NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 11
Carrier File No. 12-07-0063
Organization File No. B-2747-15
Claimant: Loren C. Harris

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on June 8, 2007, when Claimant Loren C. Harris was dismissed for testing positive for a controlled substance, his second such violation within a 10-year period violating Maintenance of Way (MOW) Operating Rule 1.5 and the Carrier's Policy on the Use of Alcohol and Drugs.
2. As a consequence of the Carrier's violation referred to in part (1) above, the Claimant should be returned to service, paid for all lost time including overtime, and that all references to this incident removed from Claimant's personal record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Loren C. Harris was dismissed from all service after testing positive for a controlled substance. According to the Carrier, this was the second such violation within a ten-year period, thereby violating Maintenance of Way Operating Rule 1.5 and the Carrier's policy on the Use of Alcohol and Drugs. The Claimant's first positive test occurred on May 28, 2002, when he testified positive for amphetamines and Chromium VI. According to the Carrier, Chromium VI is used as a urinary adulterant in workplace drug testing. The Claimant was dismissed for violating Section 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs in conjunction with the positive drug test and the adulteration of his urine sample.

The investigative hearing in the instant matter disputing the validity of the June 8, 2007 drug test was held at the Quality Inn Motel in Ada, Oklahoma on June 22, 2007 before Daniel Rankin, Division Engineer. The Claimant attended this hearing, along with Rick Sandlin, Local Chairman, Brotherhood of Maintenance of Way Employees, Frisco Federation representing the Organization. According to the Carrier, the Claimant violated Maintenance of Way Rule 1.5 because he tested positive for a controlled substance or alcohol on a test conducted on

June 8, 2007, which positive result was the Claimant's second in a ten-year period, thus subjecting him to immediate dismissal.

The Organization contends that the test results affixed to the document signed by the Claimant prior to the test do not adequately link the positive test results to the Claimant, and, therefore, insufficient evidence exists to terminate a long-service employee because the faulty documentation does not definitively link the excessive results with the sample submitted by the Claimant on June 8, 2007.

The parties were unable to resolve their dispute, and the matter was submitted to Public Law Board No. 6986.

FINDINGS AND OPINION

The Organization aptly asserts that the listing of a test number, testing device name, testing serial number, reading time and date, and read-out results do not render the test results affixed to a form signed by the Claimant sufficiently reliable to justify discharging an employee, especially a long-service employee. Assuming that the Claimant's employee identification number was properly printed on the test label, the record does not demonstrate the chain of custody of the Claimant's urine sample or the certification of the operator of the Breathalyzer

instrument that the instrument had been properly maintained and calibrated, as would be required in a court where a summons for a motor vehicle violation was being contested.

The test sample submitted by the Claimant would have been assigned a serial number and placed on a tape or form that the Claimant initialed at the test site to assure that the urine sample being tested was his sample. This common safeguard was not employed in the instant case. Therefore, the test results that are allegedly of the Claimant's urine sample must be deemed invalid.

Although the Claimant's employee identification number appears as the subject identification number on the Intoximeter AlcoSensor IV test result that is affixed to the alcohol testing form that the Claimant signed prior to the test, nothing in the documentary record shows that the sample serial numbers or the subject I.D. number are connected. There is no certification by the testing technician or by the Breathalyzer technician to establish the validity of the procedures used. A readout on a tape without elaboration as to the circumstances under which the Breathalyzer was administered and the accuracy of the device does not satisfy the requisite level of proof by clear and convincing evidence necessary to terminate an employee.

The Claimant testified that the only thing he signed after the test was his urine sample, and that he did not fill out any documents proffered as evidence that the test results were his. The absence of any certification by the operator of the Intoximeter AlcoSensor IV instrument that the test results were connected to the Claimant's participation in the Breathalyzer testing precludes reliance on the readings on the tapes affixed to the Claimant's testing form as evidence of prohibited positive alcohol or drug test results.

Absent some testimony or documentary evidence submitted at the investigatory hearing to establish that the Breathalyzer was calibrated on the day of the test, or within the interval accepted in the testing industry for periodic calibration, and absent evidence in the record demonstrating how the grievant's employee identification number on the form came to be placed on the testing result tapes that were affixed to his form, the Carrier has not sustained its burden of persuasion to demonstrate that the Claimant tested positive. Therefore, the discipline predicated upon this positive result cannot be sustained.

The claim of L.C. Harris that he was dismissed from all service without cause is hereby sustained. The Claimant shall be returned to work forthwith, subject to a return to work physical examination, and shall be made whole for all wages lost during the interval. The Board

hereby retains jurisdiction for the purpose of resolving any dispute that may arise regarding the implementation or computation of the remedy ordered herein.

We so find.

Daniel F. Brent, Impartial Chair — Dated: 4-26-08

( ) I concur. (✓) I dissent.

Carrier Member — Dated: 10/24/08

(✓) I concur. ( ) I dissent.

Organization Member — Dated: 10/01/08