

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

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

and

UNION PACIFIC RAILROAD COMPANY

Case No. 280

Award No. 254

STATEMENT OF CLAIM:

It is the claim of the Brotherhood that the charges against Claimant D. L. Frierson must be overturned and the level 5 discipline removed from his record. Claimant Frierson must be allowed to use the Companion Waiver Agreement and the one-time opportunity to work with the Employee Assistance Program.

FINDINGS:

By letter dated May 4, 2006, the Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant allegedly tested positive for an illegal substance in connection with a reasonable cause test conducted on April 26, 2006. The investigation was conducted, as scheduled, on May 16, 2006. By letter dated June 2, 2006, the Claimant was informed that as a result of the investigation, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving through substantial evidence that the Claimant was in violation of the rules. The Carrier officer had reasonable cause to order the Claimant to undergo drug and alcohol testing, and the

proper procedures for such testing were followed. The Carrier asserts that the urine test produced a positive result, in direct violation of General Operating Rule 1.5 and the Carrier's Drug and Alcohol Policy. Moreover, the Organization admitted to the test's findings. Under these circumstances, the Carrier maintains that there is no alternative for the Board but to conclude that the Carrier has met its burden of proof through substantial evidence.

The Carrier emphasizes that the Organization has not raised any sort of procedural objections, so the Board should find that no procedural errors occurred during the handling of this claim. The Carrier maintains that the Claimant's dismissal therefore should not be disturbed for any procedural allegation.

The Carrier goes on to assert that it is well-established that once an arbitral panel has substantiated the presence of substantial evidence, it lacks the authority to overturn the level of discipline assessed, even if that discipline seems harsh. The Carrier points out that discipline may be overturned only if the panel finds that it was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes the exchange of correspondence between the parties in which the Carrier stated that the request for a leniency reinstatement was being denied; the discipline cannot be considered arbitrary in light of this. The Carrier also insists that the discipline imposed in this matter was in accordance with the Carrier's UPGRADE Policy, and that violations of Rule 1.5 and the Drug and Alcohol Policy are accorded Level 5 discipline, which is dismissal. The Carrier additionally asserts that this is not a case where the Companion Agreement is an option because the Claimant was charged with and found guilty of another major rule violation.

The Carrier then argues that the fact that it erroneously sent the Claimant paperwork relating to the Companion Agreement was rectified when this error was discovered. As for any assertion that the Claimant accepted the offer before it was rescinded, the Carrier maintains that this is suspect in that the fax date on the document is two days subsequent to when it supposedly was signed. The Carrier contends that the Claimant was not entitled to the benefits of the EAP program, and an administrative error is not contract language. The Carrier asserts that there is no substance to the Organization arguments.

The Carrier insists that it has shown through substantial evidence that the Claimant was guilty of the charges. The Claimant committed very serious rule violations, and these violations support the assessment of Level 5 discipline. The Claimant behaved recklessly when he reported for work on the property while under the influence of an illegal substance. The instant claim therefore should be denied in its entirety.

The Carrier then addresses the Organization's reliance on discipline assessments in other cases. The Carrier insists that these other cases involve incidents that are quite different from the situation at issue. Moreover, numerous referees have held that each discipline case must stand on its own merits. The Carrier maintains that there is no way that the Board can conclude that the Claimant was treated harshly when he was dismissed for a serious breach of the safety rules.

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

The Organization initially contends that the charge should be set aside and the

Claimant offered the one-time Waiver Offer for the Companion Agreement and the opportunity to work with the Carrier's Employee Assistance Program. The Organization asserts that the Claimant initially was offered this assistance, and he did in fact sign the offered waiver and accepted the opportunity to work with the EAP, before he was denied this opportunity.

The Organization acknowledges that positive result of the urinalysis, but it does contest the right of the Claimant to be offered the one-time opportunity to use the Companion Agreement and the EAP. The Organization points to the Carrier's subsequent denial of this opportunity, based on an alleged violation of Rule 1.6(1). The Organization maintains that although this is a major rule, the Claimant was not guilty of violating this rule. The Organization emphasizes that the Claimant was a passenger on a machine that had two operators when it was involved in a collision with another machine. The Claimant was facing forward while the machine was traveling in a backwards direction. The Organization insists that the Claimant had no opportunity to view what was going to happen behind the machine, and there has been no showing of responsibility on the Claimant's part. The Organization further argues that under the circumstances, the Claimant should not even have been tested in this instance.

The Organization contends that it is an injustice for the Claimant to have been charged with such a major rule violation. The Organization then points to a number of prior cases involving machines and/or vehicles in which Rule 1.6 charges were not alleged. The Organization argues that there is no reason to use this Rule in the instant case because it is not applicable. The Organization asserts that the Claimant should be

entitled to use the Companion Waiver Offer Agreement, should be allowed to work with the EAP, and should have a one-time opportunity to return to work.

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 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 an illegal substance after a reasonable-cause test was conducted on April 26, 2006, after an accident on the job. The Grievant tested positive, and the Organization acknowledged the positive result of the urinalysis.

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 Organization's major claim in this case is that the Claimant should have been offered the one-time waiver offer for the Companion Agreement and have been given an opportunity to work with the Carrier's Employee Assistance Program since this was his first alcohol- or drug-related offense. The problem with the Organization's argument is that it fails to recognize that the Claimant in this case was charged with other serious rule violations which, if the Claimant is properly found guilty of those violations, preclude his opportunity to participate in the Employee Assistance Program and sign the one-time

waiver agreement. The Claimant in this case was previously found guilty of a very serious rule violation in connection with the accident involving his machine. Given that he was found guilty of that rule violation, this Board finds that the Carrier properly denied the Claimant the opportunity to sign the one-time waiver and participate in the Employee Assistance Program while retaining his job.

For all of the above reasons, the claim in this case is denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: Oct. 3, 2008



CARRIER MEMBER

DATED: Oct 3, 2008