PUBLIC LAW BOARD NO. 4244

Award No. 295
Case No. 302

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on March 27, 2002, Mr. Jose Mayorga was dismissed from service of the BNSF for his alleged violation to comply with Section 7.9 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs dated September 1, 1999. It is alleged that this was Mr. Mayorga's second positive test within a ten year period.

2. As a consequence of the Carrier's violation referred to above, Mr. Mayorga shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 27, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-02-0079. Organization File No. 190-13I2-024.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Jose Mayorga, entered the Carrier's service on October 22, 1996. He was working as a Trackman on September 19, 2001. On that date he was tested for reasonable suspicion of using a controlled substance. That test, using a urine specimen he submitted, yielded a positive result for the presence of phencyclidine ("angel dust"). In accordance with the Carrier's Policy on the Use of Alcohol and Drugs, ("Policy," herein) this being his first positive test, he underwent an evaluation which determined that he could be returned to service, provided he passed a return-to-work drug/alcohol test. He was thereafter subject to follow-up testing during the following twelve-month period.

On March 15, 2002, he was required to undergo a follow-up drug/alcohol test. On March 27, 2002, the Carrier's Division Engineer notified the Claimant that he had violated the Policy by substituting a urine specimen in the follow-up test on March 15, which did not "exhibit clinical signs or characteristics consistent with normal human urine. Substituting a urine drug specimen is

deemed a refusal to test." The Division Engineer's letter goes on to state that Section 7.9 of the Policy provides for dismissal from employment any employee who substitutes a urine specimen. That Section reads as follows:

> **Dismissal.** Any one or more of the following conditions will subject employees to dismissal:
>
> - More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period.
> - A single confirmed positive test either for any controlled substance or alcohol obtained under any circumstances within three years of any "serious offense" as defined by the Burlington Northen Santa Fe "Policy for Employee Performance Accountability."
> - Failure to abide by the instructions of the Medical & Environmental Department and/or Employee Assistance Program regarding treatment, education and follow-up testing.
> - Failure to provide a urine or breath alcohol specimen without a valid, verified medical explanation.
> - Adulteration, substitution or dilution of urine samples.
> - Possession of alcohol, controlled substance, illegally obtained drugs, adulterant substance, or drug paraphernalia on BNSF property obtained under any circumstances as follows:
>
> 1. within 3 years of any "serious offense" as defined by the Burlington Northern Santa Fe "Policy for Employee Performance Accountability", or
> 2. within 10 years of a confirmed positive test either for any controlled substance or alcohol, or
> 3. involving a criminal conviction.

The Parties' Agreement provides that the Policy will not preclude the filing and progression of claims for reinstatement, which must be filed within 60 days from the date the employee is notified of his termination.. Accordingly, on April 18, 2002, the Organization's General Chairman filed an appeal of the Carrier's disciplinary decision.

The Organization points out that the Claimant works with weights and takes body building supplements, and it took the laboratory an "extended period of time" to test the specimen. (The record shows that the specimen was taken at 9:00 p.m. on Friday, March 15; received by the testing laboratory at 10:58 a.m. on Tuesday, March 19; and reported at 1:26 p.m. on Wednesday,

March 20). The Organization further notes that the specimen cups containing the urine had no boric acid preservatives added.

The Organization enclosed with its appeal the results of urine tests it states were taken independently by the Claimant on March 26 and on March 28, 2002, which were analyzed by different laboratories on March 27 and April 2, respectively. Each of the separate laboratory reports indicates the specimens tested negative for the five types of controlled substances required by the applicable Federal Regulations governing the railroad industry. One laboratory report also shows negative results for other substances subsumed within the Federal guidelines.

The Organization argues that the Carrier has not sustained its burden of proof, but even if it had, the discipline is "extreme, unwarranted and unjustified."

The Carrier rejoins that a substituted urine specimen is treated, under the Policy's provisions, as a condition which will subject an employee to dismissal. Furthermore, the substitution is deemed to a refusal to be tested, which is considered the same as a positive test. Thus, the Claimant has two drug offenses within a ten-year period, which also subjects him to dismissal.

The Carrier concludes, therefore, that its decision to terminate the Claimant is within the scope of the Parties' Agreement, and it declined the Organization's appeal.

On November 25, 2002, the Organization again corresponded with the Carrier. It pointed out that the Claimant, in a facsimile transmission to the Carrier's Manager of Medical Support Services on April 4, 2002, requested that a quantitative analysis be performed on his split urine specimen. As of that writing, November 25, 2002, the Claimant had not received a response to his timely request. The Organization contended that there was no evidence to support the Carrier's position that there was substitution of the specimen.

On April 17, 2003, following a conference between the Parties' representatives, the Carrier responded to the Organization's November 25 letter. The Carrier points out that Federal Regulations require that an employee must request the quantitative analysis directly to the Carrier's Medical Review Officer. Although that was not done in this case, the Carrier nevertheless arranged to have the quantitative analysis made and the result was sent the Claimant on March 14, 2003.

The Carrier also responded to the Organization's submission of the analysis of urine specimens taken on March 26 and March 28, 2002. It argues that there is no chain of custody evidence which proves those specimens were actually submitted by the Claimant. In any event, the specimens were taken 11 and 13 days, respectively, after the submission of the follow-up test on March 15, 2002. The Carrier points to a decision rendered by Public Law Board No. 3139,

which considered a similar situation in which an employee submitted in evidence negative tests taken more than ten days following a positive test. There, that Board noted that there was no proof that the later specimens were the employee's, no evidence that the testing laboratories were reputable and reliable, and even if the specimens were genuine, the controlled substance could have dissipated in the interim following the first, positive test.

On April 28, 2003, the Organization again asserted that the Claimant had still not received the analysis from the split specimen. Therefore, the Carrier has failed to prove that the urine specimen was substituted.

On May 13, 2003, the Carrier responded, having obtained a statement from the laboratory that tested the split specimen, stating that it determined, on March 25, 2002, that the specimen was "substituted–not consistent with normal human urine." It was sent to the Claimant in April 2002, March 2003, and again in May, 2003, at the same address given to the laboratory by the Claimant himself. The Board notices that this is the same address to which the notice of his dismissal was sent on March 27, 2002, by Certified Mail, for which the Claimant gave a receipt of delivery. The Carrier continued to decline the appeal.

The Board has studied the record in this case and considered the arguments presented by the Parties. The significant issues raised will be addressed.

The Board does not believe the length of time before the laboratory tested the specimen was excessive. The specimen was taken on a Friday night, and received at the laboratory on the following Tuesday morning, indicating that only one working day had passed. Urine specimens are customarily shipped by an express carrier, such as FedEx or UPS, which do not dispatch shipments on weekends. The test result was issued a little more than 24 hours after receipt.

Examination of the procedures for taking urine specimens in the applicable Federal Regulations, 49 CFR Part 40, does not indicate that a boric acid preservative is a requirement of the collector.

While the Organization referred to the Claimant's working with weighs and taking of body building supplements, it offers no proof that these facts provide a lawful explanation of a substituted urine specimen.

The Board is not persuaded that the subsequent urine specimens on March 26 and March 28, which rendered negative test results, are of any evidentiary value for the same reasons given by the Carrier, and supported by the decision of Public Law Board No. 3139. Although this Board has no reason to question the reliability of the tests, nor the identity of the person submitting the specimens, presumably the Claimant, these results more than ten days later prove only that the Claimant was clean on those latter dates. Since his urine specimen was substituted, it

cannot be known whether it was positive (or negative) for any controlled substance on March 15, 2002.

The Carrier is correct when it asserts that the request for a test of the split specimen should have been directed to the Medical Review Officer. 49 CFR §40.153(c) provides:

> (c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (e.g., by use of an answering machine with a "time stamp" feature when there is no one in your office to answer the phone).

The Organization, however, states that the Claimant directed his request in the manner in which he was told to do so and, as it turns out, his request was honored. The second testing laboratory sent it out three times to the Claimant's address of record. The Board can only conclude that it was sent and cannot explain the Claimant's contention that it was not received.

The quantitative values for the laboratories' conclusion that the specimens were "not consistent with normal human urine" are not disclosed in the record. Presumably the temperature was within normal range when the specimen was submitted; otherwise, the collector would have made a notation of that fact and required the Claimant to so certify. We are left without any data as to the specific gravity and the creatinine level, which are essential elements in the evaluation of a urine specimen's validity. These values have not been supplied by either the Carrier or the Organization.[1] When the Carrier has proven by the laboratory report that the specimen was substituted, it has presented evidence sufficient to make a prima facie case to support its position, and the burden shifts to the Organization to refute that evidence. This it has failed to do.

The Policy, which is modeled after the Federal Regulations applicable to alcohol and drug use in the transportation industries, provides that adulteration, substitution, or dilution of a urine specimen will subject an employee to dismissal. (Section 7.9). It further provides that an

---

[1]A substituted non-urine liquid would have a creatinine concentration less than or equal to 5mg/dl (49 CFR 40.93(b)). Creatinine is defined in *Taber's Cyclopedic Medical Dictionary*: "The decomposition product of the metabolism of phosphocreatine, a source of energy for muscle contraction. . . . It is a normal, alkaline constituent of urine and blood." 49 CFR §40.151(i) states, "You [MRO] must not accept, as a legitimate medical explanation for a substituted specimen, an assertion that an employee can produce urine with no detectable creatinine. There are no physiological means through which a person can produce a urine specimen having this characteristic."

employee who tampers with a urine sample by substitution, dilution, or adulteration is deemed to have refused to be tested, which is also a dismissible offense. (Section 7.6).

The Board concurs in the Carrier's reasoning in support of its decision to dismiss the Claimant from its service. The Board can find no reason to sustain the Organization's claim on behalf of its member. The claim is therefore denied.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

June 25, 2003
Date