Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
vs	)	**Case 15/Award 15**
Burlington Northern Santa Fe	)	

Statement of Claim

1. That the dismissal of Mr. R. L. Bligh for alleged violation of Burlington Northern Santa Fe Maintenance of Way Rule 1.3, Part 1.3.1 (Safety) and Part 1.5 (Drugs & Alcohol), in connection with his alleged adulterating a urine specimen on March 9, 1999, was arbitrary and capricious and in violation of the Agreement.

2. As a consequence of the violation referred to in Part (1) above, Claimant R. L. Bligh shall be restored to service with full back pay and benefits:

Background

On March 19, 1999 the Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged adulteration of a urine specimen he provided for a drug test while he was assigned as a track laborer on the date of March 9, 1999. After postponement, an investigation was held. On April 21, 1999 the Claimant was advised that he had been found guilty as charged and he was dismissed from service of the Carrier. The Claimant's discharge was appealed by the Organization up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it was docketed before the National Railroad Adjustment Board, and then re-docketed before this Board for final

adjudication. Hearing on this case before this Board took place on February 23, 2001 The Claimant was present at the hearing which took place in Fort Worth, Texas.

Discussion

The Claimant's Notice of Investigation which was dated March 19, 1999 states that he was being charged with allegedly adulterating a urine specimen after he was asked to take a drug screen test for cause. When the Claimant was asked to take the test he was assigned to work as a Section Laborer on the Carrier's property at Old Monroe, Missouri on the date of March 9, 1999.

The record shows that the Claimant was escorting a Burro crane which was operating in the West Alton area on March 9, 1999. In the afternoon the crane knocked down a power line at "...about Mile Post 20.17...". The crane was operated by a fellow employee of the Claimant by the name of Greg Nichols.

The Roadmaster out of West Quincy, Missouri testified at the investigation which was held on April 6, 1999. He was the two trackmen's supervisor who was about two hours' away from Mile Post 20.17 when he first heard about the accident. The Roadmaster went to see the two employees and concurrently ordered a drug screen test for both them. According to the Roadmaster's testimony he did this "...due to the fact that we knocked power lines down...". By ordering the drug tests for the two employees the Roadmaster testified that he was ". ..following procedures that are recommended by the Burlington Northern Santa Fe...to the best of (his) knowledge...".

Both the Claimant and operator Nichols were tested at the Depot at Old Monroe, Missouri on March 9, 1999. It took some time for the tester to get to Old Monroe from St. Charles, Missouri although she arrived on the spot prior to the arrival of the Roadmaster. After the two were tested the Claimant and his fellow employee "...went home and returned (to work) the next day...".

On March 18, 1999, or some 9 days after the test was conducted, the Roadmaster was contacted by the Carrier's Manager of Drug and Alcohol Testing in Fort Worth, Texas with information that there were some problems with the Claimant's test results. This led to an interview with the Claimant who was brought in from the field and subsequently removed from service. The document provided to the Roadmaster on March 18, 1999, with copy to the Claimant, states the following in pertinent part which is cited here for the record.

> "Regards: Ricky L. Bligh
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> "The aforementioned employee's urine drug screen test conducted on March 9, 1999 revealed the presence of an adulterant. Adulterating a urine drug specimen is deemed a refusal to test.
>
> "The employee is in violation of Section 12.0 (c) of the Burlington Northern Santa Fe policy on Use of Alcohol and Drugs. This information is being relayed to you for formal administrative action. You are instructed by the Medical & Environmental Health Department to initiate the investigative process and immediately remove this employee from service pending results of the investigation".'

The Claimant has been out of service since that day. Immediately upon receipt of

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'Carrier's Exhibit 1 @ p. 7/26 inter alia.

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this information from the Manager of Drug and Alcohol Testing Carrier's supervision initiated the investigative proceedings which ultimately led to the Claimants's full discharge, the appeal of the same, and finally the adjudication of the discharge before this Board.

According to testimony at the investigation by the Roadmaster he was advised that the Claimant had adulterated his urine sample by putting nitrate into the sample. He also testified that he had been unaware that the Claimant may have had a drug problem and he states that the Claimant was a good worker. The Roadmaster also testified that the operator of the Burro crane advised him that he had the crane in the wrong location and that he alone took full responsibility for the accident with the power lines. Mr. Nichols was subsequently cited for violating Carrier's rules and was dealt with by the Carrier in the manner cited below. For the record the Carrier wrote the following to Mr. Nichols who was the operator of the Burro crane.

"March 11, 1999

"G. A. Nichols

"This letter will confirm that as a result of our conference on 3-9-99 at 5PM at Old Monroe, MO depot concerning the incident of BNX 975068 operated by you allowing the boom of this machine to come into contact breaking a U.E. power line at Mile Post 20.17, West Alton, MO on 3-9-99 at 2 PM.

"Due to the fact of your good record as a BNSF employee, your immediate reporting of this incident and in taking responsibility in this matter, you are being issued a level one (1) reprimand for not complying with Rules S-17.2.5 and S-20.2.1.

"In addition you agree to develop an action plan to prevent this type of occurrence

in the future. Please contact myself if you need assistance.

"This letter will be placed in your personal file for (1) year",

This letter was signed by the Roadmaster.

The Claimant was exonerated and was not cited by the Carrier for any culpability with respect to the downed power lines at Mile Post 2 1.17 on the afternoon of March 9, 1999. The record establishes that if the operator of the crane had been attentive to the instructions given to him by the Claimant the accident would never have happened in the first place. It was the Claimant who had called the Roadmaster about the knocked down power line. The Roadmaster testified that it did not appear to him that the Claimant was under the influence of anything on March 9, 1999. The Roadmaster then volunteers the following about the Claimant:

> "...I've worked with (the Claimant)...here since December 4, 1989 and he lives here at Old Monroe. He never misses a call. He lets me know when he's going to be out of town and as a laborers, he's not required to in any way to do that. He comes out every time we need him. He goes to St. Louis. He pilots the escort around, or escorts the Burro around the whole length of my territory from St. Louis...to Keokuk, Iowa... He uses his personal vehicle, which we reimburse him for mileage, due to the fact we don't have extra company trucks to put with him. He has a very good record of twenty-six year with one minor incident twenty years ago. He's a good employee...".

According to the Roadmaster he could not remember any days' work which the Claimant had ever missed, he has never had an injury, he does not miss call-outs, volunteers on his own to advise the Roadmaster of the river level in the area, and gets along well with fellow workers. According to the Roadmaster he would not hesitate to use the Claimant on all kinds of assignments because he is an "...exceptionally good worker...".

Testimony by the Claimant corroborates that of the Roadmaster with respect to the March 9, 1999 accident at Mile Post 20.17. He was not in the vicinity when the accident happened. The Claimant was about "...900 yards away..." when the accident occurred.[2]

With respect to the adulteration of the drug sample the Claimant does not deny that he did this. He testified that his wife had a birthday party for him on March 7, 1999 and after the party was over, and everyone left, he and a friend went outside the house and smoked marijuana. When the accident occurred on March 9, 1999 the Claimant states that he was afraid that this drug would show up in the drug screen. Since there was a two hour or so wait until the drug tester showed up the Claimant testified that he met some construction workers in a bar in town and when he explained to them that he had to take a drug screen they advised him to use something called "clear" which was supposed to cover up potential positive results of a test. The Claimant states that he obtained some "clear" from these workers. He admits that he adulterated his mine sample with it when he was administered a drug screen test on March 9, 1999.

Findings

After a review of the full record in this case, including the full transcript of the investigation and the arguments by both sides in conferencing this claim on property the Board concludes as follows.

First of all, the Board will deal with the issue of the propriety --- and the

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[2]The Roadmaster testified that the Claimant was about a quarter of a mile away from the Burro crane when the accident happened. It appears that he was more accurately about a half mile away.

Organization would argue, the validity --- of the drug screen test administered to the Claimant in this case. The test administered to the Claimant on March 9, 1999 was a "...reasonable cause drug test...". There is considerable disagreement between the parties over whether there was or was not reasonable cause to test the Claimant in the first place. The Burro operator took full responsibility for causing the accident as noted in the foregoing. But given the fact that there was an accident, and that the Claimant was party to a two person gang working together when the accident occurred, did the Carrier have reasonable grounds for giving both the Claimant and the Burro operator drug screens immediately? This is the question to be resolved here since it is clear that the drug screens were ordered and administered first, and the Roadmaster interviewed the two employees afterwards. There can be no doubt about this sequence which is addressed again and again in this case by both sides. The Carrier states as much in its correspondence with the Organization when it says:

> "...Both (the Claimant) and the Crane Operator were tested in this instance because both were responsible for the safe operation and movement of the crane. You argue that the Claimant was over 900 years away from the crane when it struck *the* line, *however, when the decision to test the Claimant was made, the Carrier did not know exactly what had happened* or where the Claimant was..." [3]

In view of the full scenario of the accident, therefore, did the Carrier have reasonable cause for testing the Claimant? The Organization would argue in the negative. The Carrier in the positive.

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[3] BMWE Exhibit A-5 @ p. 1

What is at stake here is an interpretation of the Carrier's drug testing policy. In this respect the Board observes that the parties include in their exhibits a new policy of the Carrier which is dated: effective September 1, 1999." That policy post-dates March 9, 1999 and is not applicable here. What is pertinent here is the Carrier's older drug testing policy (100.1) which goes back to April 16, 1985, revised January 1, 1997. In reviewing that policy the Board observes that the test conducted did not fall under Section 9.1 "reasonable suspicion" since the Roadmaster testified at the investigation that he had no reason to believe that the Claimant was under the influence of anything when he met him after the accident occurred on March 9, 1999. Therefore the test was given for "reasonable cause" under Section 9.2 of the 1997 policy. This policy states:

> 9.2
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> Urine samples for drug testing and/or breath samples for alcohol testing may be collected from any employee under any of the following circumstances:
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> > 9.2.1
> >
> > When an employee has been involved in an accident, incident or near-miss and a supervisor believes that the employee's acts or omissions contributed to either the occurrence or severity of the accident, incident or near miss.

This policy does not say that a supervisor needs solid facts at his or her disposal prior to requiring a drug or alcohol screen test in the event of an accident. It only says that the test will be conducted on basis of what a supervisor "believes". A review of the facts of this case does not persuade the Board that the Roadmaster in this case did other

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[4] BMWE Exhibit A-6 & Carrier Exhibit 5

than act reasonably on basis of what he believed at the time the decision was made to require the Claimant and the Burro operator to both take drug tests. The policy as stated above permits a supervisor to err in the direction of commission rather than omission. Obviously, if the Claimant's test results had come out negative the application of Section 9.2.1 of the older 1997 policy would have had no adverse effect. Unfortunately for the Claimant, that is not what happened. The Board rules that it was not improper for the Carrier to have administered the drug screen test to the Claimant on March 9, 1999 under current policy in effect.

Secondly, the Board will address the issue raised by the Organization with respect to a Rule G waiver which the Organization raised almost immediately after the Claimant's test results became known.' In it letter to the Roadmaster in early April of 1999 the Organization states the following.

> "(The Organization is) requesting that the Carrier offer (the Claimant) a Rule G waiver since this is his **first** (adverse test result) in the last ten (10) years. The current Rule 'G' policy states that BNSF provides for positive conditions ENCOURAGING employees to seek relief. (The Claimant) realizes that he has a problem and has asked for relief and a chance, by utilizing the Employee Assistance Program...
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> "This is (the Claimant's) **first** Rule G and according to BNSF Rule G policy (he) deserves an opportunity to go through treatment...".

The Board has studied the position of the Organization on this point. It cannot be sustained. Unfortunately for the Claimant he was not only discharged for having tested

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'See Carrier's Exhibit 1 pp. 20 of 26.

positive for drugs --- on basis of his own admission of having used drugs two days prior to the test --- but he was also discharged for what is arguably a much more serious offense. The latter was a deliberate attempt to circumvent the testing procedures themselves.

Lastly the Board will now address the merits of the case. The Claimant was discharged for violation of the following BNSF Maintenance of Way Rules.

> **Rule 1.3.1 - Safety Instructions**
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> Employees must have a copy of, be familiar with, and comply with Safety Working for US and all other safety instructions issued in a separate book or in another form.
>
> **Rule 1.5 - Drugs and Alcohol**
>
> The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.
>
> The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while n duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids while reporting for duty, while on duty, or while on company property.

The evidence warrants conclusion that the Claimant was in violation of these rules. The Claimant admits at the investigation that he had smoked marijuana two days before the testing date and he admits that he took measures to falsify the test results of the drug screen test he was ordered to take on March 9, 1999. In view of this the Claimant is not only guilty of violation of the two Rules cited above, but he is also guilty of violating the

Carrier's drug testing policy at Section 12.0 in effect at the time he took the test. This policy states the following.

> Section 12.0
>
> Any one or more of the following conditions will subject employees to dismissal:
> .....
> (c) Refusal to provide a urine specimen or breath sample for testing when instructed under the terms of this policy or federal or state regulations unless the inability to provide a sample is for a verified medical reason. Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal.

On merits the claim cannot be sustained.

There remains the issue of the appropriateness of the discipline assessed. This Board, in accordance with arbitral precedent, may look to extenuating circumstances when addressing this issue. There is credible evidence, which is testimony by the Roadmaster who was the Claimant's supervisor, that the Claimant was a hard working, reliable, conscientious employee. This, coupled with his long tenure with the Carrier, plus his prior record, provides basis for amending the discipline of discharge which has been assessed in this case. Exactly how much that should be amended, however, must to be weighed against the gravity of the offense which the Claimant committed.

The Claimant implies, in his testimony, that his use of marijuana prior to the testing date was idiosyncratic. If that was so the Board would expect some corroborating evidence. None was presented. In its April, 1999 letter to the Roadmaster which deals with the application of the Carrier's Rule G policy, the Organization addresses the issue of the Claimant's drug "problem". Such would appear to imply that when the Claimant

describes his March 7, 1999 experience with marijuana that this was not a one-time event. The Board is conscious of the safety requirements of this industry. The use of drugs and alcohol impair perception. Impaired perceptions lead to accidents. This is why the industry is so heavily monitored in these matters. To compound matters, which weighs heavily in any ruling issued by this Board in this case, is the fact that the Claimant not only admitted of drug use, but he took active measures to evade being properly tested. The Board would be remiss in issuing a ruling in this case which sets precedent which would give any semblance of approving such actions. The Claimant should be well advised of the gravity of the Rule and policy violations at bar.

The Board had reviewed the arbitral precedent provided for its study by the parties. It fmds nothing therein to persuade it that what has been stated in the foregoing is not appropriate with respect to the instant case. The Board is aware of the FRA and FWHA nine (9) month rule. That rule is subject to discretion by a Carrier to dismiss an employee for violation of Rules and policy such as that involved here. In the Board's ruling here it will amend that dismissal decision by the Carrier.

The ruling by the Board is that the Claimant shall be returned to work without back pay for time held out of service, but with seniority unimpaired. The Claimant shall be subject to a back-to-work physical examination in accordance with Carrier's policy, and to a back-to-work clearance by the Director of the Carrier's Employee Assistance Program.

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Award

The claim is sustained in accordance with the Findings. Implementation of this Award shall be within thirty (30) days of its date. The Board holds jurisdiction over this Award until it is implemented.

Edward L. Suntrup, Neutral Member

Thomas M. Rohling, Carrier Member

Roy C. Robinson, Employee Member

Date: 7/30/01