

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**UNION PACIFIC RAILROAD COMPANY
(former Chicago and Northwestern Transportation Company)**

Case No. 257

Award No. 232

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

1. The dismissal of Trackman D.M. Jones for his alleged refusal to submit to a reasonable cause drug test on April 24, 2000 was without just and sufficient cause (System File UPSGRM-9143D/1246250).
2. Trackman D.M. Jones shall now be allowed the remedy prescribed in Rule 19(d)."

FINDINGS:

Claimant D.M. Jones was employed by the Carrier as a trackman at the time of this claim.

By letter dated April 25, 2000, the Carrier informed the Claimant to appear for an investigation and hearing on charges that he allegedly violated Section IX of the Carrier's Drug and Alcohol Policy when he refused to take a reasonable cause drug test. The investigation and hearing was conducted on May 9, 2000. As a result of the investigation and hearing, the Claimant was found guilty of violating Carrier Operating Rule 1.6(3) and Section IX of the Carrier's Drug and Alcohol Policy. The Claimant accordingly was dismissed from the Carrier's service on May 19, 2000.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal from service as being without just and sufficient cause. The claim requests that the Claimant be reinstated to service with all rights unimpaired, that he be made whole for all losses, and that all

reference to this matter be removed from his personnel record. The Carrier denied the claim.

The Carrier contends that the evidence demonstrates that the Claimant was afforded all elements of due process, and the Organization has not argued that the Claimant's due process rights were violated. The Carrier argues that it has met its burden of providing substantial evidence of the Claimant's misconduct. The testimony of Cunningham and Varvel substantiate the charges against the Claimant. Moreover, the Claimant admitted that he refused to take the drug test, and the record establishes that the Claimant was not eligible for self-referral under the Drug and Alcohol Policy.

The Carrier also maintains that there is no support for the Organization's contention that the Claimant was in pain and discomfort, which confused his priorities on the day of the incident. The Carrier argues that there is no evidence that the Claimant went to see a doctor that day, which leads to the presumption that the Claimant's excuse of a doctor's appointment was merely an "escape" for his refusal to submit to the drug test.

The Carrier argues that the sequence of events clearly and convincingly establishes that the Claimant was told to go to the Health Van for reasonable cause testing, and that he refused. The Claimant was advised that he had the choice of being tested or being removed from service. Once the Claimant was advised of the test, and he refused to be tested, the Claimant no longer had the option of taking himself out of service under Red Block. The Carrier asserts that the Claimant's admissions provide the substantial evidence to find him guilty of violating Rule 1.6(3) and the Carrier's Drug and Alcohol Policy when he refused to submit to a drug test for reasonable cause.

The Carrier contends that because the Organization never provided any evidence during

the on-property handling of this matter that the Claimant had enrolled in or completed an EAP, such an assertion cannot be considered in determining the outcome of this matter. The Carrier argues that in light of the Claimant's admissions, there can be no question that the Claimant had a substance abuse problem. The Carrier maintains that given the seriousness of insubordination and the Claimant's violation, the Claimant's dismissal was not arbitrary, capricious, or an abuse of managerial discretion. The Carrier argues that there are no factors in the record that provide any basis for modifying the assessed discipline in this matter. The Carrier therefore contends that the instant claim should be denied in its entirety.

The Organization contends that the Carrier has failed to demonstrate why the Claimant was being required to go to the Health Van for an examination when it was some 125 miles away. The Organization points out that if there was some cause for a fitness exam or probable cause for a urinalysis, a physician was available in Marshalltown, Iowa, only sixty-three miles away.

The Organization additionally maintains that during the incident at issue, the Claimant was experiencing shoulder pain that made him confused regarding his priorities. The Organization argues that the more the Carrier insisted that the Claimant submit to urinalysis, the more confused and paranoid the Claimant became; the Claimant increasingly wanted to take himself out of service under the provisions of Operation Red Block. The Organization emphasizes that the Claimant, who was scared and confused, believed that he could take himself out of service and seek help under Red Block's provisions. The Organization points out that since his dismissal, the Claimant has worked with the Carrier Employee Assistance Program and has successfully completed a drug and alcohol abuse rehabilitation program.

The Organization contends that given the facts surrounding this incident, the Claimant's twenty-three years of service, and his exemplary work record, the dismissal at issue was excessive. The Organization emphasizes that the Claimant's record is free of any previous drug- or alcohol-related discipline, and it argues that dismissal in this case is punitive rather than remedial. The Organization maintains that the Carrier's decision to dismiss such a long-term employee for one incident represents excessive and undue punishment. The Organization contends that the claim should be allowed and the Claimant afforded the remedy set forth in Rule 19(d).

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of refusing to attend the physical examination which included a drug screen. Once the Claimant refused to attend the physical examination, he was advised that he would be tested under the probable cause standard and he again refused to be tested. The Claimant does not deny this refusal.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

This Carrier, as all others, has a rule that requires employees to be tested for drug and alcohol to comply with the Carrier's own rules as well as the federal safety requirements. The Claimant here admitted that he refused to take the drug test. Once he refused to take the drug test, he was ineligible for any other type of program since he was in violation of Carrier rules.

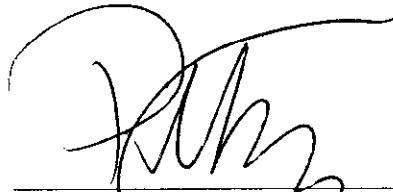
This Board finds that it was too late for the Claimant to turn himself in to the Red Block program for substance abusers. The Carrier's rules require that employees enroll in that program before they act in violation of the Carrier rules.

This Board finds that once the Claimant had been advised that he would be tested and refused to be tested, he no longer had the option of taking himself out of service under the Red Block program.

This violation amounts to a serious violation of Carrier rules. This Board is not unmindful of the Claimant's lengthy seniority dating back to 1977. However, the Carrier's rules involving the requirement of testing for drugs and alcohol, which include the penalty of discharge if one fails to comply, are a sufficient basis to overcome the lengthy seniority of the Claimant. Therefore, despite the lengthy seniority, this Board has no choice other than to uphold the termination. The claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 7-26-02



CARRIER MEMBER

DATED: 7-26-02

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**UNION PACIFIC RAILROAD COMPANY
(former Chicago and Northwestern Transportation Company)**

Case No. 258

Award No. 234

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

1. The dismissal of Foreman C.R. Gatewood for his alleged violation of Rules 1.1.2 and 1.6 of the General Code of Operating Rules and Rules 70.1, 70.4 and 70.5 of the Union Pacific Railroad Rules when he sustained an injury on August 7, 2000 was without just and sufficient cause and based on unproven charges (System File 2WJ-7311D/1249823).
2. Foreman C.R. Gatewood shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered."

FINDINGS:

Claimant C.R. Gatewood was employed by the Carrier as a foreman on Gang 2947 at the time of the incident at issue in this claim.

By letter dated August 10, 2000, the Carrier informed the Claimant to appear for an investigation and hearing on charges that he allegedly violated Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5 in connection with an incident during which the Claimant incurred an injury. The investigation and hearing was conducted on August 16, 2000. As a result of the investigation and hearing, the Claimant was found guilty of violating Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5. The Claimant accordingly was dismissed from the Carrier's service effective August 24, 2000.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal from

service as being without just and sufficient cause. The claim requests that the Claimant be reinstated to service with his seniority and all other rights unimpaired, and that he be made whole for all wages lost. The Carrier denied the claim.

The Carrier contends that the evidence demonstrates that the Claimant was afforded all elements of due process. The evidence demonstrates that the Claimant received proper and timely notice, and that he was afforded the opportunity to present witnesses in his own behalf. The Carrier asserts that the Claimant was provided a fair and impartial hearing in accordance with the provisions of the parties' Agreement.

The Carrier also maintains that there is substantial evidence to support its finding that the Claimant was guilty of violating its rules. The Carrier argues the Louris' testimony establishes that the Claimant failed to be alert and attentive when he placed his fingers under the tie plate that was under the suspended rail. The Carrier emphasizes that the Claimant previously had been instructed that employees were not to use their hands and fingers to remove/insert tie plates because of the possibility of sustaining a personal injury if their fingers are pinched or crushed. The Carrier points out that this is how the Claimant incurred his injury on August 7, 2000.

The Carrier maintains that the record demonstrates that the Claimant was negligent and careless of his own safety when he ignored Manager Deurloo's repeated instructions, given during safety audits on August 2 and August 4, 2000, and then wrongfully placed his fingers under the tie plate on August 7, 2000. The Claimant was not being responsible for his own safety, was not allowing himself a safe work place, and was acting in defiance of his supervisor's instruction and Carrier rules when he placed his fingers in a position where they might be pinched or crushed, which is what occurred. The Carrier argues that the Claimant refused to

abide by Carrier rules requiring that employees follow the safe and proper procedure for the installation of tie plates; as a result of his own negligence, the Claimant sustained a personal injury.

The Carrier argues that the evidence proves that the Claimant understood Deurloo's repeated instructions about the proper and safe procedure for installing tie plates, as well as Deurloo's concern that employees risked getting their fingers pinched or crushed if they put their fingers under the tie plates. The Carrier maintains that on August 7th, the Claimant disregarded Deurloo's instructions, and it points out that if the Claimant had been in compliance with these instructions, there would have been a broken stick instead of crushed fingers. The Carrier argues that the evidence therefore establishes the Claimant's willful, flagrant, and reckless disregard for Carrier safety rules, and his unwillingness and inability to comply with his supervisor's instructions.

The Carrier maintains that the Claimant acknowledged that as foreman in charge of three gangs, he was cautioned on August 2 and again on August 4, 2000, about unsafe work practices. The Claimant further admitted that in connection with a previous personal injury that he sustained in July 1999, he was told that he needed to slow down and work safer. The Carrier contends that the Claimant has chosen to ignore the Carrier's counseling, instructions, and safety rules, and he has continued to use unsafe work habits in the performance of his duties. The Carrier asserts that as the foreman in charge of three gangs, the Claimant should have been setting an example for the employees working under his jurisdiction regarding the safe performance of their duties. The Carrier asserts that the Claimant instead showed a total lack of judgment and a willful disregard for the safety of both himself and those employees.

The Carrier argues that there is no support for any claim that the equipment caused the Claimant's accident. Instead, if the Claimant had complied with Deurloo's repeated instructions, his fingers would not have been under the tie plate and there would have been no injury. The Carrier contends that the Claimant's admissions make it clear that he is guilty of the charges against him. The Carrier accordingly asserts that there can be little doubt that the Claimant was in violation of Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5.

The Carrier then argues that the discipline assessed in this matter was not arbitrary or capricious, nor was it an abuse of managerial discretion. The Carrier maintains that the Claimant's record demonstrates that he is incapable of working safely and that he continually ignores safety instructions. Despite safety and rules training, counseling, and safety audits, the Claimant has failed to positively respond to Carrier's attempt to have him become a productive and safe employee. The Carrier asserts that the Claimant's conduct was sufficiently serious to warrant his dismissal. The Carrier therefore contends that the instant claim should be denied in its entirety.

The Organization contends that the evidence establishes that the Carrier failed to provide the employees working on the project at issue with the proper tools to perform the necessary functions associated with the tie replacement project. The Organization points out that it was not until after Deurloo's August 2d visit to the work location that the Carrier provided the employees with some shop-made hooks for removing the tie plates from under the suspended rails.

The Organization additionally maintains that during Deurloo's August 4th visit to the site, Deurloo observed employees installing tie plates by hand, but Deurloo did not take exception to any particular part of the replacement process that was being performed. The Organization

asserts that Deurloo's comment that "we're going to have to find some better way to do it," was general in nature and did not specifically address any one aspect of the process being used. Moreover, Deurloo did not explain how the process should be changed or performed differently. The Organization contends that Deurloo did not advise the Claimant of his objection to the use of hands for placing the tie plates until Deurloo's report was presented at the August 16th hearing.

The Organization then addresses the Carrier's contention that the Claimant should have used a stick, maul handle, shovel, or some type of bar to position the tie plates under the rails. The Organization emphasizes that the use of such tools for anything other than their intended purpose would be in violation of Carrier safety rules. The Organization maintains that if the Claimant had used one of these tools on August 7th, he still would have sustained an injury, but he would additionally have been charged with violating Carrier Safety Rules 76.0, 76.1, and 76.8. The Organization asserts that the Carrier failed to provide the Claimant with a proper tool to perform the tie plate installation.

The Organization asserts that the Carrier has failed to prove that the Claimant was performing his work in a "careless" manner, as charged. The Carrier did not demonstrate that the Claimant was advised that the Carrier considered his method of installing the tie plates to be a violation of any specific safety rules. The Organization emphasizes that this Board consistently has ruled that an accident or injury, by itself, does not constitute a rule violation. There must be evidence of negligence or carelessness, but the Carrier has not presented any such evidence in this case.

The Organization argues that the Carrier has failed to meet its burden of proof with regard to the charges against the Claimant, so the assessed discipline must be deemed improper and

must not stand. The Organization contends that the instant claim should be sustained, and the Claimant should be immediately reinstated to his employment with all rights unimpaired and made whole for all wages lost.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant acted in violation of any safety rules on August 7, 2000, when he sustained an injury. There is no question that the Claimant was told on several occasions by his supervisors that he and his workers should improve the procedures they were using in performing their tasks. However, the record is not clear that the Claimant was told specifically to use certain tools and provided with the appropriate tools and that those procedures and tools would have prevented the injury that occurred. Consequently, the claim will have to be sustained.


It is fundamental that just because an accident or injury occurs does not necessarily constitute a rule violation. The Carrier in this case has cited several rules which it contends were violated by the Claimant that led to his injury. For example, the Claimant is being charged with *not being alert and attentive*. However, there was no proof provided at the hearing that the Claimant was not alert or attentive. The Claimant was also charged with being careless for the safety of himself and others. However, there is no proof of any carelessness on the part of the Claimant. It is true that the Claimant did not totally protect his body parts since he wound up being injured by getting his hand and fingers pinched or crushed. However, in order to be found guilty of a violation of that rule, it must be shown that the Claimant did something out of the ordinary and carelessly that caused that type of injury. In this case, although the Carrier has

some hooks and other devices that can be used in an effort to perform the tasks that were being performed by the Claimant and his crew on the date in question, it is not clear from the record that the Claimant and his crew were properly trained in the use of those hooks and that those hooks were made available on the date in question.

In order to sustain the finding of guilty, the Carrier must show with sufficient proof that the Claimant not only was injured as a result of his actions, but acted in violation of the rules and thereby caused the injury. In this case, the Carrier has failed to meet its burden of proof. Therefore, the claim shall be sustained.

AWARD:

The claim is sustained. The Claimant shall be reinstated to service with all back pay and other rights unimpaired.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 7-26-02



CARRIER MEMBER

DATED: 7-26-02