NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402
AWARD NO. 133, (Case No. 154)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: September 23, 2009

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator Santos D. Perez for violation of Union Pacific Operating Rule 1.5 (Drugs and Alcohol) and the Union Pacific Railroad Drug and Alcohol Policy in connection with a positive reasonable cause prohibited substance test administered on May 17, 2008 at Alvarado, Texas, is unjust, unwarranted, excessive and in violation of the Agreement (System File MW-08-98/1504665D MPR).

2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. S. D. Perez have his personal record cleared of all charges. Also that he be afforded the opportunity for the Companion Agreement. Also that the Claimant be reinstated will all back pay, seniority unimpaired and all other rights due to him by the Collective Bargaining Agreement."

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On May 23, 2008, Carrier notified Claimant to appear for a formal Investigation on June 11, 2008, which was mutually postponed and subsequently held on July 29, 2008, concerning the following charge:

"Please report to the Crown Plaza, 700 Avenue H East, Arlington, Texas, on Wednesday, June 11, 2008, at 0800 hours, for investigation and hearing. The charges that you allegedly had measurable drug in your system, as evidenced by the positive test result on the Union Pacific Railroad reasonable cause test. The test was administered to you in accordance with Union Pacific Railroad's Drug and Alcohol Policy on May 17, 2008, at Alvarado, Texas, while you were working as a Machine Operator.

This would be in violation of the Union Pacific Operating Rule 1.5 of the General Code of Operating Rules, and the Union Pacific Railroad Drug and Alcohol Policy.

* * *

Circumstances associated with this investigation have nullified waivers, agreements, or any policy that would allow you to work with Union Pacific's Employee Assistance for purposes of re-instatement."

On August 14, 2008, Claimant was notified that he had been found guilty as charged and was dismissed from service.

There is no disagreement between the parties that on May 17, 2008, Claimant while operating a Multi -Screw Spiker Machine struck another machine resulting in damage to both machines and the death of co-worker John T. Hadfield. Following the accident Claimant was given a reasonable cause drug and/or alcohol test in accordance with the Carrier's Drug and Alcohol Policy. Claimant tested positive for methamphetamines and was removed from service pending the outcome of an Investigation.

It is the Organization's position that Carrier's decision to dismiss the Claimant and not allow him to enter the Employee Assistance Program for reinstatement purposes is contrary to the Prevention Program Companion Agreement Section 1 of Appendix No. 7 which lists only three exceptions that would not allow an employee to participate in the Program. The pertinent language of Section 1 states:

"An employee who has been dismissed from service as a result of violating Rule 1.5 may elect to participate in the Rule 1.5 Rehabilitation/Education Program (R1.5 R/E Program or Program), provided:

(a) The employee has had no Rule 1.5 offense on his or her record for at least ten (10) years; and

(b) The employee has not participated in the Rule 1.5 R/E Program for at least ten (10) years; and

(c) The incident giving rise to the dismissal did not involve significant rule violations other than Rule 1.5."

The Organization argued that there is no evidence that Claimant had any Rule 1.5 offense on his record in the past ten years or that he had participated in the program in the past ten years, therefore, when the Carrier dismissed him on August 14, 2008, for the singular violation of Rule 1.5, he was contractually entitled to elect to participate in the Rule 1.5 Rehabilitation/Education Program. It concluded by asking that because the Carrier failed to allow the Claimant to enter the R/E Program the Claim be sustained as presented.

It is the position of the Carrier that Claimant was not allowed the opportunity to enter its Companion Agreement Program because his positive test involved a "major rule violation". It argued that in a second case before this Board (Case No. 155) Claimant was charged and found guilty of violating Rule 1.6 - Conduct (Careless of the Safety of Themselves or Others) which also required a Level 5 dismissal. According to it the dismissal of the Claimant is supported by Section 1(c) of Appendix No. 7 (quoted above) which provides for employees to participate in rehabilitation/education programs when experiencing a first time drug and alcohol violation unless they fall under any or all of the three exceptions. Because Claimant fell under one of those exceptions he was not entitled to enter the Program and the Carrier concluded by requesting that the Claim remain denied.

The Board has thoroughly reviewed the record and the skillful arguments of the parties. It is clear that the Carrier proved its charges as Claimant tested positive for methamphetamines and admitted to such on page 29 of the transcript when he made a closing statement wherein he said the following:

> **"I mean I guess I'm sorry that this had to come to this. I mean I don't- I've never- I've never been a person to do- do drugs. I was just- my cousin had just been released from jail and we was- I went to a cookout three days before it'd been the first time I had ever done it. ..."** *(Underlining Board's emphasis)*

The question of whether the Claimant should have been allowed to enter the R/E Program has subsequently become academic because in Award No. 134, Case No. 155, (which is a companion case involving the same Claimant) the Board found that Carrier's decision to dismiss Claimant was appropriate. Therefore, the Board finds and holds that the dismissal in Award No. 134 cannot be overridden and the question raised in the instant case is now moot, thus, the Claim is dismissed.

AWARD

Claim dismissed.

William R. Miller, Chairman

B. W. Hanquist, Carrier Member

T. W. Kreke, Employee Member

Award Date: 12/9/09