

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 341**

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 26, 2006 when Claimant E. Salcido, was terminated for testing positive for a controlled substance a third time within a ten year period; and**
- 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 unimpaired, remove any mention of this incident from Claimant's personal record and make Claimant whole for all time lost commencing October 26, 2006.**

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 October 26, 2006, Claimant was advised his seniority and service with the Carrier had been terminated pursuant to the Agreement Rules when an employee tests positive any time during the period of ten years from his first positive such test. This just happens to be Claimant's third bite of the poisonous apple.

Under the Agreement that exists wherein an employee's seniority and service rights are terminated without a hearing, the Claimant, if he disputes the findings, can file

a claim protecting Carrier's decision.

This was done. In these situations, the burden of proof of Carrier's alleged failure to abide by the Rules rests solely upon the shoulders of Claimant.

There is no doubt about the circumstances leading to the termination. Claimant took his dental problem to Mexico (he was working close to Mexico) where that dentist numbed him with Codenit. One day following his return to work, he was tested and the test was positive for cocaine.

It develops that the pain killer used by the dentist was entirely legal in Mexico but is banned in the United States.

No effort was made to convince this Board that the pain killer contained a cocaine derivative of a sufficient quality to cause a positive test.

Under these conditions, Claimant will not be returned to service. This is his third occurrence of testing positive for a banned substance.

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


David D. Tanner, For the Employees


Samantha Rogers, For the Carrier

Dated: 3/27/09