

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
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 September 13, 2002, Mr. L. J. Rael was dismissed from service of the BNSF for his alleged violation of Rules 1.3.1 and 1.6 of the Maintenance of Way Operating Rules in effect January 31, 1999, as supplemented or amended, and Section 7.6 and Section 7.9 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs dated September 1, 1999.
2. As a consequence of the Carrier's violation referred to above, Mr. Rael shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 26, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-02-0202. Organization File No. 150-1312-027.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. Lawrence J. Rael, entered the service of the Carrier on July 22, 1996. He was required to undergo a return-to-work urine drug screen and breath alcohol test on July 23, 2002; such tests are uniformly required of employees who are returning to work after absences of more than six months. The urine specimen provided by the Claimant did not fall within the acceptable temperature range, 90-100°F. Although this was not a Federally-mandated test, the Carrier's testing procedures conform to the Federal regulations.¹ In compliance with the Carrier's procedures, another specimen was taken under direct observation about two hours

¹Section 5.6 of the Carrier's Policy on the Use of Alcohol and Drugs states, "All breath alcohol and urine collections will be performed according to procedures specified in 49 CFR Part 40."

later, when a person of the same gender was available to accompany the Claimant into the collection site. Both specimens were submitted for testing. The result on the first specimen read, "Specimen Substituted: not consistent with normal human urine." The second specimen tested negative.

On August 1, 2002, the Claimant was directed to attend a formal investigation concerning the laboratory report, alleging he had provided a substitute for his urine specimen on July 23, 2002. The investigation was held on August 19, 2002. The Claimant was present and was represented by the Organization's Vice General Chairman. A transcript of testimony and evidence was prepared and appears in the record before this Board.

On September 13, 2002, the Claimant was notified that as a result of the investigation, he was dismissed from the Carrier's employment for violation of Maintenance of Way Operating Rules (MWOR) 1.3.1 and 1.6, and Sections 7.6 and 7.9 of the BNSF Policy on the Use of Alcohol and Drugs (Policy). These provisions read as follows:

MWOR 1.3.1

Safety Rules. Employees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form.

Maintenance of Way Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty.

Hazardous Materials. Employees who in any way handle hazardous materials must have a copy of the instructions or regulations for handling these materials. Employees must be familiar with and comply with these instructions or regulations.

Timetable/Special Instructions. Employees whose duties are affected by the timetable/special instructions must have a current copy they can refer to while on duty.

Classes. Employees must be familiar with and obey all rules, regulations, and instructions and must attend required classes. They must pass the required examinations.

Explanation. Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of.

Issued, Cancelled, or Modified. Rules may be issued, cancelled, or modified by track bulletin, general order, or special instructions.

Engineering Instructions. Employees governed by the Engineering Instructions must be familiar with and comply with all their provisions; additionally, a copy of Engineering Instruction No. 1 must be available for reference while on duty.

MWOR 1.6

Employees must not be

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous.

Policy Section 7.6

Employees refusing to participate in any federal or BNSF drug test will be removed from service immediately and disqualified from service for a period of at least nine (9) months, and subject to dismissal from service with BNSF. Refusal includes:

- Outright rejection of participation in a drug or alcohol test;
- Failure to provide an acceptable identification number for federal testing (i.e., social security number, employee ID, driver's license number or engineer certification number);
- Failure to provide a urine or breath specimen without a valid medical reason;
- Tampering with a urine sample by substitution, dilution or adulteration;
- Failure to report for a test without a valid reason; or,
- Harassment of, or refusal to follow the instructions of authorized collectors.

Policy Section 7.9

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 Northern 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.

Division Engineer Craig L. Sloggett and Specimen Collector Lynda S. Smith, (she is not a Carrier employee), as well as the Claimant, presented testimony at the investigation. Mr. Martin M. Crespino, Manager of Medical Support Services, also offered testimony by telephone. Except for one divergent account, their testimony was generally consistent.

On July 23, 2002, the Claimant was taken from the work site and driven to the Roadmaster's office in Belen, New Mexico. Ms. Smith was waiting with two urine collection kits. The Claimant was directed to select one of the two. The rest room in which he yielded the specimen, next door to the Roadmaster's office, had already been prepared to prevent contamination or adulteration with water. He returned with the specimen container in a very short period of time, estimated by Ms. Smith and the Claimant at 30 to 45 seconds.

The temperature strip provided with the container did not record the specimen's temperature. Ms. Smith said the specimen was clear in color and did not have an odor characteristic of urine. She immersed an oral thermometer in the specimen, in the event the temperature strip had failed. After about five minutes, when the oral thermometer did not indicate a reading higher than its minimum 85°F., Ms. Smith, accompanied by the Claimant, returned to the Roadmaster's office to prepare the paperwork in connection with the test. Division Engineer Sloggett was waiting outside the office. Ms. Smith called him in and advised him the specimen did not fall within the prescribed temperature range, and showed him the temperature strip. Mr. Sloggett then called someone by telephone and it was determined that an observed collection should be performed. Since this requires a collection person of the same gender as the donor, arrangements were made with another medical facility for this to be done. Ms. Smith, while retaining the first specimen, she said, drove to the other facility and Mr. Sloggett followed, accompanied by the Claimant.

When the second specimen was obtained, it was within the normal temperature range and a color typical of urine. Both specimens were sent to the testing laboratory together by Ms. Smith as required by the Federal regulations. She testified that, except when traveling to the second medical facility and while he provided the second urine specimen, she and the Claimant were together at all times after he gave her the first specimen, and it was not out of her possession until it was sent to the laboratory. The Claimant, however, testified that Ms. Smith handed the specimen to Mr. Sloggett when they entered the Roadmaster's office, and that Mr. Sloggett took it outside the room for 30 or 35 seconds, unobserved by either the Claimant or Ms. Smith. The Claimant believes that was when the specimen was substituted. It had not been sealed at that point. He denied tampering with the specimen in any way.

The Organization promptly appealed the Carrier's disciplinary decision. The Organization argues that the allegation that it was not normal human urine was based solely on its temperature outside the normal range. It further argues that the chain of custody was broken when Mr. Sloggett handled the specimen before it was sealed. The second test was negative, thus proving that the Claimant was clean of prohibited drugs. Therefore, the Organization contends that the discipline is "extreme, unwarranted and unjustified," and even if the Carrier had proven its charges, the discipline is excessive.

The Carrier responds that the Claimant submitted a specimen that was determined by the testing laboratory not to be normal human urine. This is a violation of the Carrier's rules. The Claimant's only defense is the broken chain of custody, and he failed to prove that defense. Dismissal when an employee attempts to falsify a drug test is not harsh, the Carrier contends.

The Board has carefully studied the record in this case, and considered the arguments advanced by the Parties.

The record leaves some troublesome questions unanswered. If the Claimant substituted some liquid other than urine for the first specimen, we are left to wonder where it came from. The record does not indicate whether or not Ms. Smith required the Claimant to show the contents of his pockets. She added blue dye to the water in the toilet, and the specimen was said to be clear. The water supply to the lavatory was cut off by herself, Ms. Smith said. The Claimant's representative, during cross examination of Mr. Sloggett, brought out the fact that the Claimant was taken from the job site to be tested, without having any prior knowledge that he would be tested on that date. The point being made, of course, is that he could not have prepared a substitute liquid for this test, not knowing that he would be tested at that particular time.

The Board is not persuaded that the Claimant was truthful when he said that Ms. Smith gave his specimen to Mr. Sloggett, who took it outside the office, where he could substitute some other substance for the Claimant's urine. To give credence to this assertion, the Board would have to believe that Mr. Sloggett had some undisclosed motive for causing a false charge against

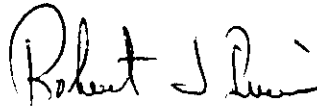
the Claimant, and that Ms. Smith violated her trust by giving him the opportunity to tamper with the specimen. Ms. Smith, a disinterested party, testified that the specimen never left her possession. She and Mr. Sloggett both testified that Mr. Sloggett did not even touch the container.

The laboratory's determination that the first specimen was "not consistent with normal human urine" was not based solely on the fact that it was outside the acceptable temperature range, as the Organization argues. 49 CFR §40.93(b) states, "As a laboratory you must consider the primary specimen to be substituted if the creatinine concentration is less than or equal to 5mg/dl and the specific gravity is less than or equal to 1.001 or greater than or equal to 1.020." The Board believes that if it had been negative for the prohibited substances and displayed specific gravity and creatinine levels consistent with normal human urine, the test result would have been negative, as was the second specimen.


Both Sections 7.6 and 7.9 of the Carrier's Policy subject one to dismissal for substitution of a urine specimen. Discipline is clearly warranted for that reason, but the very purpose of the alcohol/drug test was to ascertain whether the Claimant was free from the influence of these substances. The negative report on the second specimen demonstrates that he was free from the effects of drugs on July 23, 2002. The Board believes that permanent dismissal is not warranted for that reason. The Claimant shall be reinstated to service with all rights unimpaired, but without pay for time lost. He will, of course, be subject to another return-to-work alcohol/drug test.

AWARD

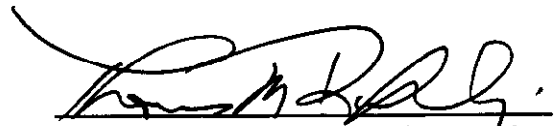
The claim is sustained in accordance with the Opinion. The Claimant shall be returned to service within thirty (30) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

I Dissent!

June 25, 2003

Date