

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES |) | |
| |) | Case No. 29 |
| and |) | |
| |) | Award No. 29 |
| UNION PACIFIC RAILROAD COMPANY |) | |
| |) | |

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

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

1. The dismissal of Track Laborer Harold D. Goings for violation of GCOR Rule 1.6 Part 3 and Section 16 of the Union Pacific Drug and Alcohol Policy in connection with his refusal to take a reasonable cause test January 29, 2008 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File 1502807 SPW).
2. As a consequence of Part 1 above, we request that Mr. Goings be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wages and benefit loss suffered by him since his removal from service and the alleged charge(s) be expunged from his personal record."

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of 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.

Claimant was operating a company vehicle on January 29, 2008 when he was involved in an accident at approximately 2:45 pm in the afternoon. Claimant suffered injury severe enough to require being transported to the emergency room of a local hospital and placed under the Emergency Room Physician's care for testing and treatment.

While Claimant was in the emergency room at least two railroad management officials,

Claimant's manager of track maintenance and a manager of track projects, came into the emergency room to the area where claimant was being held. The record shows that a contract employee for the railroad appeared in that area approximately 6:10 pm and left the area approximately 25 minutes later. What did, or did not, occur during that 25 minute period is what forms the basis of the dispute before us.

The manager of track projects ("MTP") testified that he entered Claimant's cubicle in the emergency room at approximately 5:55 pm and that the contract employee who was supposed to administer a Breathalyzer test and collect a urine sample entered Claimant's cubicle at 6:10 pm. The manager recalled that the contract employee entered the cubicle, put her collection box, the contents of which are her vials and whatever other necessary equipment that she has to perform the tests, and that Claimant asked who she was. The MTP told Claimant that she was going to take a sample because of his involvement in a personal injury. The MTP quoted the Claimant as saying "You need to talk to my doctor and nurse. You need to get their approval before I do anything." The manager further testified that the above-noted exchange was the only attempt to collect the samples required that he witnessed, and that of the 25 minute period that the sample collector was with Claimant that he was only there about 5 minutes. The manager of track projects was asked if the specimen collector was wearing any identifiable name tags or was introduced to Claimant and he could not recall. The MTP testified that the specimen collector stated to him as she was leaving the hospital that after three times that she had attempted to collect a sample, that after the third time that it was deemed a refusal, that she had to do no more.

Claimant's manager of track maintenance ("MTM") testified that Claimant contacted him from the scene of the accident and that he first visited the accident site and then went to the hospital where Claimant was being treated. The MTM recalled that the specimen collector approached Claimant and that he told her that he wasn't going to let her do anything until they spoke to the doctor and nurse. The MTM further testified that he told the specimen collector that Claimant had not refused and that she needed to administer the test. The MTM further related that when the Claimant's doctor told him that it was okay to take the test, Claimant replied: "go ahead." The MTM stated that when he heard that he told the specimen collector to "go ahead and perform the test."

The MTM further explained that Claimant had never met the specimen collector and that when he informed the Claimant that this was the one that's going to take the drug and alcohol test that the Claimant replied: "I don't have a problem with that" and that he told the MTM that "I prefer that you remain and watch me take the test."

When asked point blank, the MTM testified:

Q: So you heard the doctor say that she could give me the test, is that correct?

A: That's correct.

Q: And did {Claimant} refuse?

A: No, he didn't.

Claimant testified that in regard to who the specimen collector was, the MTP stated at the Emergency Room "Here she is, here is the nurse" to which the Claimant relates he replied: "No, that's not my nurse - she's over there." Claimant also testified that when he asked the specimen collector who she was and what she was doing that she made it clear: "I don't have to tell you anything." Claimant related that when the MTM finally told him 'She's the lady with the company, she's here to take a breathalyzer and urine test...' that he responded "I don't have a problem with that."

Claimant further asserted that the hospital's nurse said that the patient (Claimant) hadn't refused anything and that the MTM told the specimen collector that 'he has not refused; I'm ordering you to test him.'

It should also be acknowledged that the hospital's nurse that was on duty and attending to Claimant at the time of the specimen collector's visit made the following report that was admitted to this record:

18:45 Railroad Representative presented herself at bed-side.

Railroad Representative stating that she required a urine specimen and breathalyzer.

Patient stated that he didn't know who she was and verbalizing concern that she was not affiliated with hospital.

...

Railroad representative packing to leave - directed that if patient had indeed been drinking, that would still be on the UA for a period of time and the short time that had lapsed would not change the status of the breathalyzer.

Representative called her supervisor - She stated that she was directed to not do anything further.

Patient had clearly calmed down - Agreed to provide any sample required, but she said she would not do test at this time. Railroad Representative stated that "Per Contract, the patient must comply with her demands... when a reasonable cause is present.

Claimant's MTM testified that after Claimant was released from the emergency room, he gave him a ride home. The MTP testified that between 8:00 pm and 8:30 pm, Claimant filled out a 52032 Form at the El Centro office, and upon completion of the paperwork, at 8:40 pm Claimant was advised that he was being held out of service for failure to submit to a drug test.

The following day, January 30, 2008, Claimant was sent a letter over the signature of the Director of Track maintenance to the effect that he was being dismissed from service for refusal

to remain available to take a reasonable cause drug and alcohol test in violation of GCOR Rule 1.6 (3) and the Union Pacific Drug and Alcohol Policy.

On February 5, 2008 , the January 30 letter was canceled and an investigation was scheduled on charges that Claimant violated GCOR Rule 1.6 (3) and Section 16 of the Drug and Alcohol Policy. The investigation was held as scheduled and on March 13, 2008 Claimant was notified by letter that he had been found guilty of the charges and was dismissed from service. The Organization filed claim on April 16, 2008 which was denied June 10, 2008. The denial of the claim was appealed July 23, 2008 and denied by the Carrier September 23, 2008. A conference was held to discuss the dispute on February 3, 2009 without resolution.

It is the Carrier's position that it proved that the Claimant was guilty of the charges set forth in its letter of discipline and demonstrated that Claimant was guilty of violation of Rule 1.6 (3) because he refused to submit to a reasonable cause test requested by proper authority. Carrier asserts that the testimony and evidence produced at hearing provides substantial evidence that Claimant was insubordinate when he refused to submit to the drug and alcohol test that was to be administered by a contracted employee. The Carrier argues that on January 29, 2008, a contractor for the railroad identified herself and informed Claimant that a urine sample had to be taken due to his personal injury and that Claimant did not submit. Carrier avers that the contractor approached claimant a second time and again he refused to submit to the test. The Carrier points out that Claimant was not undergoing any medical treatment at the time the contractor was attempting to collect samples. Carrier points to Section 16.3.1 of its Drug and Alcohol Policy which states: "*An employee who refuses to provide breath or a body fluid specimen or specimens, when required, or remain available after an accident, is considered insubordinate under Union Pacific Rules.*" Thus, Carrier argues, when Claimant refused to provide samples to the contractor when required, he was insubordinate in violation of GCOR Rule 1.6 (3). Hence, the Carrier asserts, that based on the evidence, it has met its burden and has produced substantial evidence to demonstrate that Claimant did violate the rules with which he was charged.

Moreover, the Carrier contends, the record reveals that Claimant was afforded all of the due process rights as outlined in the current Agreement and that the discipline assessed in this matter was commensurate with Claimant's egregious behavior. The Carrier asserts that its assessment of discipline in this matter was neither arbitrary, capricious nor an abuse of discretion but was in line with previous Board's determinations that where employees have been found to be insubordinate, that a Level - 5 discipline assessment and subsequent dismissal were found to have been reasonable.

The Organization maintains that the evidence and testimony on this record fails to demonstrate a violation of the cited rules and that the penalty assessed was unjust and unwarranted. The Organization asserts that Claimant never once refused an instruction from any Carrier Officer or any of its known authorized agents and there was no proof that Claimant refused to be tested. The Organization contends that the record evidence reflects that Carrier's

drug testing agent entered the Emergency Room and without providing identification, identifying herself or explaining why she was there informed Claimant that she needed to perform a drug and alcohol test on him and that he informed her that she would have to speak to his doctor and when his doctor approved the request he would comply. The Organization avers that Claimant's response does not equate to a refusal. The Organization points to the record to show that once the MTM informed Claimant who the contractor was and the treating physician gave his permission for the test, that the Claimant readily agreed to comply with the test. Nevertheless, the Organization states, the contractor insisted on leaving before the tests were taken despite the MTM and the hospital's nurse informing that the Claimant was not refusing and failed to abide by a direct order from the MTM to administer the test. Thus, the Organization opines, the Carrier has failed to prove that Claimant willfully violated the rules with which he was charged.

We agree with the Organization that the Carrier failed to prove the charges filed against the Claimant. The Carrier asserts in its argument that a contractor for the railroad identified herself and informed Claimant that a urine sample had to be taken due to his personal injury and that Claimant did not submit. In fact, the record shows that the MTP testified that he could not recall whether the specimen collector was wearing any identifiable name tags or was introduced to Claimant. The MTM testified relative to Claimant not understanding who this unidentified woman was that when he informed the Claimant that this was the one that's going to take the drug and alcohol test that the Claimant replied: "I don't have a problem with that"

Moreover, the Carrier argues that Claimant refused at least twice to submit to the test. The record shows that the MTP testified that he only witnessed the contractor discuss sample collection with Claimant on one occasion and that interchange consisted of Claimant telling the collector: "You need to talk to my doctor and nurse. You need to get their approval before I do anything" that, we think, was not an unreasonable request. Further, the MTP explained that he was only in the room for about five minutes of the approximate 25 minutes the sample collector was allegedly trying to collect samples. The MTM testified that he was not privy to the initial conversation that Claimant had with the contractor near the washroom but that after he told Claimant who the collector was and that she's the lady with the company, she's here to take a Breathalyzer and urine test...' that he responded "I don't have a problem with that." That hardly qualifies as a refusal.

The Carrier further maintains that Claimant was not undergoing medical treatment at the time the specimen collector attempted to collect her samples. This too, we find to be in conflict with the record. The record shows that although the Claimant had had x-rays taken and blood drawn, he was still waiting to be taken for further x-rays of his head at the time all of this was occurring. Moreover, Claimant was in the Emergency Room under a doctor's direct care and was not unjustifiably reluctant to do anything that the doctor who was attending him did not specifically approve.

We also take note of the Nursing Report prepared by an unbiased, disinterested nurse who was also attending to the Claimant during Claimant's stay at the Emergency Room. The nurse reported that Claimant agreed to provide any sample required.

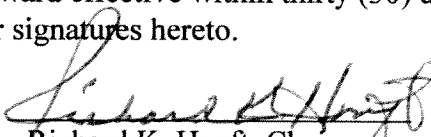
Taking all of this into account, we do not agree that there was substantial evidence to prove Claimant was insubordinate when the MTP approached Claimant at the restroom door with someone who was not proven to have been identified to Claimant by telling her that she must seek permission from his doctor. Moreover, Claimant's MTM testified that when he explained who the lady was Claimant responded that he did not have a problem with that. The MTM also testified that Claimant did not refuse and that he directed the collector to administer the test but she did not. There was not substantial evidence on this record to find that Claimant refused the Drug or Alcohol test.

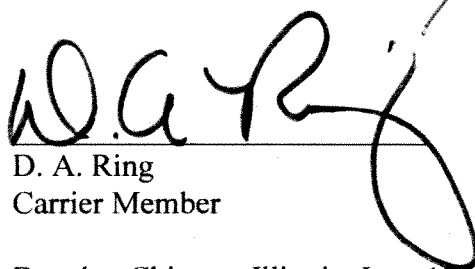
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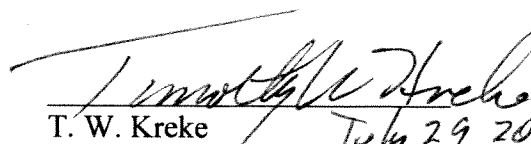
Claim sustained.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

July 29, 2009

Dated at Chicago, Illinois, June 12, 2009

7-29-09