

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, July 15, 2003, when, without an investigation, it dismissed the Claimant, Mr. T. D. Barber, for allegedly violating Section 7.9 of the BNSF Policy on the Use of Alcohol and Drugs, a second time within a 10-years, when he tested positive for a controlled substance on July 1, 2003.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate the Claimant to service with benefits and seniority unimpaired and make him whole for all wages lost account of this violation. Additionally, the Carrier shall remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-03-0202. Organization File No. 140-1312-0310.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. T. D. Barber, became employed by the Carrier in its Maintenance of Way Department in 1974. On July 28, 2000, he was required to undergo a random test for the use of alcohol and/or drugs. The test disclosed the presence of a prohibited, controlled substance - 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 employees who test 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 6, 2000. 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 July 1, 2003, the Claimant was required to submit to a random test required of employees who possess a Commercial Drivers License in connection with their work. The laboratory's test report indicated the presence, again, of a controlled substance in his urine specimen. This occurring within a ten-year period following his previous positive test, he was sent a letter by the Carrier's Division Engineer on July 15, 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 on July 1, 2003 for a controlled substance for the second time within a ten-year period.

Carrier records disclose that you tested positive for a controlled substance on July 28, 2000.

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 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 Division Engineer, 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 Carrier responds that the laboratory test results clearly show that the Claimant twice tested positive for controlled substances within a ten-year period. It further contends that it properly used the provisions of the two Letters of Understanding, which permit 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 denied the Organization's claim, and the dispute has been referred to this Board for its decision, based on the record.

The Organization does not contest the validity of the laboratory test results, which indicate in both the random tests the presence of a controlled substance. The only 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.

The Board has considered the record in this case and the arguments of the Parties. A threshold issue raised by the Organization is the Carrier's failure to hold an investigation within 30 days after the Claimant was held out of service, a possible violation of Agreement Rule 13(b). The Carrier asserts that Letters of Understanding dated April 1, 1990, and June 24, 1991, permit it to dismiss an employee without holding an investigation.

Similar issues were addressed by this Board at length in its Award Nos. 311, 312, and 313. The determinations made by this Board in those cases is incorporated herein by reference. An employee subject to dismissal under the provisions of Policy Section 7.9 may be terminated without an investigation, subject to appeal.

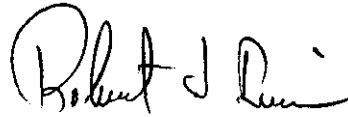
The final question which remains is whether the discipline is excessive. The Board finds that the Claimant was clearly put on notice in the Carrier's letter dated October 6, 2000, that he would be subject to periodic testing for five years, and that violation of any of six explicitly listed conditions 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 controlled substances less than three years 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."

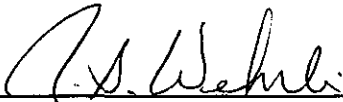
He was tested in compliance with the regulatory requirements of the Federal Motor Carrier Safety Administration, U. S. Department of Transportation. The Carrier's Policy is consistent with those and other Federal regulations pertaining to drug and alcohol use in transportation industries. The Board has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

AWARD

The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

3/10/04

Date