PUBLIC LAW BOARD NO. 4244

Award No. 312
Case No. 322

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 on, March 28, 2003, when it dismissed the Claimant, Mr. J. J. Michelena, from service for allegedly violating the Carrier's Policy on the Use of Alcohol and Drugs, when he tested positive for a controlled substance a second time within a 10-year period.

2. As a result of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority intact, remove the discipline mark from his personnel record, and make him whole for all time lost. [Carrier File No. 14-03-0114. Organization File No. 170-13I2-036.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. Juan J. Michelena, became employed by the Carrier as a Maintenance of Way Trackman on September 4, 2001. On August 7, 2002, he was required to undergo a Federally prescribed random test for the use of alcohol and/or drugs. The test disclosed the presence of Amphetamine and Methamphetamine in his urine. The Carrier's Maintenance of Way Operating Rules and the United States Department of Transportation's drug and alcohol regulations prohibit covered employees from performing service when testing positive for certain controlled substances.

Provisions of the Carrier's Employee Assistance Program permit an employee who tests positive for the first time to be placed on a leave of absence for the purpose of evaluation, treatment, and education. If they are determined to be free of a mental or physical disorder, and can pass a return-to-work drug/alcohol test, they will be permitted to resume work, subject to follow-up testing from time to time.

The Claimant satisfactorily completed the necessary requirements, and was authorized to return to service on October 25, 2002. He was advised that he would be subject to periodic testing for a period of five years. He was also advised that more than one confirmed positive test either for any controlled substance or alcohol during any ten-year period would subject him to dismissal. The Claimant's signature on a copy of the communication outlining the foregoing conditions, returned to the Carrier's Manager of Drug & Alcohol Testing, acknowledged his having read and understood them.

On March 28, 2003, the Claimant was required to submit to a follow-up test, and the breath alcohol test disclosed his breath alcohol concentration to be 0.021%. The Federal Regulations and the Carrier's Policy on the Use of Alcohol and Drugs ("Policy") prohibits an employee from reporting for or remaining on duty with a blood or breath alcohol concentration greater than 0.02%. This occurring about five months after his return to service, he was sent a letter by the Carrier's General Manager on April 3, 2003, reading in part as follows:

> I have been advised by BNSF's Medical Director's office that you have violated Rule 7.9 of Burlington Northern Santa Fe's "Policy on the Use of Alcohol and Drugs," effective September 1, 1999, for testing positive for an controlled substance or alcohol for the second time within a ten-year period. The pertinent part of Rule 7.9 reads as follows:
>
> > "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."
>
> For the reason given above, effective immediately, your seniority and employment with the BNSF Railway Company are terminated. If you dispute the action taken, you are entitled to have a claim submitted on your behalf for reinstatement, which must be presented within 60 days from the date of this letter, pursuant to Letter of Understanding dated June 24, 1991, between the Carrier and the Brotherhood of Maintenance of Way Employees [*sic*].

A claim was promptly and timely submitted by the Organization, which argues that the Letter of Understanding dated June 24, 1991, cited by the General Manager, was only intended to amend an earlier Letter of Understanding dated April 1, 1990, because the Carrier had reduced the period from 90 days to 45 days within which an employee must provide a negative test result, following the first-time positive result. The Organization further argues that the Letter of Understanding dated June 24, 1991 was not intended to be used as an instrument to dismiss employees without an investigation, nor to endorse the Carrier's Policy on the Use of Alcohol and Drugs ("Policy"). The Organization concludes that the Carrier acted improperly in terminating

the Claimant under the Policy, it being a rule outside the terms of the Collective Bargaining Agreement.

The Organization also contends that the Carrier violated Agreement Rule 13 when it denied the Claimant his right to an investigation. It cites several Awards of the National Railroad Adjustment Board holding that Agreement rules prevail over a carrier's operating rules, and an investigation is required before discipline is administered.

The Organization further argues that the Claimant had ingested six beers and had eaten a meal between 6:00 p.m. and 10:00 p.m. the night before he was tested. In the morning, he arose about 6:00 a.m., twice used Listerine mouthwash, and went to work. The record indicates that he was tested at 7:39 a.m.

The Carrier responds that the laboratory test results clearly show that the Claimant twice tested positive for controlled substances or alcohol within a ten-year period. It further contends that it properly used the provisions of the two Letters of Understanding, which permitted it to dismiss an employee without holding an investigation, although the Organization has an opportunity to present a claim on the employee's behalf. The discipline was within the scope of both the Agreement and the Policy. The Carrier rejected and denied all of the other objections, arguments, and claims raised in the Organization's appeal.

The Carrier denied the Organization's claim, and the dispute has been referred to this Board for its decision, based on the record.

The Board has given serious consideration to the Organization's suggestion that ingested alcohol the night before, or the use of a mouthwash containing alcohol, may have yielded the breath alcohol reading, which barely exceeded the cut off level prescribed by the Federal regulations and the Carrier's Policy. Since the Claimant was not afforded an investigation, in which he could have presented an arguable defense and called witnesses, the Neutral Member has engaged in independent research to determine whether there is merit in this suggested defense.

A law firm which specializes in representing over-the-road truck drivers advises its clients that mouthwashes, cold medicines, allergy medications, and some prescription drugs, all contain alcohol, and cautions against using these compounds before or while driving. It also cautions drivers about what it calls its number-one problem — residual alcohol. Residual or "left over" alcohol in a person's system can result in a test reading in excess of legal standards the "day after." Depending on several factors, such as weight, metabolic anomalies, gender, genetic characteristics, ethnic origin, alcohol tolerance, etc., it takes the body a certain amount of time to process and get rid of alcohol. Even though the physical effects of alcohol, i.e., "drunkenness," may not be present nor observable, the blood may contain a measurably proscribed amount,

particularly in view of the low threshold prescribed by the Federal regulation, which has been adopted by the Carrier in its own rules.

A study was conducted by the Department of Psychiatry, University of Alabama School of Medicine (UAB), in Birmingham, to determine whether breath alcohol values attained following mouthwash use pose a realistic threat to the accuracy of blood alcohol determinations by breath analysis. Ten normal subjects were checked for breath alcohol measurements 2, 4, 6, 10, and 15 minutes after rinsing their mouths with Listerine (26.9% alcohol) and two other brands of mouthwash, also containing varying percentages of alcohol content. The study concluded that the decay of breath alcohol values following mouthwash use is sufficiently rapid that mouthwash use would not pose a realistic threat to the accuracy of blood alcohol determinations by breath analysis under normal circumstances. The use of mouthwash immediately prior to breath testing in a mistaken attempt to hide the smell of alcohol or other substances, however, may significantly increase the measured breath alcohol value. The Neutral Member also consulted an experienced law enforcement officer, who stated that it is customary to wait at least 15 minutes to test the breath of a driver suspected to be intoxicated, to allow the dissipation of anything taken orally, which might affect the test result. Literature on the subject confirmed this officer's statement.

The Board is accepting the Organization's defense at face value, and concludes that even though the mouthwash probably had no impact on the test value, since the alcohol in a mouth-wash used only for rinsing (but not ingested) is rapidly dissipated, according to the UAB study, there may have been residual alcohol in the Claimant's system. The possibility exists that the Claimant may have misrepresented to the Organization the amount of alcohol intake, or its time of ingestion. In any event, the breath alcohol reading, even though marginally over the cut off level, cannot be disregarded. In Award No. 27, Public Law Board No. 6102, involving the same Carrier, Organization, and Neutral Member, that Board commented on the reliability of breath alcohol test values:

> When faced with the positive test readings on the one hand, and the Claimant's denials on the other, one might wish for more evidence than the cold, emotionless figures of the test values. But the fact is that the results of breath alcohol testing devices are considered probative evidence in the courts of the land. Although arbitrators are not bound by court decisions on evidence, they may look to judicial rulings for guidance concerning scientific evidence, on the theory that courts have had a much more extensive opportunity to determine whether such evidence is reliable and competent. This is the method of determining alcohol impairment prescribed by the Federal Regulations. Locomotive engineers, truck drivers, and airline pilots may lose their licenses to work on the basis of this same technology. It has become widely accepted because its accuracy has been proven. This is true, even in the absence of corroborative evidence, such as breath odor, behavior, speech, gait, and such like characteristics of one under the influence of alcohol

> which are so easily recognized by the average citizen, lacking sophisticated diagnostic skills. The two test result values are sufficient evidence of alcohol use on duty.

The only remaining issues before the Board are whether the Claimant was improperly denied an investigation, whether the Maintenance of Way Operating Rules and the Policy are superseded by the Collective Bargaining Agreement, and whether the discipline is excessive.

Rule 13, the Discipline Rule, in the Parties' Agreement, reflects a universally fundamental right of represented employees in the railroad industry: "[N]o employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation." The Parties, however, over a period of years, have entered into letters of understanding which provide exceptions to the pre-discipline investigation requirement. For example, in 1979, they reached an understanding that an employee who accumulates 60 or more demerits might be terminated without holding an investigation, provided the Carrier notifies the employee and the Organization of each instance in which demerits were assessed. This letter states that the employee's only recourse is the processing of a claim.

The April 1, 1990 Letter of Understanding reads as follows:

> It is agreed that, effective April 1, 1990, the provisions of Rule 13 will not be applicable to employees who are placed on medical leave of absence for sixty (60) days as a result of testing positive for a substance prohibited by Carrier's rules, and who, during the sixty (60) day period, fails to furnish a negative urine sample. Such employee will be notified in writing by certified mail, return receipt requested, after the sixty day period has expired of the termination of his seniority and employment. The written notice shall contain an adequate statement of the circumstances resulting in the employee's termination of employment. Copy of this letter will be furnished to the General Chairman together with copy of the letters written by Carrier's Medical Director to the employee.
>
> It was also understood that the above will not preclude the filing and progression of claim filed on the employee's behalf for reinstatement which must be submitted to this office within 60 days from the date he is notified of termination of his employment.

Clearly, this Letter of Understanding permits the Carrier to terminate an employee who fails to provide a negative urine specimen during the period of his medical leave of absence, subject only to the outcome of a claim filed on his behalf. The Organization's General Chairman signified his concurrence by affixing his signature to this letter. When it was agreed that "the provisions of Rule 13 will not be applicable," the Parties thereby agreed to waive all the terms of

that Rule, including the provision that employees may not be disciplined without first being given an investigation.

Then, on June 24, 1991, the Parties executed another Letter of Understanding, which was referred to in the General Manager's letter to the Claimant dated April 3, 2003. (See page 2, *supra*). It reads:

> This will confirm our understanding reached on June 20, 1991, in connection with the application of Rule 9.0 of the Santa Fe's "Policy On Use Of Alcohol and Drugs" which became effective March 1, 1991, and which all Santa Fe employees were notified by letter dated February 1, 1991, which reads as follows:
>
> [Santa Fe's Rule 9.0 has been supplanted by Section 7.9 of the Policy, but its provisions are substantially the same].
>
> Effective June 1, 1991, an employee who is subject to dismissal under the aforequoted [*sic*] provisions of Rule 9.0 shall be notified in writing by Certified Mail, Return Receipt Requested, to the employee's last known address, copy to the **General Chairman**, of termination of his seniority and employment. The notice shall contain ad [*sic*] adequate statement of the circumstances resulting in the employee's termination of employment.
>
> It was also understood that the above will not preclude the filing and progression of claim filed on the employee's behalf for reinstatement which must be submitted to this office within 60 days from the date he is notified of termination of employment.
>
> The Letter of Understanding dated April 1, 1990, will remain in effect.
>
> If the above correctly reflects our understanding of the manner in which Rule 9.0 cases will be handled, please indicate your concurrence by affixing your signature on the line provided below.

The Organization's General Chairman signified his concurrence by affixing his signature to this letter.

The Board has compared these two Letters of Understanding and considered the Parties' respective arguments. The only essential differences in the two Letters are (1) the circumstances which could result in an employee's summary termination, and (2) the reference to Agreement Rule 13 in the first Letter and its omission in the second Letter.

Although the second Letter, unlike the first, does not contain the phrase, "[T]he provisions of Rule 13 will not be applicable," the Board has to consider whether it was intended, that Rule 13 should be applicable to those employees who are the subject of the second Letter. The Carrier argues that the reference to the first Letter in the second Letter — "The Letter of Understanding dated April 1, 1990, will remain in effect" — determines that no investigation is required. The Neutral Member does not find the issue disposed of so easily.

If, however, the Parties intended in the second Letter to retain the provisions of Rule 13, the Board is caused to question why the second Letter was written at all. If Rule 13 were intended to be applicable under the circumstances described in the Letter of Understanding dated June 24, 1991, the provisions for notice, an adequate statement of the circumstances, and the manner of filing and progressing a claim, with its attendant time limits, would not be necessary. Furthermore, there is no plausible reason why an investigation would be required before termination in the one instance, and not required in the other. One would expect to find consistency among the Agreement's various parts. The Board holds that an investigation is not required under the circumstances provided for in the Letter of Understanding dated June 24, 1991.

The next issue before the Board is whether a Carrier-promulgated Rule, such as those provisions in its Policy, are superseded by the Rules in the Parties' Collective Bargaining Agreement. The Organization quoted Third Division Award 15590, which reads, "We have ruled on many occasions that agreement rules prevail over operating rules when there is a conflict." In that case, an agreement rule provided that an employee had no right to claim work on the sixth or seventh day of his work week. The carrier's rule required employees subject to call to be in place where they could be contacted. When the carrier attempted to call that claimant on the sixth or seventh day of his work week, and he was unavailable, he was charged with a rule violation. The Third Division held that he was not required to be available on those days, notwithstanding the carrier's operating rule, because he had no right to claim work on those days, in accordance with the agreement's rule.

In the instant case, the Board has considered whether any Agreement rule "prevails over" Section 7.9 of the Carrier's Policy. Rule 13 is such an Agreement rule. Employers have the right to promulgate rules for the guidance of their employees. The Policy is such a rule. When an employer enters into a Collective Bargaining Agreement with its employees' designated representative, however, that Agreement may modify or even supercede the employer's rules if there is a conflict. With respect to these Parties, Agreement Rule 13 provides such a modification. As to a specific application, Section 7.9 of the Policy provides that an employee is "subject to dismissal" for certain specified offenses. But the Carrier's right to dismiss is superceded by Agreement Rule 13, to the extent that "[N]o employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation." As it happens, however, as the Board observed above, the Parties agreed, in 1991, to forego the requirement that an investigation be held before discipline is imposed. Therefore, in a case of this kind, the Carrier is not

precluded from summarily dismissing an employee, but the Organization retains the right to file and progress a claim disputing the Carrier's action. That is exactly what has been done here. The Board finds no Agreement rule which prevents the Carrier from dismissing an employee for violation of the conditions found in Section 7.9.

The final question which remains is whether the discipline is excessive. The Board finds that the Claimant was clearly put on notice in the Carrier's letter dated October 25, 2002, that he would be subject to periodic testing for five years, and that violation of any of six explicitly listed conditions would subject him to dismissal. He signed his name under this sentence: "I have read and understand the above conditions." When he tested positive for the presence of alcohol some five months later, he violated the first listed condition: "More than one confirmed positive test *either for any controlled substance or alcohol, obtained under any circumstances during any* 10-year period."

The Claimant's record of disciplinary actions indicate that he does not possess a record sufficiently clear of rule infractions which might warrant any degree of leniency. He had two previous entries. He is not a long-term employee with a generally good work record.

He was tested in compliance with the regulatory requirements of the Federal Motor Carrier Safety Administration, U. S. Department of Transportation. The Carrier's Policy is consistent with those and other Federal regulations pertaining to drug and alcohol use in transportation industries. The Board has no reasonable grounds to sustain the Claim; it will be denied..

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

10 29 03
Date