version of the incident.

Despite the Organization's strenuous argument, we distinguish our findings in Award No. 16 from our conclusions here based on different facts in the record. In that matter, where the tester was not produced as a witness, the facts allude to serious questions regarding the tester's compliance with specimen collection protocols and chain of custody anomalies during the breath analysis test. The tester's testimony therefore, became integral to establishing a properly conducted alcohol test. Award No. 16 indicates that the Carrier refused to produce the tester as a witness, which is a significant difference from the facts in the record here. The Carrier did not refuse to produce Hinz as a witness and there is nothing in the record that alleges a defective specimen collection process or a problem with the chain of custody.

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 Policy and the GCOR when he tampered with his urine specimen on May 23, 2016.

The documentary evidence and the witnesses' testimony provides substantial evidence that the Claimant used hand warmers to tamper with the temperature of his urine specimen, which the Policy defines as a refusal to submit to the drug test. The evidence also indicates that the Claimant was alone with the specimen before it was discovered missing. It is well-established that substantial evidence in discipline cases need be " . . . relevant evidence as a reasonable mind might accept as adequate to support a conclusion." National Railroad Adjustment Board Third Division Award No. 28330. The sufficiency of the evidence adduced here supports a determination of guilt. Both Disney and Stefani saw the hand warmers in the area where the Claimant was sitting alone and confirmed they were still warm. Further, there is reliable testimony to support Hinz's written statement that the Claimant was alone with the specimen before it was discovered missing and no one else had

entered the room when Hinz left him for a brief time.

While the Board recognizes the significance and impact of losing ones job after 20 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 the safety of its workplace. Based on numerous awards from arbitration tribunals throughout the industry, tampering with or adulterating a specimen is a serious offense equivalent to insubordination and dishonesty. See Third Division Award No. 36039 involving the same parties to this Board and the awards cited therein where dismissal for such conduct has been consistently upheld.

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 its Policy and the GCOR when he tampered with the random drug test specimen on May 23, 2016.

AWARD

Claim denied.



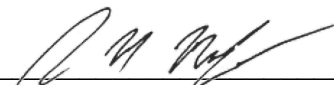
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18