Public Law Board No. 6584

Parties to Dispute

United Transportation Union Yardmaster Division	)	
vs	)	**Case 1/Award 1**
Soo Line Railroad Company	)	

Statement of Claim

Request that Yardmaster Mike J. Milokzky be reinstated with all seniority rights unimpaired; pay for all lost time; pay for any lost health care benefits; pay for attending the January 18, 2001 investigation; pay for any lost vacation entitlement; pay for any other benefits or entitlement and removal from his record of any discipline assessed from the outcome of this investigation.

Background

The Claimant was advised on January 5, 2001 to attend an investigation in order to determine facts, and place responsibility, if any in connection with his allegedly submitting a false urine specimen while under a by-pass agreement follow-up test. After postponement the investigation was held on January 18, 2001. Thereafter the Claimant was advised by the Carrier on January 26, 2001 that he had been found guilty as charged and he was dismissed from employment, effective that date. This discipline was appealed by the Organization and denied by the Carrier at the first level of handling. Thereafter the denial was again appealed and conferenced properly in accordance with Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim it was

docketed before this Board for final adjudication.

Discussion

As background to this case it is stipulated that the Claimant showed up at work on January 30, 2000 with alcohol on his breath. This was approximately eleven months prior to receiving the letter of investigation which led to the instant arbitration. On that date the Claimant was taken out of service with an investigating pending. In early February of 2000 the Claimant elected to go under what is called on this property a by-pass agreement and he contacted the Carrier's employee assistance coordinator. The EAP coordinator permitted the Claimant to return to work on February 22, 2000. Under the by-pass agreement the Claimant was subject to random drug and alcohol testing.

On December 30, 2000 the Claimant was given a follow-up test. The test results came back with information from the testing lab that they were inconsistent with normal human urine. The instant case centers on whether there was a falsification of the testing sample.

Procedural Issues

There are a number of procedural objections raised in this case which will be dealt with by the Board prior to addressing the merits of the case. The Organization raises a due process concern since there was no stenographer at the investigative hearing but instead a recording device was used and then a transcript was transcribed from the recording tape. On this point the Board will observe that the use of recording devices is

common at investigations in the railroad industry and are an accepted means for gathering testimonial evidence. A review of the record in this case does not persuade the Board that normal, accepted means were not taken in order to assure sufficient accuracy of the record here before the Board. This objection is, therefore, dismissed.

There was also an objection raised during the handling of the claim's appeals on property, which are to a great extent procedural and which will, therefore, be dealt with by the Board at this point in this Award. According to this objection the scientific credibility of the testing laboratory was looked at askance by the union in view of certain alleged improper procedures followed by such labs while conducting their testing procedures. The Board has examined this serious objection and it is unable in the instant case to conclude that there is sufficient information provided by the Organization on this matter to permit conclusion that Medtox, which was the laboratory used to test the sample provided by the Claimant in December of 2000 under his by-pass agreement, was guilty of any type of malfeasance. This conclusion is supported by the Carrier's response to this objection wherein it states for the record, in handling the claim on property, that "...Medtox is a Department of Health and Human Services and National Institute for Drug Abuse (NIDA) certified facility that performs testing of urine samples for drugs and alcohol (and it)...has met...governmentally determined standards..." which would lead to high levels of confidence in any test results that this laboratory reports.[1] The Board has

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[1]See Carrier's Exhibit J inter alia.

no grounds for disagreeing with this information provided by the Carrier. Medtox is a well-known and reputable testing lab which this Board had dealt with not only in this but in many other comparable cases. It is a reputable testing establishment and its scientific reputation at this point is intact. The Board is unable to find information in the instant record before it to warrant any contrary conclusion. As an evidentiary matter the Board has no grounds for not accepting results reported from Medtox's labs.

Discussion on Merits

Now turning to the merits of the case there is testimony at the investigation by Jennifer Age, the occupational health manager, that when she received the results of the Claimant's follow-up test on January 4, 2001 the chief medical officer reviewed the test results and concluded that the chain of custody had been properly followed. The medical officer also confirmed that the test results showed that the specimen submitted by the Claimant was not consistent with human urine. This witness testified that the test results showed that the specimen submitted was not considered to be a diluted specimen, but rather a substituted specimen.

Testimony by the Claimant is that he was unable to provide a urine specimen when first requested to do so from about 12:30 AM until 1:50 AM on the morning of December 30, 2000. According to the Claimant he drank up to 48 fluid ounces of water and also some 8 ounces of coffee in order to be able to provide a urine specimen. The evidentiary issue here is whether this would have scientifically led to test results which showed that

the urine sample was not human urine. According to the Carrier the answer is: no. There is scientific evidence provided by the Carrier to the effect that research on samples with sample sizes as large as 500 subjects showed that participants who drank almost twice as much water as the Claimant states he did on the date in question, and in some cases up to a gallon of water, did not produce results which indicated that the urine specimen provides was other than human. There is considerable sophistication at this point in the lab testing techniques to permit conclusions about dilution of urine samples. Tests can now determine when testing subjects attempt to dilute samples by means of large intakes of fluids prior to taking a test. Dilution techniques employed by tested subjects do lead to flawed test results and are not uncommonly subject-matter for employers taking disciplinary actions against such employees on grounds that they have allegedly attempted to vitiate test results.

But this is not the issue in this case. The test results produced after the Claimant to this case allegedly provided a urine specimen led to the scientific conclusion that the sample was not diluted, but it was substituted with some liquid which was not consistent with human urine. In effect, the Claimant, and the Organization on his behalf, argue one line of reasoning with respect to the test results, and the testing laboratory and the medical review officer address another. The Claimant was discharged, not for diluting the sample he provided for testing on December 30, 2000, but for substituting that sample with something other than his own urine. The test results which came back sufficiently

show that the Claimant's specimen was substituted.[2] In effect, the actions by the Carrier are based not on failure to pass a drug screen, but refusal to test.

Findings on Merits

There is sufficient evidence of record in this case to warrant conclusion that the Claimant engaged in actions whereby he did not dilute the urine sample he provided for testing on December 30, 2000, but that he provided a substitute sample which was not consistent with human urine. As a result the Claimant refused to take a urine test under his by-pass agreement which he had signed some eleven months prior to the incident at bar.

Arbitral tribunals have gone on record on numerous occasions to the effect that employees who are given a good faith second chance, when it involves alcohol and drug usage, are not to be afforded a third chance. The logic behind such reasoning centers to a great extent on safety concerns in an industry such as the railroad industry where all employees must be conscious of such matters. An employee who uses drugs or alcohol while on the job is a danger not only to himself or herself, but also to his or her fellow employees.

On merits, the evidence in the instant record before the Board can reasonably lead it to no other conclusion than that it follow the precedent firmly established with respect to tolerance for drug and alcohol use on railroad premises and/or with respect to

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[2]See Carrier's Exhibit C.

employees being under the influence of one or the other while on assignment.

The instant case also touches on another matter which tribunals of this type take very seriously. By, in effect, attempting to substitute a false sample for a drug and alcohol screen test the Claimant to this case was not honest. There is abundant arbitral precedent in this industry to warrant conclusion that dishonesty in and of itself is sufficient grounds for an employee's discharge.

Lastly, the Board has been made aware of the fact that the Claimant to this case is a fairly long-term employee since he has a service date which goes back over ten years. The Claimant's prior record has also been scrutinized by the Board.[3] It includes several prior disciplines. As a whole this record is insufficient to warrant conclusion that the denial of the instant claim before it by the Board would not be proper. The Board must, therefore, rule accordingly.

Award

The claim is denied.

Edward L. Suntrup, Chairman & Neutral Member

Larry E. Nooyen, Carrier Member

J. R. Cumby, Employee Member

Date: 6-16-2003

[3]Carrier's Exhibit E.