

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 March 19, 2003, when it dismissed the Claimant, Mr. D. Sena, for allegedly violating Rule 1.3.1, 1.5 and 1.6, and section 7.6 and 7.9 of the BNSF Policy on the Use of Alcohol and Drugs, when he refused to provide a urine sample for testing.
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. 14-03-0116. Organization File No. 160-1312-033.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. David Sena, became employed by the Carrier on July 6, 1999, thus having less than four years' service at the time of an incident on March 19, 2003, which is the subject of this dispute. As an employee holding a Commercial Driver's License, he was subject to random testing for the presence of alcohol and/or controlled substances, pursuant to regulations issued by the Federal Motor Carrier Safety Administration (FMCSA), as well as the Carrier's own rules. In October, 2000, the Claimant had been given a conditional suspension for testing positive for a controlled substance. He successfully completed treatment and education as prescribed by the Carrier Employee Assistance Program, and returned to work in November, 2000. In compliance with FMCSA regulations and the Carrier's Policy on the Use of Alcohol and Drugs (Policy), the Claimant was subject to unannounced follow-up testing for alcohol and/or controlled substances. Section 4.8 of the Policy reads as follows:

4.8 Follow-up Testing. Employees permitted to return to work following a violation of this policy, will be required to participate in follow-up testing as determined appropriate by a Substance Abuse Professional (SAP). A minimum of

six (6) unannounced tests will be conducted during the first year following the return to service. The tests may include a urine drug screen and/or a breath alcohol test for a period up to five (5) years.

Although the wording is different in some respects, the Federal regulation, 49 CFR § 40.307(d), incorporates the same follow-up testing provisions as set forth in Section 4.8 of the Carrier's Policy, *supra*.

On March 19, 2003, when the Claimant appeared for an alcohol/drug test, events at that point resulted in a notice of charges and investigation being brought against the Claimant by the Carrier's Southwest Division General Manager, in a letter having the same date, March 19, reading in part, as follows:

[T]o develop the facts and place responsibility, if any, in connection with alleged violation of Rules 1.3.1 and 1.6 of Maintenance of Way Operating Rules, . . . and Sections 7.6 and 7.9 of BNSF Policy on the Use of Alcohol and Drugs, . . . concerning your failure to provide urine specimen for random drug and alcohol test while working as Welder Trainee at Fort Sumner, New Mexico, on March 19, 2003. [Underscoring added].

The investigation was held on April 23, 2003, following an agreed-upon postponement. The Claimant was competently and professionally represented by the Organization's Vice General Chairman. A transcript of testimony and evidence offered in the investigation appears in the record before this Board. Testimony was presented by the Carrier's one witness, Assistant Roadmaster William Gomez. The Claimant testified in his own behalf.

This transcript describes the following events on March 19, 2003. When the Claimant reported for work, Mr. Gomez advised him that he was to be administered tests for alcohol and/or drug use. The Claimant had been given follow-up tests on numerous occasions since his reinstatement in November, 2000, and he was not surprised; he said he was familiar with the routine. He went into a place of privacy on the premises, and met the trained person, a woman, who would administer the breath alcohol test and obtain the urine specimen. This person was not an employee of the Carrier, but was under contract to perform these services.

The Claimant testified that the breath alcohol test was administered first, and yielded a negative result, indicating there was no alcohol present in his breath. He stated that he was unable to provide a urine specimen at that time; "I didn't have the urge to give a urine specimen." While he was waiting to become able to provide the specimen, the Claimant and the collection person engaged in conversation. He testified that she told him that regulations issued by the United States Department of Transportation (DOT) require follow-up testing for only one year, and "railroad regulations" state that follow-up examinations are required for only two years.

Since it had been more than two years since he had begun follow-up testing, he testified that he "felt harassment was being pushed upon" him, so he refused to provide the test specimen. He said he felt the follow-up examination was "unnecessary." He readily admitted that he refused to undergo the test. On cross examination, he said that he wasn't "totally familiar" with the Carrier's policies on testing, but, he added, "[H]er being the tester, I figured she knew a bit more on that as far as I'm concerned." (Transcript Answer No. 48). However, when Sections 7.6 and 7.9 of the Carrier's Policy were read into the record, he acknowledged that he was familiar with their provisions. These Sections read as follows:

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.

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.

Mr. Gomez related what happened when the Claimant refused to provide the urine specimen:

Mr. Sena walked by me and went outside. Shortly after the tester came up to me and told me we had a problem. She pulled me back to the backroom, he, she told me that he refused the test and left the property. [Transcript Answer No. 11].

The Claimant gave this explanation:

77. Q. If you had any questions or concerns why wouldn't you talk to Mr. Gomez?
- A. Well, I'm not sure, familiar with these procedures. I didn't know whose, who has the stand or whatever. I'm not sure how these, these are conducted or anything, this is my first one.
78. Q. Why did you just walk off then without talking to Mr. Gomez or anything?
- A. Walk off...
79. Q. Didn't you leave...
- A. ...from the job?
80. Q. ...the job, leave the Company property?
- A. I, I was upset. Rather than face another altercation with someone, I left for my, for my own safety. For anyone's safety. I was pretty upset with the, with the constant follow-up exams. The rate that I was being given them. And for, just, just out of anger I walked out. And I mean that's just what it boils down to.

During the course of the investigation, the Claimant raised the issue of whether he was being subjected to random or follow-up testing. The record indicates that he was charged with failure to provide a specimen for a random test. He testified that the paperwork in connection with his testing indicated that it was a follow-up test. Mr. Gomez testified that he was "pretty sure" it was a follow-up test, but he didn't know "for sure." The Claimant testified, "I refused the follow-up exam, but I did not refuse the random." (Transcript Answer No. 56).

As the result of this investigation, the General Manager wrote the Claimant on May 14, 2003, that because of his refusal to provide a urine specimen for a random test on March 19, 2003, he was dismissed for violation of Maintenance of Way Operating Rules 1.3.1, 1.5, and 1.6, and Sections 7.6 and 7.9 of the Policy. These Maintenance of Way Operating Rules (MWOR) read as follows:

Rule 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.

Rule 1.5

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their

breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

Rule 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.

The Carrier's disciplinary decision was promptly appealed by the Organization to the Carrier's Labor Relations Department. The Organization believes the discipline is unwarranted, and it asks that the Claimant be reinstated and paid for all time lost. Its position is best depicted by quoting directly:

On the day in question the Claimant in fact had taken the Breathalyser Test and passed it. However he had just gone to the bathroom prior to being informed of the test and was waiting to provide a specimen when in a conversation with the Tester Person, he was informed that the follow up exam did not meet the time limits for either the Carrier nor the DOT Requirement. So out of this conversation, it was his understanding from the Tester Person, that the Claimant, did not have an obligation to provide for this test, and it was nothing more than harassment on the Carrier's part. The Claimant states that this is the reason he did not have to take the test, and therefore left the vicinity. The Claimant made it quite clear that he did not refuse, and it was not a random test but was in fact, a follow up exam. [General Chairman's letter dated May 20, 2003].

In its response to this appeal, the Carrier states that the Claimant's dismissal was warranted. It points out that he readily admitted that he refused to submit to the urinalysis, and

he also left the Carrier's property although he had reported to work on an assignment on that date. It is also the Carrier's position that even if the Claimant felt he was being harassed, as he testified, it was his responsibility to do as instructed and grieve later. "Work now and grieve later is one of the oldest axioms of the Railroad industry," the Carrier asserts. If he was being improperly tested, he could have requested an unjust treatment hearing.

The Carrier also points out that even if the Claimant had been told by the "test lady" that he was not subject to follow-up testing after one or two years, it did not lessen his responsibility to comply with instructions. The applicable Federal Regulation, 49 CFR § 40.307(d)(2) provides that follow-up testing may be performed for up to 60 months. Section 4.8 of the Carrier's Policy provides a period of up to five years.

The Carrier also states that its Policy, in Section 7.9, (see page 3, *supra*), provides for dismissal when an employee fails to provide a urine specimen without a valid, verified medical explanation.

The Board has studied the transcript of evidence and testimony in the record, and has considered the arguments carefully devised by the Parties, and reached the following conclusions. The Claimant appears to have a problem with anger management. When he was told, if his account is true, that he was not subject to follow-up testing after one or two years, he had two rational courses of action he might have followed. (1) Assuming that he was "clean," he might have submitted the urine specimen anyway, and then filed a grievance, demanding that follow-up testing cease. (2) He might have sought the counsel of Mr. Gomez. If Mr. Gomez was uncertain whether follow-up testing could properly be administered, he could have applied to higher authority, or directed the Claimant to the Carrier's Medical and Environmental Health Department. The Claimant let his anger override his common sense, and he walked off the job, rather than "face another altercation," he said. He might have been charged, also, with violation of Maintenance of Way Operating Rule 1.15, which prohibits employees from leaving their assignment without proper authority.

As it turns out, the "test lady" was incorrect in her interpretation of both the DOT's Regulations and the Carrier's Policy. The Claimant testified that he was familiar with the applicable rules. (Transcript Answers 5, 6, 66, and 70). He also testified that he was not familiar with them. (Transcript Answers 42, 48, and 88). In any event, he is required to be conversant with the Carrier's rules. It is a general truth, whether formally written or not, in this and other industries, that when an employee does not understand a rule or instruction, he should apply to a supervisor for an explanation. This principle is written for the benefit of the Carrier's employees in MWOR 1.3.1, under the subtitle "Explanation." That would have been a prudent course of action, especially since Mr. Gomez was readily available to the Claimant.

The Board cannot discern any benefit for the Claimant in the distinction between a random test and a follow-up test, alluded to in the Claimant's testimony and the Organization's appeal. If the "test lady" and the Claimant were persuaded that he was being improperly given a follow-up test, it becomes clear why the Claimant testified, "I refused the follow-up exam, but I did not refuse the random." (Transcript Answer No. 56). As the holder of a Commercial Driver's License, he was subject to a random test any time his name was selected in accordance with the prescribed selection methods.

The Board notices that the record shows the Claimant testified the paperwork pertaining to his testing on March 19 indicated that it was a follow-up test, but the notice of charges and the notice of discipline refer to a random test. The entry in the Claimant's personal record file refers to a random test. These may have been mistakes on the Carrier's part when these letters were written, or the "test lady's" paperwork may have been in error. But these discrepancies in terminology, whatever their nature, do not provide any comfort for the Claimant. If the letters read "follow-up" instead of "random," the outcome would be the same. It does not mitigate his refusal to go ahead with the test, or seek an explanation from his supervisor. The Board concurs in the Carrier's "obey now, grieve later" axiom. In this Board's Award No. 267, we wrote:

Arbitral decisions, not only in the railroad industry, but throughout the entire spectrum of business and industry, have historically adhered to the principle that an employee who disagrees with a work order or rule normally must obey the order or rule and challenge its legitimacy through the grievance procedure or other channels. The exceptions to this principle are logical and obvious. No employee should be punished for disobeying an order that is illegal, unethical, or immoral, or one that would endanger the employee or others.

The Board finds that the Carrier's disciplinary decision in this case was fully justified. MWOR 1.3.1 requires that employees be familiar with and obey all rules, regulations, and instructions. They must ask their supervisor for an explanation of any rule, regulation, or instruction of which they are unsure.

MWOR 1.6 requires that employees not be insubordinate. Refusal to comply with instructions to undergo testing for the presence of drugs is an act of insubordination.

Policy Section 7.6 subjects an employee to dismissal for refusal to participate in any Federal or Carrier prescribed drug test. Refusal includes failure to provide a urine specimen without a valid medical reason.

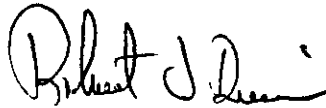
Policy Section 7.9 subjects an employee for dismissal for failure to provide a urine specimen without a valid, verified medical explanation.

For what it's worth, the record does not show by evidence or testimony, or even suggest, that the Claimant violated Maintenance of Way Operating Rule 1.5.

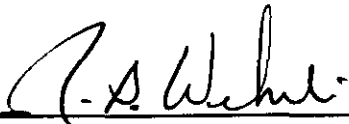
The Board has no logical reason to sustain the Organization's claim.

AWARD

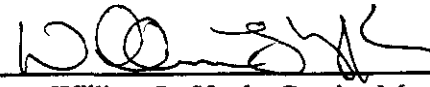
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

10/29/03

Date