BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION IBT RAIL CONFERENCE

and

UNION PACIFIC RAILROAD COMPANY

Case No. 274

Award No. 250

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

1. The dismissal of Backhoe Operator M.S. Shine for allegedly testing positive for an illegal or unauthorized drug on June 27, 2005, was without just and sufficient cause and excessive and undue punishment (System File UPRM-9682D/1436554).

2. Backhoe Operator M.S. Shine shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a backhoe operator.

By notice dated July 6, 2005, the Claimant was directed to appear for an investigation and hearing on charges that he allegedly had tested positive for marijuana during a random drug test administered on June 27, 2005. After several postponements, the investigation was conducted on September 22, 2005. By letter dated October 8, 2005, the Claimant was informed that as a result of the investigation, he had been found guilty as charged and was being assessed Level 5 Discipline, dismissal from the Carrier's service. The Organization thereafter filed an appeal, challenging the Carrier's decision to

discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant properly was selected for random drug testing, and the proper procedures for such testing were followed. The Carrier disputes the Organization's assertion that the Carrier should not have conducted a confirmation test. The Carrier maintains that the Organization is incorrect in asserting that the initial positive testing of 40ng should have ended the testing. The Carrier insists that an initial screening result of 50ng is not necessary to trigger a confirmation test; the Carrier argues that it has the right to conduct drug and alcohol tests as it sees fit. The Carrier maintains that it conducted the testing at issue in accordance with its Drug and Alcohol Policy, and the testing revealed that the Claimant had an illegal or unauthorized substance in his system.

The Carrier points out that this was the Claimant's second positive test within a ten-year period, a clear violation of the Claimant's October 7, 1997, Conditions for Returning to Service and Remaining in Service Agreement. The Carrier emphasizes that the Claimant's second positive test was a violation of the rules, and the decision to dismiss the Claimant should not be disturbed.

The Carrier goes on to assert that during the hearing, the Claimant admitted that he tested positive for marijuana and that he violated the agreement that provided him with the one-time opportunity to return to service and remain drug free. The Carrier maintains that the Organization never refuted the fact that the Claimant did have an illegal and/or unauthorized drug in his system. As for the Organization's position that the Claimant's

test results did not equate to a positive drug screen result, the Carrier insists that this assertion clearly is without merit, misleading, and incorrect. The Carrier argues that under FRA rules and regulations and the Carrier's drug testing procedures, the Claimant's test result of 40ng clearly exceeded the cutoff concentration for the confirmation drug test, which is only 15ng. The positive result from the Claimant's drug test on June 27, 2005, constituted a direct violation of General Operating Rule 1.5, as well as a direct violation of the 1997 Agreement that the Claimant signed to avail himself of his one-time return-to-service option.

The Carrier suggests that in its appeal letter, the Organization attempted to downplay the fact that the Claimant did have THC/marijuana in his system. The result of the Claimant's drug test showed a level that was nearly three times the confirmation cutoff, constituting a positive result. This level was enough to determine that the Claimant was in violation of the rules. The Carrier insists that under the circumstances, the Level 5 dismissal was appropriate.

The Carrier goes on to argue that on the property, the Organization never asserted that a procedural violation occurred. The Carrier maintains that it gave timely notice of the hearing postponements, and the Organization has not presented any colorable arguments that the postponements caused any prejudicial harm to the Claimant or his ability to present a defense. The Carrier points out that the Organization initiated the first postponement. The Carrier asserts that because it did not commit any procedural violations that would warrant disturbing the Claimant's dismissal, that dismissal should

be upheld.

The Carrier then asserts that under Rule 21.0 of its Drug and Alcohol Policy, there is no requirement for a hearing in connection with a violation of an agreement providing for a one-time return to service. The Carrier nevertheless did hold a hearing and investigation, even though the Claimant already had one opportunity to return to work after completing the Employee Assistance Program. The Claimant admittedly tested positive on June 27, 2005, and he admittedly violated the waiver and return-to-service agreement. The Carrier argues that the Claimant's dismissal was warrant and should not be disturbed.

The Carrier goes on to contend that once the Board determines that substantial evidence was adduced at the hearing to support a finding of guilt, it lacks the authority to overturn the level of discipline imposed. The Carrier emphasizes that the discipline, even if it seems harsh, cannot be overturned unless the Board finds that it was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier insists that the discipline at issue was in accordance with the Carrier's UPGRADE Policy, and violations of Rule 1.5 are accorded Level 5 discipline, which is dismissal.

The Carrier asserts that dismissal also is in accordance with the one-time return-to-service agreement that the Claimant signed following his first positive result for drugs in 1997. When he signed this agreement, the Claimant agreed that any failure on his part to comply with this agreement's terms would be grounds for immediate discharge. The Claimant also agreed that he would be bound by the terms of the Drug and Alcohol

Policy. The Carrier argues that the Claimant failed to meet the obligations of his return-to-service agreement when he was found to be under the influence of drugs while on duty and on the Carrier's property. The Carrier insists that it had no alternative but to dismiss the Claimant from service.

The Carrier maintains that the Claimant's dismissal was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier points to its obligation to ensure the safety of its employees and of the public at large. The Carrier therefore argues that it cannot allow employees, such as the Claimant, who have demonstrated an inability to follow the rules, to remain in service.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that with the exception of the October 1997 violation of the Drug and Alcohol Policy, the Claimant has an unblemished work history. Moreover, it has been almost eight years since the Claimant's first drug and alcohol violation, clearly demonstrating that the Claimant does not have an ongoing drug and alcohol problem. The Organization points out that since the October 1997 positive test, the Claimant has been tested some sixteen times on an unannounced basis. Until the test at issue, every one of these tests has been negative.

The Organization goes on to maintain that under government guidelines and regulations, the cutoff concentration for marijuana metabolites is 50ng, while the Claimant's test results were 40ng. The Organization emphasizes that the guidelines

specify that a result below the cutoff concentration must be reported as a negative. The Organization asserts that because the Claimant's 40ng level is below the cutoff level, it should be considered a negative test.

The Organization further contends that the Carrier failed to show that the Claimant was under the influence of any drug or alcohol. The minute amount shown to be in the Claimant's system is not even considered a positive result under federal guidelines, so this amount cannot be deemed enough to consider the Claimant as "under the influence."

The Organization argues that the test at issue showed only a minute presence of marijuana metabolites in the Claimant's system, and this should have resulted in a negative test. The Organization asserts that given the Claimant's long and otherwise unblemished work history, and his supervisor's testimony that he was a good employee, the Claimant's dismissal should be overturned because it is unreasonable, arbitrary, and capricious.

The Organization ultimately contends that the instant claim 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.

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 a second violation of the Carrier's drug and alcohol policy when he tested positive during a random drug test administered on June 27, 2005. The record reveals that there was a positive test of the Claimant on that date and, therefore, the Claimant was guilty of violating the specific terms of the waiver/agreement letter that he executed on October 14, 1997. In that agreement, the Claimant waived his formal investigation and accepted dismissal in connection with those charges in 1997 and was allowed to return to service on several conditions. One of those conditions was that, "You must remain drug-free indefinitely after returning to service."

The record reveals that the Claimant's test that was administered on June 27, 2005, revealed that he had not remained drug-free and, therefore, had violated his agreement with the Carrier, as well as various Carrier rules. As a result, the Claimant subjected himself to disciplinary action.

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 was guilty of a second drug/alcohol violation. On the first occasion, he accepted the Carrier's waiver agreement and agreed to remain drug and alcohol free. The Claimant failed to live up to that agreement and thereby subjected himself to discharge. This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the

claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 6-25-07

CARRIER MEMBER

DATED: 6/25/07