PUBLIC LAW BOARD NO. 4244

Award No. 346
Case No. 353

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
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 August 2, 2004 when it dismissed the Claimant, J. L. Wilken, from service for failing to comply with the terms of his conditional suspension for substance abuse of April 13, 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. 14-04-0129. Organization File No. 40-13I2-049.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. Jeffrey L. Wilken, was hired by the Carrier in 1975. He was working as a Trackman in the Maintenance of Way Department on March 22, 2004, when he was given a craft transfer test for the use of alcohol and drugs. The test was positive for the use of Amphetamines and Methamphetamine Isomers. This being the Claimant's first positive test, in accordance with the Carrier's Policy on the Use of Alcohol and Drugs, the Claimant was given a conditional suspension, contingent upon his placing himself in the Carrier's employee assistance program and full compliance with instructions given him by the Employee Assistance Manager.

A condition of this program is commencement of treatment within 45 days from the start of the suspension. This condition was stated in a letter sent the Claimant on April 13, 2004, which further advised,

> [F]ailure to abide by the instruction or program set forth by the Employee Assistance Manager and/or the Medical and Environmental Health Department, will automatically result in dismissal.

The Claimant acknowledged receipt of this letter by his personal signature and the date, "04-14-04."

On June 6, 2004, the Carrier's contract Substance Abuse Professional, a psychologist licensed by the State of Kansas, advised the Carrier's Medical and Environmental Health Department that the Claimant had not entered into treatment in a residential substance abuse program, pursuant to his recommendation. Consequently, on June 8, 2004, the Carrier's Manager Medical Support Services instructed the Division Engineer to continue withholding the Claimant from service, and to initiate an investigation. On June 11, 2004, the Claimant was served a notice of investigation on the following charge:

> [Y]our alleged failure to comply with the terms of the conditional suspension letter dated April 13th that you signed on April 14th, 2004, for violation of rule 1.5 of the Maintenance of Way Operating Rules, . . . and BNSF Policy on the Use of Alcohol and Drugs . . . when you allegedly failed to actively comply with the proper instructions from the Medical and Environment Health Department and/or Employee Assistance Program regarding treatment, education and follow-up testing.

(Maintenance of Way Operating Rule 1.5 prohibits the use or possession of intoxicants, narcotics, or controlled substances while on duty or on the Carrier's property.)

The investigation was set for June 25, 2004, but postponed until July 20, 2004, at the request of the Organization. The Claimant failed to appear, although the record shows that he acknowledged receipt of the original notice and the notice of the postponement. The investigation was twice recessed while the premises were searched for the Claimant, and proceeded when he could not be found. He was represented by an officer of the Organization. The Division Engineer was the Carrier's sole witness, who introduced the documentary evidence referred to above. No witness appeared on the Claimant's behalf. A transcript of testimony and evidence taken in the investigation is in the record before this Board.

The record in the investigation is sufficient to support the charges brought against the Claimant. In accordance with the instructions given him on April 13, 2004, he had 45 days from the date of his suspension to commence treatment. That 45-day period ended on May 28, 2004. As of June 6, 2004, the date of the Substance Abuse Professional's letter, 54 days had elapsed.

On August 2, 2004, the Carrier advised the Claimant that the charges were sustained, and his employment with the Carrier was terminated, effective the same date.

The Claimant's representative was severely handicapped in his efforts to provide a viable defense in the investigation by reason of the Claimant's absence, and being without any rebuttal witnesses. The Organization promptly filed its appeal, which was likewise disadvantaged. It was

understandably without any firm ground on which to place its reliance. The Claimant's absence from the investigation was at his own peril.

Some 6½ months later, in February, 2005, the Claimant offered a six-page response to his discharge, addressed to the Organization, and forwarded to the Carrier. This statement presents written testimony which could have been tested for veracity by cross examination at the investigation. As a general rule, after-obtained evidence cannot be considered. In NRAB First Division Award 20834, affidavits executed by carrier officers more than nine months after the investigation closed were not considered by the Board, which held, "The purpose of the investigation hearing is to develop all material facts deemed necessary to establish an employe's guilt, if any."

Similarly, in NRAB Third Division Award 24179, after the investigation was concluded, the carrier in that case came forward with a statement given by an employee to support the carrier's position that the claimant purposely committed an infraction of the rules. The Board said, "[We] cannot consider the Clerk's statement since it was untimely introduced as evidence subsequent to the investigation." It went on to explain that the claimant had no opportunity to rebut the statement or examine the clerk on the statement's accuracy.

Arbitrators have admitted exculpatory evidence which was not known or available to the disciplined employee after evidentiary hearings have been closed, but this case does not present such circumstances. To the extent, therefore, that the Claimant's response offers testimony, it cannot be considered by this Board. One of the purposes of the investigation was to give him the opportunity to present testimony and evidence in his defense. The response, however, also offers argument on his own behalf, and to that degree, the Board has given some weight to this document.

The Claimant argues that while drug testing has a place in today's society, he believes that it should be administered to all the Carrier's employees, and not limited to those employees subject to the Hours of Service Act, those holding Commercial Driver's Licenses, and certain exempt officers. Examination of the Carrier's Policy on the Use of Alcohol and Drugs, however, indicates that only random testing is limited to those classes of employees to which he refers. All employees are subject to reasonable suspicion testing, reasonable cause testing, return-to-work testing, and craft transfer testing. The Claimant feels that "[E]very employee that is on or about the tracks . . . should be subject to random drug testing." Although this Board cannot agree nor disagree with the Claimant's opinion in this regard, the fact remains that he tested positive, and the Board cannot see any materiality in speculating whether other employees not subject to random testing might be using alcohol or controlled substances. In view of the prevalence of substance abuse in American society, it's quite likely that some employees' use of alcohol or controlled substances goes undetected. That does not lessen the Claimant's responsibility for his own positive test result.

The Claimant also believes that certain employees' names are purposely placed on a random drug test list. He asserts that he has "seen it." While purposely selecting an individual for testing in the guise of random selection would be a violation of the rules promulgated by the U. S. Department of Transportation, subjecting the Carrier to criminal and civil penalties, the Claimant's assertion is just that — an unsupported assertion. If he could demonstrate that his name was listed for a purported random test, not by random selection, but by purposeful inclusion of him by name, the test would be invalid. He has not shown that to be true.

The Claimant complained of the volume of tests being conducted at the testing site, suggesting that the contracting site — not a Carrier facility — was overwhelmed with the work, but he has not shown that this impaired the accuracy of the test he was administered.

The Claimant states that he was not supplied with a copy of the laboratory's report when his split sample was tested. He said he was told twice by the testing laboratory that the test was positive, but he was not furnished a written report. He believes that the absence of a written report invalidates the test. Federal Regulations, however, at 49 CFR § 40.185, require the testing laboratory to report the results directly, and only, to the employer's Medical Review Officer. The results cannot, therefore, be lawfully sent to the employee.

The Claimant also argued that because of certain personal matters in which his family was involved, he was unable to enter into full-time treatment for 30 days as recommended by the Substance Abuse Professional. He requested a modified out-patient plan for treatment, but his suggestion was not accepted by the Substance Abuse Professional. He therefore chose his family obligations, and did not follow the prescribed treatment plan.

He explained his absence from the investigation by reason of an injury which he suffered the night before the investigation. He said he sent an e-mail the next morning, and asked a friend to call the Division Engineer, but the friend did not make the call.

The Claimant points to his past record of 28 years' service, with only two previous disciplinary entries, those occurring in 1986 and 1990, for relatively minor infractions.

Significantly, the Claimant did not deny the validity of the positive drug test which resulted in his discharge.

The Carrier's Policy on the Use of Alcohol and Drugs permits an employee who tests positive for alcohol or drugs for the first time to enter its Employee Assistance Program. If the Substance Abuse Professional determines the employee is alcohol or drug dependent, the employee is granted a medical leave of absence for up to 60 days, for initial treatment.

In the instant case, the Substance Abuse Professional made such a determination, and prescribed a period of treatment as an in-patient in a residential substance abuse program. In order to maintain his employment relationship with the Carrier, nothing was more important to the Claimant and his family than compliance with that prescription.

This Board cannot second-guess the plan of treatment prescribed by the Substance Abuse Professional, and the real issue in this case is whether the Claimant should have followed the prescribed plan for his treatment. Without regard to whether he had adequate cause for absence from the investigation afforded him, the decision to forego the treatment plan is the base cause for his dismissal. He acknowledged his understanding that failure to abide by the instructions or program for his treatment would automatically result in dismissal. The claim is denied. Had he been present and had his defense consisted of the response he submitted after the investigation closed, the Board would still have denied the claim.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

July 11, 2005
Date