

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on, August 7, 2002, when it dismissed the Claimant, Mr. R. R. Martinez from service for committing a second serious rules offence within a 12 month time frame when he allegedly violated Rules 1.3.1 and 1.5 of the Maintenance of Way Operating Rules, and Section 3.1 and 7.9 of the BNSF Policy on the Use of Alcohol and Drugs.
2. As a result of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority intact, remove the discipline mark from his personnel record and make him whole for all time lost.” [Carrier File No. 14-02-0043. Organization File No. 160-1312-0118.CLM.]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees (“Parties”) herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Robert R. Martinez, was hired by the Carrier on July 6, 1999. His personal record shows that he was assessed a 30-day record suspension, and a one-year probationary period, on July 18, 2001, for being absent without leave for more than five consecutive days.

On November 14, 2001, while on duty, he was selected for a random drug and/or alcohol test. The result was positive for the metabolite of marijuana.

On November 30, 2001, the Claimant was issued a notice of investigation by General Manager Greg A. White, reading in part as follows:

“[T]o develop the facts and place responsibility, if any, in connection with alleged violation of Rules 1.3.1 and 1.5 of Maintenance of Way Operating Rules, . . . and Sections 3.1 and 7.9 of BNSF Policy on the Use of Alcohol and Drugs, effective September 1, 1999, concerning report received November 19, 2001, alleging you tested positive for a controlled substance while on duty November 14, 2001.”

The investigation was first set for December 5, 2001, but by agreement of the Parties was postponed to and held on January 24, 2002. A transcript of evidence and testimony taken at the investigation appears in the record.

There is no dispute that the test was positive for the metabolite of marijuana. The Claimant denied that he had used marijuana while on duty, and attributed his positive test to his attendance at a party on the previous weekend.

On February 20, 2002, as the consequence of the investigation, Mr. White sent the Claimant a notice of discipline, reading in part as follows:

“[Y]ou are dismissed from employment for violation of Rules 1.3.1 and 1.5 of the Maintenance of Way Operating Rules, . . . and Sections 3.1 and 7.9 of the BNSF Policy on the Use of Alcohol and Drugs, . . .”

The Rules and Sections referred to in Mr. White’s letter read as follows:

[Maintenance of Way Operating Rule (MWOR) 1.3.1].

“Safety Rules. Employees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form.

Maintenance of Way Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty.

Hazardous Materials. Employees who in any way handle hazardous materials must have a copy of the instructions or regulations for handling these materials. Employees must be familiar with and comply with these instructions or regulations.

Timetable/Special Instructions. Employees whose duties are affected by the timetable/special instructions must have a current copy they can refer to while on duty.

Classes. Employees must be familiar with and obey all rules, regulations, and instructions and must attend required classes. They must pass the required examinations.

Explanation. Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of.

Issued, Cancelled, or Modified. Rules may be issued, cancelled, or modified by track bulletin, general order, or special instructions.

Engineering Instructions. Employees governed by the Engineering Instructions must be familiar with and comply with all their provisions; additionally, a copy of Engineering Instruction No. 1 must be available for reference while on duty.”

[MWOR 1.5]. "The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable 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 on 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 when reporting for duty, while on duty, or while on company property."

[Section 3.1, Alcohol and Drug Policy]. "While on BNSF property, on duty or operating BNSF work equipment or vehicles, no employee may:

- Use or possess alcohol;
- Use or possess controlled substances or illegally obtained drugs;
- Possess drug paraphernalia;
- Report for duty or remain on duty or on property when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
- Report for or remain on duty or on property with a blood or breath alcohol concentration greater than or equal to 0.02%; or
- Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs.

[Section 7.9, Alcohol and Drug Policy]. "**Dismissal.** Any one or more of the following conditions will subject employees to dismissal:

- More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period.
- A single confirmed positive test either for any controlled substance or alcohol obtained under any circumstances within three years of any 'serious offense' as defined by the Burlington Northern Santa Fe 'Policy for Employee Performance Accountability.'
- Failure to abide by the instructions of the Medical & Environmental Department and/or Employee Assistance Program regarding treatment, education and follow-up testing.
- Failure to provide a urine or breath alcohol specimen without a valid, verified medical explanation.
- Adulteration, substitution or dilution of urine samples.
- Possession of alcohol, controlled substance, illegally obtained drugs, adulterant substance, or drug paraphernalia on BNSF property obtained under any circumstances as follows:

1. within 3 years of any 'serious offense' as defined by the Burlington Northern Santa Fe 'Policy for Employee Performance Accountability', or
2. within 10 years of a confirmed positive test either for any controlled substance or alcohol, or
3. involving a criminal conviction."

The Organization promptly appealed the Carrier's disciplinary decision to its General Director - Labor Relations, who denied the claim. It therefore comes before this Board for review and a final decision.

The Organization presents a somewhat intricate argument on the Claimant's behalf. It points out that the Claimant was dismissed from service pursuant to the Carrier's Policy for Employee Performance Accountability (PEPA), which defines a first-time violation of MWOR 1.5 as a "serious violation," which may result in dismissal from service if it is the second serious incident within a 36-month review period. However, the Organization argues, a provision in the PEPA states that if the PEPA conflicts with the Carrier's alcohol/drug policy, the latter takes precedence over the PEPA. That being true, it reasons, the alcohol/drug policy provides that a first-time offender is referred to the Carrier's Employee Assistance Program, and upon meeting all the requirements of that program, and finally presenting a negative return-to-work test for alcohol and drugs, the employee will be returned to work. The Organization goes on to state that the Claimant in this case has undertaken the required steps, and after full compliance therewith, should be returned to service.

The Carrier's rebuttal is more simplistic. It points out that Section 7.5 of its alcohol/drug policy reads as follows:

"All drug and alcohol offenses are considered serious. Drug and alcohol violations will be considered with prior and future serious offenses for assessing appropriate discipline."

The Carrier then refers back to the Claimant's disciplinary entry in 2001 for being absent without leave for more than five consecutive work days, and the application of a three-year probationary period following that offense. It then turns to this provision in the PEPA:

"A second serious incident within a 36-month review period will subject the employee to dismissal."

Thus, the Carrier asserts, only five months after the previous disciplinary action, the Claimant tested positive for marijuana use on a random drug test, which constitutes a second serious offense within the review period, which warrants his dismissal from service.

The Board questions whether absence without leave for more than five consecutive work days constitutes a "serious rule violation" as defined in the PEPA. Among the list of "Serious Rule Violations" defined in Appendix B, only one definition addresses absences:

"Extended unauthorized absence (as may be defined by labor agreements and applicable law)."

But the Parties seem to be in agreement that the Carrier's Policy on the Use of Alcohol and Drugs takes precedence over the PEPA. The Carrier posits that Section 7.5 of that Policy permits it to consider drug violations in conjunction with prior violations of the Carrier's rules in assessing appropriate discipline. Although the Board does not have before it the disciplinary decision in the 2001 case, since it is only summarized in the Claimant's personal record document, probationary review periods generally provide that subsequent infractions of its rules during the review period may subject the employee to dismissal.

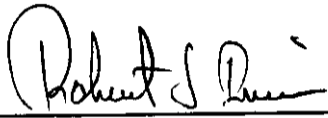
The Board is compelled to advise the Parties that it does not find itself bound to walk in lockstep with either the PEPA or the Carrier's Policy on the Use of Alcohol and Drugs. These are unilaterally promulgated Carrier policies, and while they are quite useful in establishing uniformity in the application of disciplinary procedures and the United States Department of Transportation's regulations for the control of alcohol and drugs use in railroad operations, respectively, they do not rise to the level nor carry the force of the agreements negotiated by the Parties, to which they are bound. But the PEPA and the Policy are of practical value in establishing a degree of order and fairness in dealing with these very important matters.

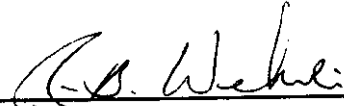
The Claimant is not a long-time employee with a generally good record. He had only 28 months of service with a prior disciplinary entry. He was clearly guilty of the rule infractions with which he was charged, and he did not challenge the result of the drug test. Although the Organization's position has substantial merit and appeal, the Board holds that the Carrier has the better position.

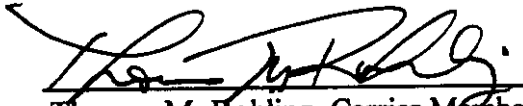
Although the Board's Neutral Member might not have applied the same degree of discipline, if he had been the person making the decision, neither can we find that the severe penalty of permanent dismissal is so unconscionable as to warrant its reversal.

AWARD

Claim denied.


Robert J. Irvin, Neutral Member


R. B. Wehrli, Employee Member


Thomas M. Rohling, Carrier Member

January 10, 2003
Date