

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 when on May 14, 2003, Mr. Cody L. Banister was dismissed from service for violation of Rule 1.5 of the Maintenance of Way Operating Rules and Section 3.1 of the BNSF Policy on the Use of Alcohol and Drugs in conjunction with Mr. Banister's alleged testing positive for a controlled substance.
2. As a consequence of the Carrier's violation referred to above Mr. Banister shall have his record expunged of the above referenced discipline, paid for all time lost as a result of his being dismissed, and he shall be returned to service with his seniority unimpaired. [Carrier File No. 14-03-0117. Organization File No. 160-1312-034.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, Trackman Cody L. Banister, entered the Carrier's employment on July 6, 1999. The Carrier's Southwest Division General Manager directed him to report for an investigation on April 15, 2003, (later postponed until April 23, 2003),

[T]o develop the facts and place responsibility, if any, in connection with alleged violation of Rules 1.5 of Maintenance of Way Operating Rules, . . . and Section 3.1 of BNSF Policy on the Use of Alcohol and Drugs, . . . concerning your alleged testing positive for a controlled substance while working as trackman at Clovis, New Mexico, on March 24, 2003.

The investigation began at 4:00 p.m. on April 23, 2003. The Claimant had not appeared at that time. The investigation was recessed until 4:25 p.m. During the interim, a search was made in the vicinity of the building, and unsuccessful attempts were made to contact the Claimant

by telephone. The investigation was reconvened at that point. The Claimant was represented *in absentia* by the Organization's Vice General Chairman.

The Carrier's sole witness, Assistant Roadmaster William Gomez, offered in evidence a copy of the laboratory Test Result Report for the Claimant's Return to Duty drug test performed on March 24, 2003. The test yielded a positive result for the presence of amphetamine and methamphetamine well in excess of the cut off levels prescribed by the Federal statutes which govern Federally mandated tests. The Carrier's alcohol and drug testing rules are consistent with Federal statutes.

Mr. Gomez also offered in evidence a copy of a letter sent the Claimant by the Carrier's Manager Medical Support Services on March 31, 2003, which enclosed a copy of the test results, and which removed him from the Carrier's service.

After accepting these documents into the record, another search was made for the Claimant, and telephone contact was attempted, again without success. Because of his nonappearance, no rebuttal evidence was presented on his behalf. His representative asked that the Claimant be offered a first-time waiver pursuant to Sections 7 and 8 of the Carrier's Policy on the Use of Alcohol and Drugs.

A transcript of testimony and evidence presented in the investigation was prepared, and appears in the record before this Board.

On May 14, 2003, the General Manager advised the Claimant, in writing, as the result of the investigation, that he was dismissed from the Carrier's service for violation of Maintenance of Way Operating Rule 1.5 and Section 3.1 of the BNSF Policy on the Use of Alcohol and Drugs. These provisions read:

Maintenance of Way Operating Rule 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.

BNSF Policy on the Use of Alcohol and Drugs Section 3.1

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 when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
- Report for or remain on duty 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.

The General Manager's decision was promptly appealed by the Organization to the Carrier's Labor Relations Department. The appeal was denied, and the matter now comes before this Board for adjudication.

The Claimant's personal record indicates that he had been recalled to work in March, 2003, after being furloughed since September 21, 2001. Section 4.7 of the BNSF Policy on the Use of Alcohol and Drugs requires that employees returning to work after an absence greater than six months must pass a urine drug screen and/or a breath alcohol test.

The record indicates that the Claimant did not avail himself of the Carrier's policy which permits an employee testing positive for the first time to enter the Carrier's Employee Assistance Program. This Program permits an employee to return to the Carrier's service after evaluation, education, and necessary treatment. It was the Claimant's responsibility to contact the Program within five days after his removal from service. This he failed to do. Section 8.3 of the BNSF Policy on the Use of Alcohol and Drugs provides:

Upon removal from service, the employee must contact EAP within 5 days to schedule an evaluation. Otherwise, the employee is subject to immediate dismissal for failure to follow instructions.

The Claimant did not appear at the investigation afforded him, after being duly notified. He therefore did not avail himself of the opportunity to offer any defense against the positive test result, notification procedures, or his failure to contact the EAP. The Board has no alternative but to deny the claim.

AWARD

The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

William H. Yeck
as at August 21, 2003

September 4, 2003
Date