

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 266

A w a r d No. 242

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

1. The dismissal of Assistant Foreman D.T. Lennie for allegedly having an illegal or unauthorized drug in his system on May 10, 2004, at Albert Lea, Minnesota, was without just and sufficient cause, contrary to the Carriers own drug and alcohol policy and in violation of the Agreement (System File 2RM-9560D/1405472D CNW).
2. As a consequence of the violations referred to in Part (1) above, Assistant Foreman D.T. Lennie ‘. . . should be returned to active service with all seniority right restored, compensation for all lost time and wages, medical benefits he was deprived of, vacation rights restored, credit for months of benefits he was deprived of, vacation rights restored, credit for months of service with the Railroad Retirement Board, and any other benefit not herein mentioned that any active employee would receive while working.’”

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as an Assistant Foreman.

By letter dated September 16, 1998, Claimant was afforded a one-time **return-to-**service following a positive result on a drug test taken on September 9, 1998. On May 10, 2004, a reasonable-suspicion drug and alcohol test was administered to the Claimant. The results of this test were positive for THC – marijuana. By letter dated May 18, 2004,

the Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant had an illegal or unauthorized drug in his system while working as an Assistant Foreman on May 10, 2004. After a postponement, the investigation was conducted on June 15, 2004. By letter dated June 23, 2004, the Claimant was informed that as a result of the investigation, the Claimant had been found guilty as charged and was dismissed from the Carrier's service. The Organization thereafter filed an appeal, challenging the Carrier's decision to dismiss the Claimant. The Carrier denied the claim.

The Carrier initially contends that it had reasonable cause to conduct the drug and alcohol testing at issue. The Carrier asserts that there is no basis for the Organization's assertion that the Carrier had reasonable suspicion only as to the Claimant's possible alcohol use. The Carrier maintains that it followed the proper procedures for drug and alcohol testing, and it emphasizes that the Drug and Alcohol Policy allows for a complete battery of testing to be performed when there is reasonable cause to suspect that an employee is under the influence of alcohol or an illegal substance. The Carrier argues that it has the right to conduct drug and alcohol tests in the **manner** it sees fit.

The Carrier points out that the record establishes that two employees reported smelling alcohol on the Claimant, establishing reasonable cause for testing. The Carrier asserts that it is critical to conduct thorough testing in such situations, in order to prevent injuries, and the Drug and Alcohol Policy requires breathalyzer and urine sample testing in reasonable-suspicion testing.

The Carrier goes on to argue that the positive test results reveal that the Claimant was in violation of Rule 1.5, and the Organization has not refuted the test findings. The

Carrier insists that this positive test result was enough to determine that the Claimant had violated Rule 1.5, the Drug and Alcohol Policy, and the Claimant's September 1998 reinstatement agreement. The Carrier maintains ~~that~~ the positive test result conclusively demonstrates that the Claimant was under the influence of an illicit drug while on Carrier property, and the Carrier had reasonable suspicion to conduct this test.

The Carrier goes on to contend that there is no support for the Organization's assertion that the Carrier did not schedule the hearing within the ten-day limit set forth in rule 19(A) of the Agreement. The Carrier emphasizes that the Organization has failed to take into account the mutually agreed-upon postponement of the hearing. The Carrier points out that it gave notice of this postponement within the ten-day time limit. The Carrier insists that the Organization is incorrect in asserting that the postponement had no bearing upon the time limits. Moreover, the Organization has failed to present any colorable argument that the alleged delay caused any prejudicial harm to the Claimant in presenting a defense to the charges. The Carrier argues that it did not commit any procedural violations that would warrant disturbing the Claimant's dismissal after the Carrier demonstrated the seriousness of the Claimant's violation.

The Carrier then asserts that under Rule 2 1.0 of the Drug and Alcohol Policy, there is no requirement that a hearing be conducted because the Claimant already has had one opportunity to return to work after completing the Employee Assistance Program following a positive drug and alcohol test. The Carrier points out that in exchange for the Carrier allowing the Claimant to avail himself of the one-time return-to-service agreement, the Claimant waived any rights to a hearing.'

As for the Organization's argument that the Carrier failed to give the Claimant a fair and impartial hearing because the Carrier did not provide all witnesses to the event, the Carrier emphasizes that it is required to provide only enough witnesses to adduce the necessary facts so that a proper determination of guilt or innocence may be made. The Carrier insists that it presented sufficient witnesses, and it is not obligated to present every witness to an event if a witness' testimony is not crucial to developing the facts of the case. Moreover, the Agreement allows the Organization and the Claimant to call witnesses, but they chose not to avail themselves of this right, and the Carrier cannot be held responsible for their choice. The Carrier therefore argues that no procedural errors occurred during the handling of this claim, and the Claimant's dismissal should not be disturbed.

The Carrier additionally emphasizes that this Board's role is to verify that substantial evidence was adduced at the hearing to support a finding of guilt. Once this Board substantiates the presence of substantial evidence, it lacks ~~the~~ authority to overturn the level of discipline assessed. The Carrier argues that although the discipline may seem harsh, the discipline cannot be overturned unless the panel can ~~find~~ that the discipline was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier maintains that the discipline assessed was in accordance with the Carrier's UPGRADE Policy, and that violations of Rule 1.5 are accorded Level 5 discipline, which is dismissal. Moreover, the Claimant's dismissal was in accordance with the Claimant's one-time return-to-service agreement with the Carrier, which followed the Claimant's first positive test result for drugs in 1998. The Carrier emphasizes that under that agreement, the Claimant was

required to meet certain conditions, including refraining from drug use in the future. The Carrier insists that the Claimant failed to meet the obligations of this return-to-service agreement, and he also violated Rule 1.5 and the Drug and Alcohol Policy. The Carrier maintains that its decision to dismiss the Claimant was not arbitrary, capricious, or an abuse of Carrier discretion; instead, this decision was in accordance with the important goal of safety first.

The Carrier ultimately contends that there is no basis for disturbing the assessed discipline, and the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier violated Rule 19A of the Agreement by failing to hold the hearing within ten days of the date that the Carrier had knowledge of the occurrence to be investigated. The Organization points out that the Carrier had knowledge of the occurrence on May 17, 2004, but it originally scheduled the hearing for June 15, 2004. The Carrier subsequently rescheduled the hearing for May 28, 2004. The Organization emphasizes that both of these dates were outside the ten-day period, and therefore in violation of Rule 19A. The Organization asserts that a number of Awards have upheld the clear and unambiguous time limits set forth in Rule 19A, and this claim therefore should be allowed as presented.

The Organization then argues that the witness testimony establishes that any reasonable suspicion for testing the Claimant related to alcohol and not to any other substance; the evidence demonstrates that the reasonable suspicion was based on the reported smell of alcohol. The Organization insists that the testing therefore should have been restricted to the breathalyzer test. The Organization points out that the breathalyzer

test of the Claimant registered zero, so this should have been the end of the testing. The Organization contends that urine testing was not warranted under Section 8.0, Subsection 8.1.2 of the Drug and Alcohol Policy. The Organization contends that there is no truth to the testimony that the Drug and Alcohol Policy requires urine testing in connection with reasonable-suspicion testing. The Organization asserts that the Drug and Alcohol Policy describes two completely different requirements for reasonable-suspicion testing, and none of the requirements for urine testing were present in the incident at issue.

The Organization further argues that the Carrier failed to afford the Claimant a fair and impartial investigation when it failed to produce the employees and supervisor who were involved with starting the reasonable-suspicion testing. The Organization points out that without their testimony, the Carrier relied on hearsay evidence throughout the investigation.

The Organization then asserts that under Rule 20.1 of the Drug and Alcohol Policy, supervisors have an obligation to assist employees who exhibit signs and symptoms of drug and/or alcohol abuse to seek help from the EAP. The Organization maintains that the record establishes that on five or six occasions prior to May 10, 2004, it was brought to the attention of Claimant's supervisor that Claimant seemed to have an alcohol/drug abuse problem. The Organization insists that Claimant's supervisor therefore knew in advance of this incident that the Claimant had an alcohol and/or drug abuse problem, but Claimant's supervisor failed to take the appropriate action.

The Organization additionally emphasizes that the Claimant had twenty-nine years of service with the Carrier. The Organization asserts that the discipline assessed does not

fit the infraction under the circumstances of this case, and the instant claim therefore should be sustained in its entirety.

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. There is evidence that the parties agreed to an extension of the time limits. Moreover, a review of the hearing makes it clear that the Claimant was guaranteed all of his due process rights.

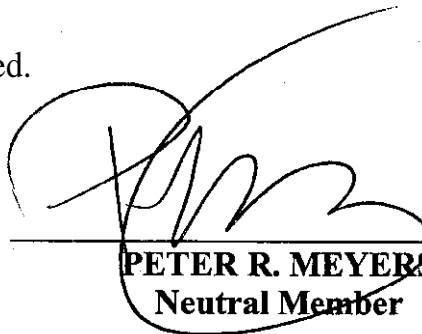
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of testing positive for marijuana on May 10, 2004. The record reveals that the Claimant had previously tested positive for drugs on September 16, 1998. At that time, the Claimant was offered the ability to sign an agreement and come back to work. Although the time frame for the random testing had expired, this Board finds that the Company still had the right to demand reasonable-cause testing of the Claimant after that three-year random testing period expired. In this case, the Carrier had evidence that the Claimant was under the influence of a prohibited substance and had the Claimant tested. The fact that he exhibited characteristics of being under the influence of alcohol and that he was later tested for drugs as well as alcohol has no significance here. According to several employees, the Claimant was clearly under the influence of something and the Carrier had an absolute right to test him to make sure that he was clean.

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.

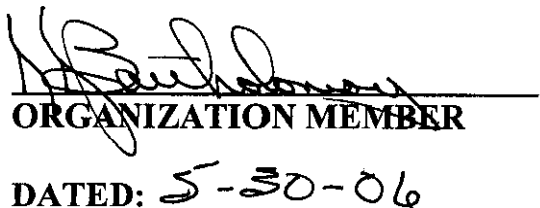
The Claimant in this case had previously tested positive for drugs only six years prior to this incident. Employees in the railroad industry are given a second chance, and only a second chance, in most cases. This Board recognizes that this Claimant had accumulated twenty-nine years of service for the Carrier. However, this Board cannot find that the Carrier's action in terminating this Claimant was unreasonable, arbitrary, or capricious after he tested positive for drugs in the workplace for s second time in six years. Therefore, the claim must be denied. The claim is denied.

AWARD:


The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: 5-30-06



CARRIER MEMBER
DATED: 5-30-06