

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. 259

Award No. 235

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

1. The dismissal of General Foreman D.E. Kobs for his alleged violation of Union Pacific Rules 1.5 and 1.6(3) effective April 10, 1994 and Union Pacific Railroad Drug and Alcohol Policy and Procedures effective March 1, 1997 when he allegedly tested positive for marijuana on October 15, 1999, was without just and sufficient cause, based on an unproved charge and in violation of the Agreement (System File 8WJ-7276D/1219306 CNW).
2. As a consequence of the violated referred to in Part (1) above, General Foreman D.E. Kobs shall now be reinstated to his former position with all rights unimpaired, compensated for all time lost and have his record cleared of this incident."

FINDINGS:

Claimant D.E. Kobs was employed by the Carrier as a general foreman at the time of the incident at issue in this claim.

By letter dated October 22, 1999, the Carrier informed the Claimant to appear for an investigation and hearing on charges that he allegedly used an illegal or unauthorized drug as evidenced by the positive test result of a follow-up drug test administered on October 15, 1999, thereby violating Carrier Rules 1.5 and 1.6(3), as well as the Carrier's Drug and Alcohol Policy and Procedures. The investigation and hearing was conducted on November 2, 1999, and as a result of the investigation and hearing, the Claimant was found guilty of these charges. The Claimant accordingly was dismissed from the Carrier's service on November 11, 1999.

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, that the incident be removed from his personnel record, and that he be made whole for all time lost. The Carrier denied the claim.

The Carrier contends that there were no procedural errors in this matter that would warrant voiding the assessed discipline. The evidence demonstrates that the Claimant was afforded all elements of due process, and there is no basis to conclude otherwise. The Carrier counters the Organization's claim that the Carrier violated Rule 19, which requires that discipline will be issued within ten calendar days after completion of the hearing, by pointing out that the investigation was conducted on November 2, 1999, and it rendered its decision on November 11, within the Agreement's time limit. Although notice of the Carrier's decision was not delivered until November 15th, due to a weekend, there was no violation of the rule and no prejudice to the Claimant or the Organization.

The Carrier argues that even if it was tardy in issuing the notice of discipline, Rule 19 does not contain any clause that would cause the Carrier to lose jurisdiction over the Claimant. The Carrier asserts that where a rule does not provide for specific consequences, all of the equities should be considered.

The Carrier then addresses the Organization's claim that the medical review officer somehow was an indispensable party to the proceedings. The Carrier emphasizes that it is not bound to call witnesses who, in its belief, are not necessary to develop the pertinent facts. The Carrier points out that the Claimant had ample opportunity to present his own witnesses.

Moreover, at best, Dr. Beirne could have verified only that he declared the Claimant's test to be positive for marijuana.

As for the Organization's contention that the collection site in Adams, Wisconsin, did not meet federal guidelines, the Carrier maintains this is merely argumentative. The Carrier contends that the Organization did not present any evidence to support this claim. The Carrier also asserts that although the collection form did not contain the actual site from which the sample was obtained, this was a harmless error and did not affect the test results.

The Carrier then contends that it has presented substantial evidence that the Claimant was guilty of violating its rules relating to drugs and alcohol. The evidence demonstrates that the proper collection and chain of custody procedures were followed in connection with the Claimant's testing. The Carrier points out that this was the Claimant's second violation of Carrier rules proscribing illegal drug usage. The Claimant tested positive for controlled substance on August 26, 1998. On this occasion, the Claimant opted to enter the Employee Assistance Program for a one-time Companion Agreement Waiver. The Claimant was returned to duty with the stipulation that he abide by the Carrier's drug and alcohol rules, and he is not eligible for another opportunity to undergo treatment and return to work. The Carrier also asserts that the hemp seed oil defense, which the Claimant has advanced here, previously has been rejected by Public Law Board 6159.

The Carrier goes on to argue that the discipline assessed was in strict accordance with the UPGRADE Discipline Policy and commensurate with the seriousness of the Claimant's violation. The Carrier emphasizes that the NRAB and numerous Public Law Boards long have held that certain offenses, such as insubordination and violation of drug and alcohol policies, are

so egregious that they warrant permanent dismissal. The Carrier maintains that railroad employees understand that such violations are dismissable offenses. Moreover, the Carrier's long-standing practice has been to demand stringent compliance with rules regarding these offenses.

The Carrier then asserts that the Claimant's use of controlled substances, after signing the Companion Agreement that demands he remain drug- and alcohol-free, constitutes insubordination. The Carrier argues that its obligation to protect the public and provide a safe workplace for its employees mandates that its policy against drug and alcohol abuse be preserved intact. Drug and alcohol abuse by railroad employees cannot be treated lightly. The Carrier argues that the Claimant's dismissal was reasonable and warranted, and the instant claim should be denied in its entirety.

The Organization initially argues that the drug test at issue was insufficient to support the assessed discipline because the Carrier did not follow the federal collection-site requirements. The Organization asserts that the Claimant's signature on the collection form did not and could not reasonably be construed as verification that all collection site requirements had been met.

The Organization contends that the Claimant's regular, but innocent and legal, use of cold-pressed hemp oil as a dietary supplement and/or food additive could have resulted in a false positive test result in this instance. The test results at issue therefore do not clearly and convincingly prove the Claimant's guilt and cannot be validly used to end his twenty-seven-year career with the Carrier. The Organization maintains that the Claimant has earned the benefit of the doubt.

The Organization then asserts that if the Carrier's failure to meet its burden of proof is

deemed insufficient to overturn its dismissal of the Grievant, then the dismissal nevertheless must be overturned because the Carrier violated the Claimant's due process rights. The Organization emphasizes Rule 19 in arguing that the Claimant was not afforded a fair and impartial hearing. The Organization maintains that because there was a conflict between the Claimant's testimony and the written notes of Dr. Bernie, the investigating officer was obligated to resolve that conflict. The Organization contends that the Carrier's refusal to allow Dr. Bernie to be questioned reveals the investigating officer's bias and pre-judgment of the Claimant's guilt. The Carrier's failure to present testimony to resolve this conflict fatally flaws its argument that the Claimant admitted to using marijuana two weeks before the test at issue. The Organization maintains the Claimant was denied due process, so the Carrier's decision to discharge him must be rescinded and the instant claim sustained.

The Organization additionally contends that the Carrier's disciplinary decision was not furnished to the Claimant within ten calendar days of the hearing, as required by Rule 19(b). The hearing was held on November 2, 1999, and the UPS mailing documents disclose that the Carrier's decision was not furnished to the Claimant until November 15, 1999. The Organization points out that Public Law Board 1844 and the Third Division have sustained challenges to such dismissals based solely upon a carrier's procedural violation.

The Organization ultimately contends that the claim should be sustained.

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

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

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 guilty finding. It is clear that the Claimant tested positive for marijuana on October 15, 1999, and therefore was in violation of the Carrier rules.

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.

Normally, in cases of this kind, the discharge is routinely upheld. However, given the lengthy seniority of this Claimant, over twenty-seven years of nearly perfect service, this Board finds that the Carrier's action of dismissing the Claimant under these circumstances was unreasonable, arbitrary, and capricious. Therefore, we order that the Claimant be reinstated to service, but without back pay. The Claimant shall not return to service until he has been examined and released by the Carrier's Employee Assistance Program. The period that the Claimant was off shall be considered a lengthy disciplinary suspension. It is hoped that this Claimant will clean up his behavior and stay away from all types of drugs and alcohol. He has a wonderful career to be proud of, and he hopefully will want it to end in a retirement and not a dismissal.

AWARD:

The claim is sustained in part and denied in part. The Claimant is reinstated to service, but without back pay. The Claimant shall not return to service until he has been examined and released by the Carrier's Employee Assistance Program. The period that the Claimant was off

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PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 7-26-02


CARRIER MEMBER

DATED: July 26, 2002