PUBLIC LAW BOARD NO. 4244

Award No. 348
Case No. 354

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters
and
Los Angeles Junction Railway Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on November 1, 2004 when it dismissed Los Angeles Junction Railway employee, M. L. Jacobs, from service for allegedly testing positive a second time within 10 years following a Breath Alcohol test on October 28, 2004, and failing to comply with the terms of his January 25, 1999 waiver.

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. 14-05-0001. Organization File No.180-13I2-052.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. Myron L. Jacobs, entered the Carrier's service on February 26, 1998. He was working as a Trackman on January 15, 1999, when he was subject to a Reasonable Suspicion/Reasonable Cause Breath Alcohol Test. The test was positive for the presence of alcohol, with a screening test showing a breath alcohol concentration of 0.117%, and 0.116% on a confirmation test performed 17 minutes later. (A blood alcohol test on a specimen drawn one hour and eleven minutes later still showed a concentration of 0.97%.)

As the consequence, the Claimant agreed to waive a formal investigation and accept a suspension and assessment of 20 demerits. The length of the suspension is not shown in the record, but the Claimant's return to service was contingent on his acceptance of the following conditions, set forth in the Carrier's letter dated January 25, 1999.

1. Agree to totally abide by the Company rules regarding the use of alcohol, narcotics and controlled substances, including marijuana.

2. Maintain monthly contact with the E.A.P. [Employee Assistance Program.]

3. Agree to submit to periodic unannounced urinalysis testing.

4. Attend three or more Alcoholics Anonymous or Narcotics Anonymous meetings per week and submit valid documentation [of] such attendance to the E.A.P. Counselor by the 10th of the following month.

5. Understand that failure to comply with any of the above conditions will result in his immediate removal from service without formal investigation.

The Claimant acknowledged his acceptance of the above terms, on January 29, 1999, by endorsing the understanding with his signature. A copy was supplied to the Organization's General Chairman.

There are no further entries on the Claimant's record until an incident on the morning of July 21, 2001. An officer of the Carrier reported that the Claimant was "argumentative and quarrelsome," and fellow employees reported that he was under the influence of "some controlled substance." The Claimant, upon being confronted, admitted he had been drinking before coming on duty. He was released from duty, and met with the Carrier's General Manager and another officer on July 23, 2001. In consideration of his good work record, the Carrier again offered leniency if the Claimant would follow instructions of the E.A.P. Counselor. The Claimant agreed to enter counseling, and he was considered as self-referred to the E.A.P. The above handling was confirmed in a letter to the Claimant dated August 2, 2001, in which he was told that the contents of the Carrier's letter dated January 25, 1999, remained in full force and effect.

On September 25, 2001, the E.A.P. Counselor advised the General Manager that the Claimant had completed his counseling, was ready to return to work, and in the Counselor's opinion was approved to return. The Claimant resumed work the following day.

On November 1, 2003, the Carrier adopted a Policy on the Use of Alcohol and Drugs, ("Policy"), patterned after that of its owning carrier, then the Burlington Northern and Santa Fe Railway, now the BNSF Railway. Thereafter, on March 17, 2004, the Carrier obtained a receipt from the Claimant acknowledging his receipt of the Policy.

On October 28, 2004, while he was on duty, the Claimant was believed to be under the influence of alcohol. He was administered a breath alcohol test, which yielded a screening test

concentration of 0.230%. A confirmation test performed 18 minutes later showed a concentration of 0.224%. (Section 6.3 of the Policy states that "any alcohol result greater than or equal to 0.02% is a violation of LAJ Policy.) The Carrier's General Manager discussed the matter with the Claimant by telephone on November 1, 2004, and wrote a letter on the same date, referring to the positive test on October 28, 2004, and the previous incidents in 1999 and 2001, and concluded:

> Because of your violation of this Company's rules and the condition of your employment as stated above, effective immediately, your seniority and employment with the 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 the Letter of Understanding dated June 24, 1991, between the Carrier and Brotherhood of Maintenance of Way Employees [*sic*].

The Carrier is an independently operated terminal railroad, wholly owned by the BNSF Railway. Employees in its Maintenance of Way Department are represented by the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters (BMWED-IBT). The applicable Collective Bargaining Agreement is that between BMWED-IBT and BNSF Railway. The BNSF Railway's Labor Relations Department handles the Carrier's labor relations functions.

A claim was 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. 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 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 breath alcohol test. 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.

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 November 1, 2004. (See page 3, above.) 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:
>
> 9.0 DISMISSAL
>
> Any one or more of the following conditions will subject employees to dismissal for failure to obey instructions:
>
> (a) A repeat positive urine test for controlled substances obtained under any circumstances.
>
> Those employees who have tested positive in the past ten (10) years would be subject to dismissal whenever they test positive a second time.
>
> (b) Failure to provide a urine specimen for testing when instructed under the terms of this policy or Federal or State regulations. Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal.
>
> 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 notices, in passing, that a third Letter of Understanding dated December 29, 2003, addresses changes in numbering and placement of the Maintenance of Way Operating Rules and the Drug/Alcohol Policy. This Letter of Understanding, addressed to the Organization's General Chairman (who represents employees on both the BNSF Railway and the Los Angeles Junction Railway Company), reads as follows:

> As discussed on December 19, 2003, with Mr. Yeck of my staff, the June 24, Letter of Understanding codified the discipline handling of Employees who tested positive for Alcohol or a Controlled Substance twice within any 10-year period. That letter references Rule 9.0 from the former Santa Fe Railway's Policy On Use Of Alcohol and Drugs.

> After merger in 1996, the Carrier renumbered Rule 9.0, as Rule 12, in the reissued policy, however, the rule itself remained intact and the intent of the June 24, 1991, Letter of Understanding was not effected [*sic*]. In response to DOT and FRA regulatory changes the Carrier revised the Policy on the use of Alcohol and Drugs in January 1997, and again in September 1999. In the 1999 revision the Carrier renumber [*sic*] Rule 12, as Rule 7.9 again the rule itself remained intact and the intent of the Letter of Understanding was not effected [*sic*].
>
> In July 2000, the Carrier issued a new policy called the Policy for Employee Performance Accountability, (PEPA). This policy is a guide for Carrier Officers in approaching and dealing with discipline issues they encounter. As former Rule 9.0, now Rule 7.9, dealt with discipline, this rule was incorporated into Appendix C of the PEPA policy.
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> In September of 2003, again in response to new FRA and DOT requirements, the Carrier updated its Policy on the Use of Alcohol and Drugs. However, because the discipline portion of the policy was now covered in Appendix C of the PEPA policy, Rule 7.9 was excluded from the 2003 update. The revised Policy on the Use of Alcohol and Drugs now refers readers to the PEPA policy for discipline issues. Nevertheless, the intent of the original Rule 9.0 still exists as part of Carrier policy.
>
> Therefore, this letter will confirm the Party's understanding that the intent of the June 24, 1991 Letter of Understanding will remain intact as long as the Rule exist [*sic*], regardless of its location or numbering.
>
> If the above correctly reflects our understanding of the June 24, 1991 Letter of Understanding, please sign where indicated.

The signatures of representatives of both the Carrier and the Organization are affixed, indicating their concurrence.

The Carrier adopted its own Policy on the Use of Alcohol and Drugs, which tracks the BNSF Railway's Policy on the Use of Alcohol and Drugs as it was revised on September 1, 2003, therefore without the "discipline portion" which BNSF Railway placed in its PEPA, but this Carrier (LAJ) does not have its own PEPA, nor has it adopted BNSF Railway's PEPA. However, the Board believes that the Carrier's statements with regard to alcohol use in the Letter of Understanding dated December 29, 2003, together with its reference to the June 24, 1991 Letter of Understanding, supports the Carrier's position that it may terminate the seniority and employment of an employee who tests positive a second time. Although the "ten-year" provision is not contained in the Carrier's Policy, it is preserved from its original place in Santa Fe Rule 9.0 by

reason of the Letter of Understanding dated December 29, 2003, above. 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" the Carrier's Policy or its successors addressing the use of alcohol and drugs.. 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, the Santa Fe's Policy Rule 9.0 (as subsequently incorporated in the December 29, 2003 Letter of Understanding) 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 Letters of Understanding reviewed above permit the Carrier dismiss an employee for violation of the conditions found in its drug and alcohol policies.

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 January 25, 1999, and reconfirmed on August 2, 2001, that he was required to "totally abide by the Company rules regarding the use of alcohol, narcotics and controlled substances, including marijuana," and "failure to comply with any of the above conditions will result in his immediate removal from service without formal investigation." He signed his name under this sentence: "I concur with the

conditions set forth below." When he tested positive for the presence of alcohol while on duty, he violated Section 3.1 of the Carrier's Policy:

> While on LAJ property, on duty, or operating LAJ equipment or vehicles, no employee may:
>
> - Use or possess alcohol;
>
> - Report for or remain on duty or on property with a blood or breath-alcohol concentration greater than or equal to 0.02%; ...

and Section 7.5:

> All alcohol and drug violations are considered serious. Drug and alcohol violations will be considered with prior serious violations for assessing appropriate discipline.

This is his third infraction, and he was forewarned of the consequences. 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

Oct 19 2005
Date