

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on November 3, 2004, when it terminated the Claimant, Mr. Salcido's seniority, for violating the Carrier's Policy on the Use of Alcohol and Drugs a second time within 10-years, when he tested positive for cocaine on November 2, 2004.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights restored, remove any mention of this incident from his personal record, and make him whole for all time lost account of this incident.
[Carrier File No. 14-04-0160. Organization File No. 170-1312-0413.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 in this case, Mr. Eddie Salcido, was hired by the Carrier on September 4, 2001, in its Maintenance of Way Department. On March 31, 2004, he was required to undergo a random test for the use of alcohol and/or drugs. A urine specimen taken at that time disclosed the presence of a cocaine metabolite in excess of the confirmation cut off level prescribed in the applicable Federal Regulations.

The Carrier's Employee Assistance Program permits 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 periodic drug/alcohol follow-up testing.

The Claimant apparently completed the necessary requirements, and was reinstated to service on or about April 15, 2004. He was thereafter subject to periodic random testing for alcohol or drugs. The Carrier's Policy for Employee Performance Accountability ("PEPA") provides that more than one confirmed positive test either for any controlled substance or alcohol during any ten-year period subjects an employee to dismissal.

On October 18, 2004, the Claimant was required to submit to a follow-up test, and a positive test result was again the result. This occurring just six months after his return to service, he was sent a letter by the Carrier's Division Engineer on November 3, 2004, reading as follows:

I have been advised by the BNSF Medical Department that you have violated the BNSF Policy on the Use of Alcohol and Drugs, effective September 1, 2003, by testing positive for a controlled substance on a follow-up test conducted on October 18, 2004. Furthermore, BNSF records disclose that this is the second time within a ten-year period that you have tested positive under the BNSF Policy on the Use of Alcohol and Drugs. The first violation occurred on March 31, 2004.

In accordance with the Carrier's stated policies and practices, BNSF shall dismiss from service employees who have more than one confirmed positive test for alcohol or a controlled substance, obtained under any circumstances, during any ten-year period. Therefore, effective immediately your seniority and employment with the Burlington Northern Santa Fe Railway is terminated.

Pursuant to Letters of Understanding dated June 24, 1991, and December 29, 2003, between the Carrier and the Brotherhood of Maintenance of Way Employees [*sic*]; if you dispute this action, a claim for your reinstatement may be filed on your behalf within 60 days from the date of this letter.

A claim was promptly and timely submitted by the Organization, arguing that on October 16, 2004, two days before the Claimant was tested, suffering from a toothache, he had crossed the border into Mexico for a tooth extraction. The Mexican dentist administered an anaesthetic for the extraction, and Percodan for post-treatment pain, authenticated by the dentist's written documents. The Organization asserts that the Claimant was not aware that the substances used in his dental treatment were prohibited by United States law. The Organization asks that the Claimant be restored to service and paid for his lost time.

The Carrier responds that the record clearly shows that the Claimant tested positive for a second time within a ten-year period for the presence of a controlled substance. It points to that portion of the PEPA which lists, under the caption, "Dismissable [*sic*] Rule Violations," a second positive test within 10 years. The Carrier argues that the discipline was consistent with the PEPA and the Parties' Collective Bargaining Agreement.

The Carrier attached copies of the laboratory test results reports and the Medical Review Officer's assessment of those results for both the positive tests referred to above.

The Board notes in passing that the Parties executed letter agreements in 1990, 1991, and 2003, in which it was agreed that employees who test positive for alcohol or controlled substances a second time, need not be afforded an investigation, provided, however, that the Organization has 60 days within which to present a claim on the employee's behalf. These letters are discussed at length in this Board's Award No. 330. The Carrier acted within the provisions of these agreed-upon procedures when it dismissed the Claimant in this case.

In almost every case this Board has considered, when an employee has tested positive a second time within a ten-year period, we have upheld the Carrier's disciplinary decision, absent any extenuating or mitigating circumstances. In the instant case, however, such circumstances are present. The application of an anaesthetic and/or post-treatment use of a prescribed narcotic analgesic drug, Percodan (an oxycodone and aspirin compound), may account for the positive test administered just two days after the tooth extraction. The Board is not persuaded, though, that the drugs cannot legally be prescribed in the United States.

This is not to say that the disciplinary entry on the Claimant's record should be wiped clean, however. In accordance with Section 3.3 of the Carrier's Policy on the Use of Alcohol and Drugs, he has an obligation to ascertain whether he may safely work while taking legally prescribed medication:

Employees taking either prescribed or over the counter medications must be knowledgeable of potential adverse effects these medications have on judgment, alertness, coordination, and reaction/response time. If unclear about the effects of a medication the employee must notify their private health care provider(s) of the full scope of assigned duties to ensure that the use of the substance at the prescribed dosage level is consistent with the safe performance of his/her duties....

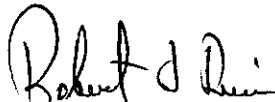
An employee taking prescription medication may be in violation of this policy if the prescription ... is not taken at the prescribed dosage level, or the medication has an adverse effect on the employee's ability to work safely.

Under the circumstances peculiar to this case, the Board is persuaded that the Claimant, whose record is clear of any disciplinary entries save for the two drug offenses discussed herein, should be given another opportunity to show that he can be a productive employee. He shall be returned to service on a last chance basis, with his seniority and other rights restored, but without pay for time lost. Additionally, subject to the Carrier's discretion, he will be subject to a return-to-work drug and alcohol screen, and compliance with other instructions as directed by the


Employee Assistance Manager, including periodic random testing for a period of time to be determined by the Carrier.

AWARD

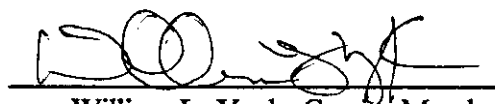
The claim is sustained in accordance with the Opinion. The Carrier is ordered to begin the return-to-work procedures within thirty (30) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member



Date