

PUBLIC LAW BOARD 6394

AWARD NO. 31

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(MW-DEAR-06-85-LM-443)

Statement of Claim:

Organization's claim on behalf of J. J. Cable requesting reinstatement to service following his dismissal as a result of a formal investigation held on October 24, 2006, in connection with failure to obey instructions to submit to a drug screen as required by the Federal Motor **Carrier** Safety Administration.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in **any** other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

D. J. Cole, the Claimant herein, entered the Carriers' service on January 23, 2006 as a Laborer, and was working as a Vehicle Operator on September 20, 2006'. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

¹ All dates noted herein occurred in calendar year 2006 unless otherwise noted.

The record evidence shows that on the morning of September 20th, an administrator of the Federal Motor Carrier Safety Administration (FMCSA) made an unannounced stop at the Chicago Yard office. The Carrier was advised that all drivers possessing Commercial Drivers Licenses (CDLs) at that location were to submit to a random drug screening. The Assistant Track Supervisor, A. A. Rodriguez advised all drivers holding a CDL, including the Claimant, that they were required to submit to a drug screen before starting work that day. The FMCSA Administrator was then given a listing of all CDL drivers who would be tested that day. Drivers to be tested were then divided into two groups. The Claimant was in the second group to be tested. All drivers in the Claimant's group were instructed to wait outside while the first group was being tested. The Claimant followed this instruction and waited by the Gang Truck. When his foreman came out he instructed all gang members "let's get going". The Claimant left with his gang without first submitting to the drug screen as he had been instructed. The following morning, Supervisors Hazel and Rodriguez were advised that the Claimant was the only CDL driver who failed to submit to a drug test the previous day. By letter dated September 22nd, the Claimant was instructed to attend a formal investigation concerning his failure to submit to a random drug screen as directed. A formal investigation was conducted on October 24th. By letter dated November 13, 2006, the Claimant was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the hearing, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, that the Claimant did, in fact, fail to obey the instructions of Assistant Track Supervisor Rodriguez to submit to a random drug screen as required by FMCSA Regulations. Accordingly, it was determined that the Claimant violated the Carrier's Policy on Alcohol and Drugs of the Norfolk Southern Safety and General Conduct Rules subjecting employees to discipline.

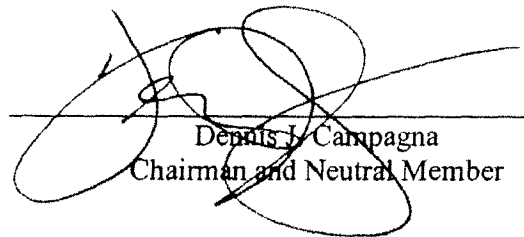
This Policy is clear, sound and well reasoned, and has been the subject of numerous decisions, the majority of which have sustained termination of employment for proven violations maintaining that actions akin to the Claimant's amount to insubordinate conduct. However, for the reasons that follow, the Board finds that termination is not warranted in this case.

Turning now to the discipline sought to be imposed, the Board finds unique and extraordinary circumstances that must be considered. In this regard, the record evidence reveals that this is not a case where the Claimant elected to leave the property and go home in order to avoid the random drug test. In fact, a careful review of the record reveals that it is more likely than not that when the Claimant's Foreman walked up to him and said "let's get going", the Claimant, who had been in the Carrier's employ for less than one year, was inclined to follow the most recent directive, get into the truck, and work with his gang on the property for the remainder of the day. While this action certainly does not excuse the Claimant's failure to submit to the random drug test, it does strongly suggest that the Claimant did not intentionally avoid his obligation to do so. However, no matter how well intended the Claimant may have been, the Carrier had reasonable cause for concern due to the fact that the Claimant's failure to follow through with his obligation to submit to the random drug test gave rise to the presumption that had he taken the test, the results would have been positive.

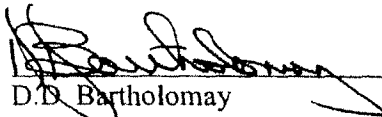
Accordingly, given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases, the Board finds that a more fitting and appropriate discipline is reinstatement without back pay. The Board's decision to reinstate the Claimant comes with the Claimant's obligation to follow all reasonable directives of the Carrier, including any directive to submit to a physical examination and a drug **and/or** alcohol test. The Claimant's return to duty is contingent upon passing a return to work physical examination which includes a drug screen. Claimant shall therefore be reinstated to service, without back pay for time held out of service.

CONCLUSION

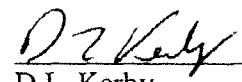
The Claim is sustained in accordance with the findings and conclusions noted and discussed above.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay
Organization Member



D.L. Kerby
Carrier Member

Dated 8-9-07, Buffalo, New York