

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6402  
AWARD NO. 196, (Case No. 219)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
DIVISION - IBT RAIL CONFERENCE**

**vs**

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific  
Railroad Company)**

William R. Miller, Chairman & Neutral Member  
K. D. Evanski, Employee Member  
K. N. Novak, Carrier Member

Hearing Date: June 4, 2013

**STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:**

- 1. The discipline (dismissal) imposed on Mr. S. Bryant by letter dated June 29, 2011 for alleged violation of Section 16 (Refusal to Permit Testing) of the Union Pacific Drug and Alcohol Policy and Rule 1.6 of the Union Pacific Operating Rules when he allegedly refused to complete a Union Pacific Reasonable Cause Drug and Alcohol Test on January 3, 2011 was without just and sufficient cause and in violation of the Agreement (System File F11-20/1559318).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Bryant's record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and improper discipline."**

**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 January 5, 2011, Claimant was directed to attend a formal Investigation on January 25, 2011, which was mutually postponed until June 24, 2011, concerning in pertinent part the following charge:

**"...for investigation and hearing on charges that you allegedly refused a**

**Reasonable Suspicion test of the Federal Railroad Administration. The test administered in accordance with Union Pacific Railroad (UPRR) Drug and Alcohol Policy on January 3, 2011, at Oklahoma City, Oklahoma, while you were working as a Track Foreman.**

**If proven, this would be in violation of the UPRR Drug and Alcohol Policy, General Code of Operating Rules (Rule 1.6), and Code of Federal Regulations. According to the UPRR Upgrade Policy, the proposed discipline for this offense is a Level 5."**

On June 29, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

The facts indicate that on January 3, 2011, Claimant was working as a Track Foreman at Oklahoma City, Oklahoma, in conjunction with Track Foreman B. Cossey; both employees were using a Form B Bulletin and flagging protection against train movement for contractors. At some point, Claimant informed Cossey that he was feeling ill and wanted to go home. However, prior to leaving Claimant was observed by Manager of Track Maintenance C. McManaman who alleged that he could smell alcohol on Claimant's breath. Manager McManaman suspected that Claimant was intoxicated, and called Alcohol and Drug Test Services, Inc. (ADTS) to perform a Reasonable Cause Drug and Alcohol test. McManaman advised the Claimant that he needed to come with him so a Drug and Alcohol test could be performed. Claimant did not go with the Supervisor and left the work site and because of that the aforementioned Notice of Investigation was served.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because he was subjected to double jeopardy as this was one of two cases involving charges stemming from the same incident. It argued the claim should be sustained without reviewing the merits as Carrier violated Claimant's "due process" rights. The Organization also addressed the Carrier's procedural argument that the Organization's initial appeal letter was filed with the wrong Carrier Officer by stating that Officer did not raise that issue and instead denied the claim on its merits. It argued that the alleged procedural error should not be considered in this instance because procedural objections must be brought up at the earliest possible time or they are considered to have been waived. Turning to the merits it argued that the Carrier did not meet its burden of proof. It argued that the record shows that the Carrier never gave a clear order to the Claimant that he was being asked to take a drug and alcohol test. Furthermore, it asserted the record shows that it was only after two Carrier Managers accosted the Claimant that they decided to test the Claimant for drugs and alcohol; thus the test was not reasonable to begin with. It suggested the actions of the Managers were so unreasonable that it brought on a panic attack as the Claimant suffers from a "panic disorder" and because of that Claimant left the

property as he felt he was being physically assaulted. Lastly, it argued that because Claimant is diagnosed with panic disorder coupled with the unusual circumstances of the incident clearly mitigates in behalf of the Claimant. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural violations on its part and Claimant was not denied his "due process" Agreement rights, whereas, the Organization's claim was procedurally defective as it was filed with the wrong Carrier Officer. It argued that the evidence shows that Manager McManaman told the Claimant that he was to submit to a Drug and Alcohol test because he had a reasonable suspicion that the Claimant was under the influence of alcohol. Claimant refused to comply, violating numerous provisions under Rule 1.6 and the Carrier's Drug and Alcohol Policy. It further argued that at the time of the incident Manager McManaman attempted to inform the Claimant of the potential consequences, of discipline or dismissal for leaving without taking the Drug and Alcohol test. Nevertheless, Claimant continued to refuse the instruction given him, resulting in insubordination. Thus, according to it, the assessment of dismissal was in accordance with the Carrier's UPGRADE Discipline Policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board notes that that this is the first of two dismissal cases involving the same Claimant, with the other case being Award No. 197, Case No. 220. Both cases have a commonality as they each arise from the same incident.

The Board has considered the parties respective procedural arguments and decided on a non-precedential basis that those arguments will not settle this case and the merits will be reviewed. Additionally, the Board notes that it has thoroughly reviewed the transcript and record of evidence and it is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

The record verifies that on January 3, 2011, the Claimant was working with a co-worker using a Form B Bulletin and flagging protection against train movement for contractors. While doing that assignment Claimant used his personal vehicle that was parked on the right-of-way behind Extreme Paint Body Shop. On that morning Claimant was contacted by Manager of Track Maintenance (MTM) C. A. McManaman and advised that he was being required to submit to a drug and alcohol test due to reasonable suspicion. On pages 34 and 35 of the transcript the Claimant was questioned about the incident as follows:

<b>"Mr. David Duckett:</b>	<b>Mr. Bryant, did you refuse to provide a breath or a body fluid specimen on that particular day?</b>
<b>Mr. Steve L. Bryant:</b>	<b>Not verbally, <u>but I did leave the scene, I did leave.</u></b>

**Mr. David Duckett:**           **Was a drug and alcohol test requested that you perform?**

**Mr. Steve L. Bryant:**       **I don't remember Clay saying that, maybe he had.**  
*(Underlining Board's emphasis)*

Claimant's decision to leave the scene translates to having refused to take the test. In his defense the Claimant asserted that the reason he left the work site was because he suffers from severe anxiety and panic attacks that were brought on in this instance because Carrier Manager McManaman and Track Inspector Finnigan approached him in a very confrontational and non-professional manner about taking the test. According to the Claimant he became extremely anxious and decided that he needed to leave the premise so as to calm down, therefore, he went to his car to leave and while he was in his automobile, Claimant stated that Finnigan jerked open his car door and yanked his keys out of the ignition after which he grabbed them back. The Carrier argued that the Carrier Officers tried to explain the consequences of refusing to submit to the Drug and Alcohol test and even attempted to prevent the Claimant from driving away, because they were concerned for both his and the public's safety.

On pages 22 and 23 of the transcript Manager McManaman explained what went on regarding the incident. On page 22 the Claimant asked McManaman where he was in proximity to the Claimant. McManaman responded as follows:

**"Again, I was all different distance from being in my pickup all the way up until one point I was in the car with Mr. Finnegan trying to restrain you from leaving..."** *(Underlining Board's emphasis)*

On page 23 the questioning of McManaman continued as follows:

**"Mr. Larry Foster:**           **Mr. McManaman, how close were you to Steve at the closest point?**

**Mr. Clay McManaman:**   **The closest point at one time I was in the car with him. We were physically touching each other. I was almost in his lap.**" *(Underlining Board's emphasis)*

The Organization also entered a statement from Mr. David Harrington, the owner of Extreme Paint and Body Shop which was building the Claimant had parked his car behind. That statement reads in pertinent part:

**"On the morning in question Steve Bryant stopped by my shop to inquire on the**

status of his Chevy truck I was repairing. It was between 8:30 a.m. and 9:30 a.m. and he didn't appear to have been drinking alcohol to me. He then went out and got in his car which was parked behind my shop. After a few hours an older man pulled beside him in a white pick-up, he got out and pulled open the driver side door of Steve's car and it appeared to me he was trying to pull Steve out of the car. He was yelling at Steve and kept reaching in his car. I then saw Steve close his door and drive away. The other man got in his truck and looked like he was chasing him."

The record shows that Carrier's request of Claimant to take a Drug and Alcohol Test became highly charged and somewhat confrontational. The Board has no reason not to believe that the Carrier Officer's intentions were to protect the Claimant and the general public, but it is also understandable that the Claimant may have become fearful while having a panic attack as the two Officers attempted to restrain him which is consistent with Doctor John E. Seguir's statement that reads as follows:

**"Mr. Bryant has been a patient of mine for several years. I am treating him for depression, anxiety and panic attacks. When having one of these attacks is judgment is not always the way it should be. Any consideration that can be given to him, while we work on this, would be appreciated.**

*(Underlining Board's emphasis)*

The record substantiates that the Claimant exercised poor judgment when he chose not to take the test, therefore, substantial evidence was adduced at the Investigation that the Claimant violated the Drug and Alcohol Policy.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 32 years of service with an unblemished record. Claimant's offense was serious, but because of the Claimant's long career and good work record the Board finds and holds that dismissal was excessive and is reduced to lengthy suspension that is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant will be reinstated to service with seniority intact and benefits unimpaired with no back-pay. Prior to reinstatement Claimant should be evaluated by the Employee Assistance Program (EAP) because of his "panic attacks". The Board also forewarns the Claimant that after reinstatement to service he needs to be careful to adhere to all Carrier Rules, Safety Rules and instructions.

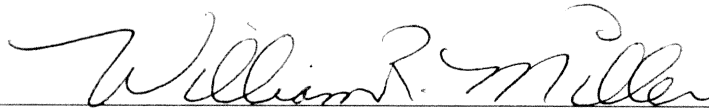
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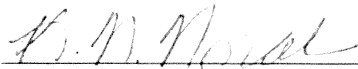
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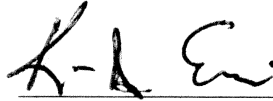
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: Aug 8 2012