

PUBLIC LAW BOARD NO. 5850

**Award No. 199
Case No. 199**

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on October 18, 2001, when it dismissed Mr. B. J. Meyer, the Claimant, from service for allegedly violating Maintenance of Way Operating Rules 1.5 when he tested positive for alcohol on September 11, 2001.
2. As a consequence of the violation referred to above, the Carrier shall return Mr. Meyer to service with seniority and benefits unimpaired, remove any mention of the incident from his personal record, and compensate him for any wages lost per the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On September 14, 2001, Carrier wrote Claimant setting up an investigation:

"...for the purpose of investigating your alleged violation of Rule 1.5 - Drugs and Alcohol, after random drug test was confirmed as positive on September 11, 2001, while assigned as Machine Operator, headquartered at Henrietta, Missouri."

The investigation, by mutual agreement, was postponed until September 24, 2001, following which the Carrier, in belief they had furnished sufficient evidence of Claimant's

culpability did, on October 15, 2001, dismiss Claimant from its service. The dismissal letter read, in pertinent part, as follows:

"...This letter will confirm that as a result of our formal investigation on September 24, 2001, concerning your violation of Rule 1.5, after random drug test was confirmed as positive on September 11, 2001, you are dismissed from employment for violation of Rule 1.5 - Drugs and Alcohol...."

At the outset of the investigation, Claimant's Representative asked if the purpose of the investigation was that Claimant tested positive for drugs. When the Hearing Officer reaffirmed what the notices (the original and the postponement) read, the Representative produced a copy of the letter from the testing facility stating the drug test for September 11, 2001, was negative and requested the investigation be cancelled.

The Hearing Officer then requested a recess and six minutes later reconvened the investigation stating a typographical error occurred and the investigation would continue. The Carrier then set out to establish that Claimant failed a breathalyzer test taken at 7:45 in the morning.

Rule 1.5 does prohibit the use of, being in possession of, or having any such prohibitive substance in their bodily fluids.

The random test for prohibitive substances came about because Claimant on or about late October of 1998, was allowed to resume service following a violation of Rule 1.5 with the caveat that for the next 5 years he would be subject to random tests for prohibitive substances. In August, 1999, Claimant was given a follow-up test, although positive for alcohol, was deemed improper and Claimant was returned to service after he once again abided by the terms of reemployment set forth by the Medical Department. The breathalyzer test was fatally flawed.

In this instance, Claimant once again blew .04 at 7:45 AM when first tested and allegedly .03 approximately for the second test. The first positive test in excess of .02 is to be followed by a second test no earlier than 15 minutes after the first test.

The only problem was that the first tester's machine malfunctioned and the results could not be printed out. In lieu thereof, the tester wrote the screen reading on the front of the breath alcohol test form.

Allegedly, the tester waited 18 minutes, then retested. He then used a compatriot's machine to print out the second reading.

From the outset, this Board finds the breathalyzer equipment malfunctioned. If the Carrier intends to use the findings of the breathalyzer to discipline an employee, it is imperative that the equipment function properly and that the operator correctly uses the equipment.

Secondly, there is a discrepancy in the time lapse between the first and second test. Claimant testified it was only 12 minutes between tests.

The Carrier countered the time gap argument with a letter supposedly from a company employee familiar with the testing equipment that the time set reflecting the second test was 18 minutes later and not 12 minutes as testified by the Claimant.

Even though the malfunctioning breathalyzer equipment is sufficient reason to sustain the claim, the major flaw in the process was charging the employee with and dismissing him for testing positive for drugs when in fact the drug test on September 11, 2001, was negative. This is more than a typographical error. Claimant's record would be forever flawed if this dismissal charge stood as is.

Granted, Rule 1.5 covers both drugs and alcohol and employees have lost their

jobs when such charges of either being in violation if they test positive, either for alcohol or illegal drugs, but there is a difference. The charge letter and the discipline should so reflect one or the other or both, whichever is applicable.

All of Claimant's seniority is to be reinstated. He is to be paid for all time lost from September 11, 2001, until he resumes work providing he successfully passes a return to service physical which includes a test for drugs and alcohol.

One other caveat of Claimant's return to service is the random testing that commenced in October, 1998, that is for five years. This is to continue and Carrier can increase the period for random testing by the same period Claimant was out of service in this instance.


AWARD

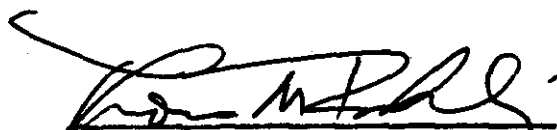
Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: August 14, 2002