

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NUMBER 7048

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BNSF RAILWAY  
(former ATSF property)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION  
(Organization)

PLB No. 7048 Cases 3, 4, and 5

Carrier File Nos. 14-07-0116, 14-07-0117, and 14-07-0118  
Organization File Nos. 180-13C2-068.CLM, 180-1311-073.CLM,  
and 180-13C2-0615.CLM

Claimant: Arthur B. Cuellar

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Investigative hearings were held on March 22, 2007, at the  
Carrier's San Bernardino, California Division Office. Jeff D. Owen,  
Division Engineer, presided over an investigative hearing in each of the  
three grievance cases that have been consolidated for purposes of this  
Award by the Public Law Board. These hearings were previously  
scheduled on August 31, 2006; October 25, 2006; November 6, 2006;  
December 5, 2006; January 11, 2007; and February 22, 2007, and were

postponed in order to afford the Claimant an opportunity to complete substance abuse rehabilitation and to appear personally at the hearings. The Claimant was provided adequate advance notice of each of the hearings, including the March 22, 2007 hearing, for which he signed acknowledgment of his receipt of the notice of hearing. The Claimant failed to appear for the March 22, 2007 hearings in the three cases that have been consolidated for consideration in this Opinion and Decision.

A recorded transcript was made of the investigatory hearing, which was submitted to Public Law Board 7048 for review, together with documentary evidence entered into the record below by the Carrier after the Organization representative was afforded an opportunity to examine the documents at the hearing. The parties were unable to resolve their dispute during the grievance procedure below, and the matter was appealed to the Public Law Board for adjudication.

### CASE NO. 3

#### STATEMENT OF CLAIM

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Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 22, 2007 when Claimant, A.B. Cuellar, was dismissed from service for an alleged violation of Maintenance of Way Operating Rules 1.1.3-Accidents, Injuries and Defects, Rule 1.6-Conduct, Rule 1.19 Care of Property of the Maintenance of Way, Rule 12.6-Passengers and Rule 12.14-Accidents/Incidents when the claimant was involved in a vehicle accident, while off-duty, no permission to drive BNSF vehicle, non-BNSF employee passenger, operating vehicle with no license to

- drive and failed to report the accident on Friday, June 17, 2006;  
and
2. As a consequence of the violation referred to in part 1 the Carrier shall immediately return the Claimant to service with all rights unimpaired and pay for all wage loss commencing June 20, 2006, continuing forward and/or made whole.

This claim was discussed in conference between the parties.

#### CASE NO. 4

##### STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 22, 2007 when Claimant, A.B. Cuellar, was dismissed from service for an alleged violation of Maintenance of Way Operating Rules 1.13-Reporting and Complying with Instructions when the claimant placed himself in the Employee Assistance Program (EAP) but failed to complete program and return to work as instructed commencing June 20, 2006; 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, all rights unimpaired and pay for all wage loss commencing June 20, 2006, continuing forward and/or made otherwise whole.

This claim was discussed in conference between the parties.

#### CASE NO. 5

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##### STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 22, 20007 when Claimant, A.B. Cuellar, was dismissed from service for an alleged violation of Maintenance of Way Operating Rules 1.13-Reporting and Complying with Instructions when the claimant placed himself in the Employee Assistance Program (AEP) but failed to complete program and return to work as instructed commencing June 20, 2006; 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, all rights unimpaired and pay for all wage loss commencing June 20, 2006, continuing forward and/or made otherwise whole.

This claim was discussed in conference between the parties.

#### NATURE OF THE CASE

The Claimant has been employed by the Carrier since 1977. His career has been plagued with prior instances of substance abuse. The Claimant was dismissed from all service effective April 20, 2007 for several reasons, including his alleged involvement in an accident in San Bernardino, California on June 26, 200, involving unauthorized use of a Carrier vehicle, improper carriage of an unauthorized passenger in a Carrier vehicle, and failure to report the accident to management. The Claimant's employment was also terminated for his alleged failure to comply with the terms of his leave of absence for participation in an EAP rehabilitation program for substance or alcohol abuse.

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#### FINDINGS AND OPINION

After fully considering all of the documentary evidence and testimony submitted by the Carrier at the investigative hearing held on March 22, 2007, the Board concludes that the Carrier has demonstrated

just and sufficient cause to terminate the Claimant's employment.

Analysis and discussion of the factors underlying this decision are set forth below.

On June 26, 2006, the Claimant asked to be referred to a substance abuse rehabilitation program. He was referred to a program in Riverside, California that he entered on or about June 27, 2006. He was dissatisfied with this program, and was then referred to a sixty day residential treatment program in Lucerne Valley, California, which he entered on July 14, 2006. According to documents in evidence, the Claimant left this program on the fifty-ninth day against medical advice. The Claimant was subsequently referred to another EAP rehabilitation facility in Riverside, California. He did not report as directed.

The Claimant was repeatedly advised in writing to report within three days to his EAP counselor in order to explain his current status. Although the Claimant did leave a phone message for his counselor, he neither spoke directly to his counselor nor left a telephone number where he could be reached. Furthermore, the Claimant's last address of record with the Carrier proved to be outdated and inaccurate. Despite the Claimant's failure to report to his EAP counselor as directed, the Claimant was provided with another opportunity to clarify his status when he was told by his EAP counselor on March 13, 2007 to report his

status within three days. The Claimant failed to comply with this directive, thus violating a basic component of his EAP agreement, whereupon his employment was properly terminated.

The Claimant's violating Maintenance of Way Operating Rule 1.13 for failure to comply with a valid, work-related directive from management--more particularly, that he report to his EAP counselor and explain his abrupt departure from the treatment program, his current status, and thus justify his continuing absence from work--was a valid exercise of management's discretion to control and direct the Carrier's work force, and was an integral element in the arrangement by which the Claimant's employment was conditionally preserved through his referral to participate in an EAP program.

Although the Claimant has experienced chronic issues of substance abuse during his employment with the Carrier, the Claimant was nevertheless obligated to comply with all the terms and conditions of his EAP referral and rehabilitative treatment protocol. The Claimant failed to respond to multiple notices to contact his EAP counselor and also failed to appear at the investigative hearing. His receipt of notice of the hearing has been amply demonstrated by the Carrier. The Claimant's failure to cooperate significantly impaired the Organization's ability to refute the documentary and testimony evidence introduced by

the Carrier at the investigative hearing, and subsequently reviewed by this Board, which evidence clearly and convincingly demonstrated that the Claimant had failed to fulfill his obligation to comply under Rule 1.13.

The Organization has argued that the Carrier acted precipitously, and that the Claimant was subjected to double jeopardy, because the Claimant had been given until April 20, 2007 to complete his treatment program, and this deadline had not yet occurred when the investigative hearing was held on March 22, 2007. However, the Organization misconstrued the nature of the offense for which the Claimant was terminated. The Claimant was given three days to report to his EAP counselor. This interval elapsed on March 16, 2007. Consequently, the later deadline for finishing his treatment is irrelevant.

The Claimant's uncontroverted failure to report despite ample notice and reasonable efforts by management to ascertain his whereabouts and his status in several rehabilitation programs constituted ample cause to terminate his employment, regardless of the April 20, 2007 deadline for having completed his rehabilitative treatment, as the offense for which he was terminated was violation of Rule 1.13 for his failure to report to his EAP counselor in a timely manner as directed by management.

Therefore, based on the evidence submitted, there was just cause to terminate his employment and dismiss the Claimant Arthur B. Cuellar from all service. The instant grievance is hereby denied.

In view of this determination, the Board need not determine definitively whether the Claimant also could have been fired for his failure to report an accident in which he was allegedly involved on June 26, 2006, as if either basis for dismissing the Claimant from all service is upheld, then the validity of the other bases is immaterial.

As the Organization established persuasively, the evidentiary record regarding this accident on which the Carrier relied, and that was submitted to the Board, was predicated primarily upon hearsay, and thus was insufficient to establish definitively that the Claimant was involved in any accident while operating a Carrier vehicle on June 26, 2006. If he had been in such an accident, he clearly failed to report it to management, an action that would also have jeopardized his employment. However, the proofs were aptly criticized by the Organization's representatives at the investigatory hearing.


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The Carrier's investigation was limited to double and triple hearsay statements without the appearance at the investigative hearing of any of the complaining witnesses who reported to the Carrier's investigator that



the Claimant caused damage to their vehicle while operating a van belonging to the Carrier that he was unauthorized to drive. Had the Claimant's operation of this van been established, especially given that his driver's license was suspended at the time, the Carrier would have had additional cause to impose serious discipline, up to and including termination of his employment in view of all of the circumstances involved. However, given the foregoing determination that the Claimant's employment was forfeited by his failure to respond to his EAP counselor and to comply with the requirements of his EAP program as directed by Carrier management, the Board need not issue a declaratory determination regarding the Claimant's involvement in a vehicular incident that allegedly occurred in June 2006.

We so find.

  
Daniel F. Brent, Impartial Chair

Dated: 9-29-08

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(☒) I concur.    ( ) I dissent.

  
Carrier Member

Dated: 10/31/08

(☒) I concur.    ( ) I dissent.

  
Organization Member

Dated: 10/13/08