PUBLIC LAW BOARD NO. 4244

Award No. 318
Case No. 325

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
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 December 6, 2002, when, without an investigation, it dismissed the Claimant, Mr. J. Moreno, Jr., for allegedly violating Section 7.9 of the BNSF Policy on the Use of alcohol and Drugs, when he refused to provide a urine sample for testing, after an on track incident on October 1, 2002.

2. As a result of the violation referred to in part (1), the Carrier shall reinstate the Claimant to service with seniority intact, remove the discipline mark from his personnel record, and make him whole for any time lost. [Carrier File No. 14-02-0278. Organization File No. 190-13I2-0212.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. Joseph Moreno, Jr., entered the Carrier's service in 1991. He was working as a Machine Operator in the vicinity of Williams, Arizona, on October 1, 2002 when an incident involving an apparent rule violation resulted in the Claimant and three other employees being required to undergo probable cause testing for drug or alcohol use. The Claimant successfully passed the breath alcohol test, but was unable to provide the required amount of urine for the drug screen. According to correspondence in the record before this Board, he was administered 40 ounces of water to drink and given three hours in which to provide a urine specimen of 45 cc. Still failing to provide the required quantity of urine, he was taken out of service, and directed to be examined by a licensed physician to determine whether he had an underlying urologic disorder or a pre-existing psychological disorder which prevented him from yielding a urine specimen of sufficient quantity.

The Claimant was examined by a Medical Doctor on October 18, 2002. He subsequently had urodynamic studies to determine why he could not void an adequate specimen. The Carrier's

Medical Review Officer (MRO), a licensed physician, reviewed the findings of the urodynamic studies with the physician consulted by the Claimant, and the two physicians determined there was no underlying urologic disorder or pre-existing psychological disorder preventing him from providing an adequate urine specimen. This determination was transmitted to Mr. Martin Crespin, the Carrier's Manager Medical Support Services on November 20, 2002.

On the same date, Mr. Crespin wrote the Carrier's Southwest Division General Manager, advising that the Claimant's failure to provide a urine specimen for testing, without a legitimate medical explanation, constitutes a refusal to test, a possible violation of Section 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs (Policy). That Section reads as follows, in pertinent part:

> **Dismissal.** Any one or more of the following conditions will subject employees to dismissal:
>
> - Failure to provide a urine or breath alcohol specimen without a valid, verified medical explanation.

As the result of the communication from Mr. Crespin, the General Manager, on November 25, 2002, wrote the Claimant a notice of investigation and charges, as follows:

> Arrange to report to the Division Engineer's Conference Room at 101 East Route 66, Flagstaff, Arizona, on Friday, December 6, 2002 at 9:00 AM, with your representative and witness(es), if desired, for formal investigation to develop the facts and place responsibility, if any, in connection with possible violation of Section 7.9 of the BNSF Policy on Use of Alcohol and Drugs, dated September 1, 1999, concerning report received November 20, 2002 alleging your refusal to provide a urine specimen during reasonable cause test conducted October 1, 2002, while working on SC-21 at Chalender, Arizona.

When the Claimant and his representative arrived for the investigation on December 6, 2002, they were advised that the investigation was cancelled, and the Claimant was handed a letter dated December 6, 2002, over the signature of the General Manager, which reads:

> I have been advised by BNSF's Medical Director's office that you have violated Rule 7.9 of Burlington Northern Santa Fe's "Policy on the Use of Alcohol and Drugs," effective September 1, 1999, for failing to provide a urine specimen without a valid, verified medical explanation. The pertinent part of Rule 7.9 reads as follows:

> "Any one or more of the following conditions will subject employees to dismissal: • Failure to provide a urine or breath alcohol specimen without a valid, verified medical explanation."
>
> For the reason given above, effective immediately, your seniority and employment with the BNSF Railway Company are terminated. If you dispute the action taken, you are entitled to have a claim submitted on your behalf for reinstatement, which must be presented within 60 days from the date of this letter, pursuant to Letter of Understanding dated June 24, 1991, between the Carrier and the Brotherhood of Maintenance of Way Employees. [*sic*]

On December 10, 2002, the Organization's General Chairman filed with the Carrier's Labor Relations Department an appeal of the disciplinary action taken. The Organization argues that the investigation was not scheduled within the prescribed time limit. Rule 13(b) of the Parties' Agreement provides that when an employee is held out of service pending an investigation, the investigation must be held within 30 calendar days of the date of the suspension. In this case, the investigation was set for a date 67 days after the Claimant's removal from service.

The Organization points out that the Claimant traveled 610 miles from his home in Madera, California, to attend the investigation, and his representative traveled from Kansas to Flagstaff, Arizona, only to find the investigation cancelled without any prior notice.

The Organization further argues that the Carrier had no right to test the Claimant, because he had violated no Carrier rules. However, he did provide a urine specimen sufficient to be tested, but the collector required a quantity sufficient for the sample to be split for a second testing. It also argues that the Claimant's due process rights were denied when he was terminated without holding an investigation, a violation of Agreement Rule 13.

The Carrier rejoins that there was an insufficient quantity of urine for the sample to be split, and failure to provide an adequate sample is considered a refusal to test. The Claimant was withheld from service for medical reasons, to determine whether he had a medical condition which kept him from voiding an adequate sample.

The Carrier denies violation of Agreement Rule 13. It states that it properly used the Letter of Understanding dated June 24, 1991, and Section 7.9 of the Policy as instruments to dismiss the Claimant without holding an investigation. The Letter of Understanding dated April 1, 1990, states that the provisions of Rule 13 will not be applicable to employees who are placed on medical leave as a result of testing positive for a prohibited substance, but the Organization is provided an opportunity to present a claim on the Claimant's behalf.

The Carrier also argues that Section 7.9 of the Policy subjects employees to dismissal for failure to provide a urine specimen without a valid, verified medical explanation. It states that it has complied with all aspects of the Agreement, and has denied the Organization's appeal. The dispute therefore comes before this Board for its decision.

The Board has considered the record in this case and the arguments of the Parties. A threshold issue raised by the Organization is the Carrier's failure to hold an investigation within 30 days after the Claimant was held out of service, a possible violation of Agreement Rule 13(b). The Carrier asserts that Letters of Understanding dated April 1, 1990, and June 24, 1991, permit it to dismiss an employee without holding an investigation.

Similar issues were addressed by this Board at length in its Award Nos. 311, 312, and 313. The determinations made by this Board in those cases is incorporated herein by reference. An employee subject to dismissal under the provisions of Policy Section 7.9 may be terminated without an investigation, subject to appeal.

The Organization raises a compelling issue when it argues that the Carrier had no right to test the Claimant, because he violated no Carrier rules. Section 4.6.1 of the Carrier's Policy addresses "Cause Testing," and reads:

> BNSF employees are subject to BNSF testing at any time while on duty. Such testing is performed under BNSF authority, using BNSF company forms. Testing may include a urine drug screen and/or a breath alcohol test, as deemed appropriate by management. BNSF Cause Testing may be used whenever:
> - Any employee is involved in an accident, injury, near-miss or incident in which evidence indicates the employee's performance may have caused or contributed to the incident or its severity, and the employee exhibits any of the following behaviors:
>   1. Neglect of established safety or other BNSF procedures;
>   2. Errors in judgment and control;

The Board notices that the Claimant was assessed a 30-day suspension and three years' probation for occupying track in the control point at Chalender without authority on October 1, 2002. This finding refutes the Organization's contention that the Claimant violated no Carrier rules and, therefore, was not subject to "cause" testing.

The Organization's argument that the urine that was voided by the Claimant could have been tested is less compelling. The Carrier's Policy provides that all breath alcohol and urine collections will be performed according to procedures in 49 CFR Part 40. Section 40.65 of that Regulation requires that a urine specimen must contain at least 45 mL of urine:

§ 40.65 What does the collector check for when the employee presents a specimen?

As a collector, you must check the following when the employee gives the collection container to you:

(a) *Sufficiency of specimen.* You must check to ensure that the specimen contains at least 45 mL of urine.

(a)(1) If it does not, you must follow "shy bladder" procedures (see § 40.193(b)).

(a)(2) When you follow "shy bladder" procedures, you must discard the original specimen, unless another problem (*i.e.,* temperature out of range, signs of tampering) also exists.

(a)(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(a)(4) You must discard any excess urine.

Under the prescribed procedures, therefore, the collector cannot submit a specimen for testing which contains less than 45 milliliters.

The Carrier is correct in its contention that failure to provide a urine specimen without a valid, verified medical explanation subjects one to dismissal. The Claimant was unable to void 45 mL of urine after the passage of three hours and after being administered 40 ounces or water by mouth. Upon examination by a licensed physician and being given urodynamic studies, no medical or psychological disorder was found which precluded him from voiding a sufficient quantity of urine for testing in accordance with 49 CFR Part 40.

The Claimant's personal record appears in the documentation before this Board. It is not exemplary. Between 1990 and 2002, he has seven disciplinary entries, not counting the instant case, and one quality performance entry. In light of all the issues discussed above, the Board finds that failure or refusal to provide the required urine specimen, without a valid, verified medical explanation, is sufficient cause for dismissal; the "For Cause Test" was justified by the Claimant's rule violation; and that the 1990 and 1991 Letters of Understanding permitted the Carrier to dismiss the Claimant without an investigation.

The claim for the Claimant's reinstatement, for any time lost, and removal of the discipline from his personal record is denied. The Board has taken note of the Carrier setting an investigation at Flagstaff, Arizona, a point more than 600 miles from the Claimant's home in Madera, California, which was cancelled without advance notice when the Claimant reported in Flagstaff. This was an unnecessary trip, and a callous indifference to the Claimant's interests. He was

caused to expend money for gasoline, food, and lodging, as well as the time required of him to travel. It is beyond the scope of this Board's jurisdiction to order that reimbursement for these costs be paid to the Claimant, but it recommends that consideration be given to making up this discharged employee's losses as a humane act of fundamental fairness.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

February 2, 2004
Date