

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 243**

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 May 19, 2003, when it withheld from service and subsequently suspended the Claimant, Mr. D. D. Martinez, for 9-months for his alleged failure to provide a urine sample during a DOT mandated test, in violation of Section 7.6 of the Carrier's Policy on the Use of Alcohol and Drugs.**
- 2. As a consequence of the violation referred to in part (1), the Carrier shall immediately restore the Claimant to service, remove any mention of this incident from the Claimant's personal record, and make him whole for all wages and benefits lost account of this incident.**

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.

Claimant, on May 19, 2003, was selected for a random test as required by the Department of Transportation. In accordance with the procedure, a tested individual has a three hour window to provide a measurable amount sufficient for testing. If Claimant could not comply during the allotted three hours, he had to seek medical concurrence

for his inability.

Claimant was unable to comply and the medical exam determined there existed no medical evidence that would have hindered him from furnishing the sample requested.

In reviewing the transcript and the on-property handling of this claim, there is no dispute about Claimant failing to produce a sufficient quantity to be tested.

The Carrier witness testified as to when Claimant commenced the test but his testimony was less than conclusive.

The following is a pertinent part of the Carrier witness's testimony:

- "28. Q. Mr. Baros, were you aware of the time of when Mr. Martinez arrived at the section house?
A. Yeah, that's when I went to the back and told him that he had a random, right about, about 7:30.
29. Q. Were, was that prior to your conference call or following the conference call?
A. It was right at, right before the conference call, 'cause I had to go back in and get on it, I'm pretty sure.
30. Q. Were you present or around anywhere near where the test was being conducted at the time?
A. Yes, yes, I was.
31. Q. Did, were you in a position to observe whether Ms. Conway allowed Mr. Martinez enough time over a period of time over a period of three hours to drink water? Was it all done at one time or...
A. It was done from around 7:30 to whenever she was done and she said he couldn't do it within the limits."

When the regulations provide a three hour window, it means three hours, not more and certainly not less. "It was done from around 7:30 to whenever she (the nurse) was done and she said he couldn't do it within the limits." "About", "approximately", "around" or other adjectives the same as "approximately" do not compare to a firm statement like "it was 7:30 am".

With just the above testimony, this Board would have sustained this claim but for one thing: Claimant initialed in two spots the FNCSR report completed by the collector. That form on two different lines listed the window closed at 10:35 am, and in one line the opening of the window at 7:35 am. Claimant, if he found difficulty with or disagreed with the three hour window, he did not have to initial the form or at least indicate he was signing same under protest.

He never balked at initialing the form, and by initialing the form he did validate everything listed thereon.

Carrier's determination to invoke the nine month suspension stands.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


William L. Yack, Carrier Member

Dated: 2/17/04