

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 on October 4, 2002, when it dismissed the Claimant, Mr. A. J. Fernandez, for allegedly violating Rule 1.13 of the Maintenance of Way Operating Rules, and Section 7.9 of the BNSF Policy on the Use of Alcohol and Drugs, when he failed to follow the instructions of the Employee Assistance Coordinator following a rule 1.5 violation.
2. As a result of the violation referred to in part (1), the Carrier shall reinstate the Claimant to service with seniority intact, remove the discipline mark from his personnel record, and make him whole for any time lost. [Carrier File No. 14-02-0298. Organization File No. 190-1312-0120.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.

On September 21, 2000, the Claimant, Mr. Arnold J. Fernandez, an employee with more than 19 years' service, was working as a Machine Operator in the Carrier's Maintenance of Way Department. He was operating a back hoe on that date, which became overbalanced and overturned on a sloping surface. The Claimant suffered no injury from the accident, but the circumstances required that "probable cause" testing for alcohol and/or drugs be performed. The tests revealed the presence of both alcohol and a controlled substance.

In accordance with the Carrier's Policy on the Use of Alcohol and Drugs ("Policy"), the Claimant was issued a conditional suspension, based upon his first-time violation of the Policy, placing himself in the Carrier's Employee Assistance Program, and his full compliance with the program and all instructions issued by the Employee Assistance Manager. He was directed to contact the Employee Assistance Manager for evaluation and treatment, and advised that treatment must commence within 45 days from the start of his suspension. He was further

advised that he would be required to receive a favorable recommendation from the Employee Assistance Manager for return to active service within 60 days from the date of his suspension.

On October 4, 2002, the Carrier's Division Engineer sent the Claimant a letter advising that an investigation would be scheduled for the following reason:

[P]ossible violation of Rule 1.13 (Reporting and Complying with Instructions) of the Maintenance of Way Operating Rules . . . and of Section 7.9 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs . . . for failure to abide by the instructions of the Medical & Environmental Health Department and/or Employee Assistance Program regarding treatment, education and follow-up testing

The investigation was held on November 7, 2002. The Claimant was competently and professionally represented by the Organization's Vice General Chairman. A transcript of testimony and evidence offered therein appears in the record before this Board.

The record includes a letter to the Claimant, dated September 6, 2002 (almost two years after he was removed from service for treatment), from the Carrier's Manager Medical Support Services, advising that he had failed to comply with instructions given him in connection with treatment. He was required to contact Mr. Jim Harrell, the Manager Employee Assistance Services, at his earliest opportunity, and to be in compliance with the Employee Assistance Program by September 16, 2002. The letter further advised that failure to comply with Mr. Harrell's requirements would result in an investigation.

Roadmaster John Palacios testified in the investigation as a witness for the Carrier. He stated that on the same date the above letter was sent the Claimant, the Claimant failed a breath test for alcohol. That prompted the Manager Medical Support Services notifying the Claimant's supervising officer to arrange for the investigation which was held on November 7.

Mr. Palacios also read into the record a letter from Mr. Harrell, cataloging the Claimant's failure to comply with his instructions. This letter reads, in part, as follows:

Failure to comply is as follows: Employee must abstain from the use of all alcohol, drugs, or any mood altering chemicals. Since his removal from service, client has relapsed on more than one occasions. Number two, failure to keep monthly contact with his Employee Assistant Manager. Employee went from December 2000 to September 2001 and from April 2002 to September 2002 without making monthly contact with the undersigned. Item three, employee has failed to provide any documentation regarding Alcoholic Anonymous or Narcotics Anonymous

attendance. Employee was directed to attend and provide documentation of meeting attendance at A.A. or N.A. at 12 meetings per month.

The Claimant testified that he entered a rehabilitation program within a few days after he tested positive for the presence of alcohol. He remained in that program for 30 days, but relapsed within two or three weeks after discharge. He reentered the program for a 14-day period, but relapsed again after "a couple of months," which he attributed to domestic problems. During this period, he said he was actively engaged in A.A. meetings and was seeing a psychologist, having been diagnosed as having manic-depressive psychosis. He had been taking prescribed medication for that condition, but indicated that, due to his financial straits, he had not used medication in eight months. He asked Mr. Harrell to permit him to reenter the program, and his request was favorably acted upon.

From the Claimant's description of events, the Board concludes that this latest round of treatment involved in-patient therapy. Because, he related, of an incident involving a visit from his wife in the privacy of his room, proscribed by the facility's rules, he was told to leave. That exacerbated his depression and, as the consequence, he somehow obtained an alcoholic beverage and began drinking, which resulted in his discharge from the facility. Because of this occurrence, he met with Mr. Harrell and was given another chance, provided that he attended 90 A.A. meetings in 90 days. He told Mr. Harrell he needed to reenter treatment, but his health insurance was expiring and he could not afford the high cost of in-patient treatment. He said he was on a waiting list for the Salvation Army's in-patient program, which he could afford. He testified that he had been going to A.A. meetings five days per week and an Alanon meeting once a week.

He further testified that he had been attending a Salvation Army out-patient program twice a week, pending admission to its in-patient program. He has also sought counseling with a Fresno (California) County mental health program, which charges a nominal fee for their services. The Claimant also admitted that he had failed to submit the required verification to attest his faithful attendance at A.A. meetings, and there were extended periods when he did not stay in contact with Mr. Harrell. He said he still possessed the documentation of his attendance and could supply it to Mr. Harrell. He expressed hope that he would soon be admitted to the Salvation Army's in-patient program. He also indicated that some of his domestic problems had been alleviated. He further expressed optimism that anticipated further treatment would result in his becoming a "worthy employee" again.

On December 4, 2002, the Carrier's Conducting Officer notified the Claimant that he was dismissed from the Carrier's employment for his failure to abide by its instructions regarding treatment, education, and follow-up testing, in violation of Maintenance of Way Operating Rule 1.13 and Section 7.9 of the Policy. These read:

Maintenance of Way Operating Rule 1.13

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

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.

The Organization promptly appealed the Carrier's disciplinary decision to its Labor Relations Department. The Organization initially requested a leniency reinstatement. It states that although he has suffered some setbacks, the Claimant has made great strides in overcoming his illness, and would make a good employee. At the time written, December 12, 2002, the Organization argues, he is clean.

The Organization further argues that the discipline is extreme, unwarranted, and unjustified, and is not supported by the record. There are no flagrant violations of the Carrier's rules.

The Carrier asserts that its disciplinary decision is fully warranted. More than two years before, the Claimant signed a waiver and was required to comply with instructions from the Employee Assistance Program Coordinator. The Claimant has not complied with those instructions. The Carrier points out that he has had two years "to clean up his act," and has failed. The Carrier notes that the Claimant testified that he was well on his way to sobriety, but the Carrier has been extremely patient and the Claimant has repeatedly failed. His dismissal is warranted.

The Carrier further acknowledged the Organization's request for a leniency reinstatement. It asserts that he has already been given a leniency reinstatement, but the Claimant has failed to meet the requirements set out in the reinstatement agreement. The Carrier states it is unwilling to try it again. The Board concludes that the "reinstatement agreement" refers to the provisions of the Employee Assistance Program, which permit a first-time alcohol/drug offender to take a conditional suspension pending successful completion of the Program.

The Board has carefully studied the transcript of testimony and evidence taken at the investigation, and has considered, with more than a little sympathy, the arguments of the Parties.

With respect to the Organization's request for leniency, the Board points out that a Board such as this cannot issue a ruling on the basis of leniency. Decisions with regard to leniency are reserved for the Carrier. See, e.g., Award No. 22, Public Law Board No. 6204, and Third Division Award 20236, wherein the Board stated the general arbitral principle with regard to requests for leniency reinstatement:

This Board has consistently held that the reinstatement of an employee on a leniency basis is solely within the discretion of Carrier. See Awards 8715, 11914, 15572, among others.

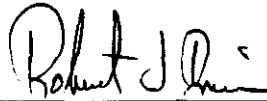
The record makes it quite clear that the Claimant has been given remarkable latitude with respect to the time limits prescribed for rehabilitation. The Carrier's notice of his positive test results prescribed sixty days to obtain a favorable recommendation from the Employee Assistance Manager. This Claimant had been treated for about two years, when he was given what must be considered a "last chance." The Board notices that the Carrier has not required strict compliance with its own published time limit. The Claimant might have been discharged many months before. Failure to demand strict compliance with its own published time limit is not to be looked at with a critical eye. This Board is being careful not to write any words which might suggest that extension of its own time limit in one case would establish a precedent requiring extension in another. Some flexibility works for the benefit of both the Carrier and a troubled employee.

The Board is not unsympathetic to the plight of the Claimant. His repeated relapses, however, which he attributes to his financial straits and his domestic problems, make it clear that he is excessively sensitive to the pressures of a troubled life, which drives him to seek escape in inappropriate behavior. The Board sincerely harbors the hope that he will obtain the help that he needs so desperately, to the end that he will gain sobriety and ensure a better life for himself and his family.

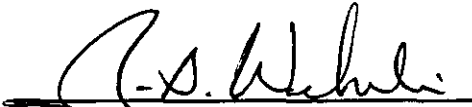
Having said that, the Board finds that it cannot extend more, nor better, opportunities for rehabilitation than have already been afforded him by the Carrier. It has been extremely patient and compassionate, but the Claimant's continued recidivism has, understandably, exhausted the Carrier's forbearance. The Board has no grounds to substitute its judgment for the Carrier's. The claim is denied.

AWARD

The claim is denied.



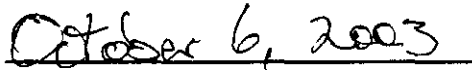
Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member



Date