PUBLIC LAW BOARD NO. 4244

Award No. 322
Case No. 329

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, September 18, 2003, when it dismissed the Claimant, Mr. K. L. Minck, for allegedly violating the BNSF Policy on the Use of Alcohol and Drugs, a second time within a 10-years, when he tested positive for a controlled substance on August 5, 2003.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate the Claimant to service with benefits and seniority unimpaired and make him whole for all wages lost account of this violation. Additionally, the Carrier shall remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-03-0239. Organization File No. 140-13I2-0314.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. Karl L. Minck, was hired by the Carrier in its Maintenance of Way Department in 1978. On August 5, 2003, he was working as a Welder. As such, he was the possessor of a Commercial Driver's License, and was therefore subject to random testing for the presence of alcohol or drugs, pursuant to Federal regulations.

He was administered a random test on that date, and the result of that test disclosed the presence of cannabinoids in excess of the Federally prescribed confirmation cut-off level. Upon receiving the laboratory test results, the Carrier immediately removed the Claimant from service on August 14, 2003. Four days later, on August 18, 2003, he was served with a notice of charges and investigation by the Carrier's Division Engineer, which reads, in part, as follows:

Arrange to attend investigation at the Section Headquarters, 669-605 3rd Street, Westwood, CA, at 1300 hours on August 24, 2003, for the purpose of ascertain-

ing the facts and to determine your responsibility, if any, in connection with your alleged violation of the Carrier's Disciplinary Rules and Policy on the Use of Alcohol and Drugs by testing positive for a second time within a ten year period for controlled substance on August 5, 2003, at Westwood, CA.

In a separate communication dated August 14, 2003, to the Division Engineer with a copy to the Claimant, the Carrier's Manager Medical Support Services wrote, in part:

> The [Claimant's] Random test conducted on Tuesday, August 5, 2003, has revealed the presence of a controlled substance. This is the second time this employee has tested positive. This employee previously confirmed positive for a controlled substance on test date September 24, 1998.

The investigation initially set for August 24, 2003, was postponed, at the request of the Claimant's union representative, to September 5, 2003. Documentary evidence was presented which confirmed the postponements and the positive drug test. The Claimant testified in his own behalf, and presented no evidence to refute the fact of the positive test.

The Claimant's representative raised a time limit objection at the opening of the investigation, and renewed it in his closing summary. He cited Rule 40.B. of the applicable Agreement, which reads:

> B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor.

The representative noted that the Claimant was withheld from service on August 14, 2003, and the investigation was initially set for August 24, 2003. He contends that August 24 was the eleventh day after his removal from service.

On September 18, 2003, Roadmaster J. J. Palacios, the investigation's Conducting Officer, notified the Claimant that he was dismissed from the Carrier's employment for violation of its Policy on the Use of Alcohol and Drugs, for testing positive for a controlled substance for the second time within a ten-year period. Section 7.4 of that Policy was read into the record in the investigation:

> Employees who test positive for drugs or alcohol more than once in any ten (10) year period will be removed from service and subject to dismissal from employment with BNSF.

The Organization promptly appealed the Roadmaster's disciplinary decision to the Carrier's Labor Relations Department. The appeal was there denied and the dispute therefore comes before this Board for a final and binding decision.

The Organization argues that the Carrier failed to abide by the time limit in which to hold an investigation, prescribed in Agreement Rule 40.B., *supra*, and that the discipline is "extreme, unwarranted and unjustified," and "excessive in proportion to the charges."

The Carrier responds that substantial evidence was developed to prove the charge, and denies any violation of the Agreement. It states that the investigation was scheduled for August 24, 2003, the tenth day after the date withheld from service.

Clearly, the result of the random drug test was positive for cannabinoids, indicating the probable use of marijuana. The record shows that this was the Claimant's second positive test result in less than ten years. The only issues which remain in dispute are the time limits of Agreement Rule 40.B., and whether the penalty assessed is excessive.

The Board believes the investigation was scheduled to be held within the time limits of Agreement Rule 40.B. The accepted practice in contract interpretation, in arbitration, and in the courts is to exclude the first day and include the last, when counting time limit rules and statutes. This can be illustrated by these rules of procedure:

U.S. Department of Labor, Rules of Practice and Procedure, 29 CFR § 18.4(a)

> (a) In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, . . .

Federal Rules of Appellate Procedure, Rule 26

> The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:
> (1) Exclude the day of the act, event, or default that begins the period.
> (2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.
> (3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday . . .

Alabama Civil Judicial Rules and Procedures, Rule 6(a)

> (a) In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday, . . .

By these rules and statutes, the accepted count in the instant case would have worked out as follows, the "event" being the Claimant's removal from service pending investigation:

August	14	15	16	17	18	19	20	21	22	23	24
	Event	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6	Day 7	Day 8	Day 9	Day 10

In this regard, the decision in the National Railroad Adjustment Board's Third Division Award 19177, quoting from Second Division Award 3545, is instructive:

> "The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last day, that is, the day on which the act is to be done * * *" 86 Corpus Juris Secundum 13(1). "The words 'from' and 'after' are frequently employed as adverbs of time, and when used with reference to time are generally treated as having the same meaning." Ibid, 13(3). "Thus, if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the generally recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and similarly, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the count." Ibid, 13(7).
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> We think the foregoing method of computing time is the only reasonable applicable of the agreement language in question. If the agreement required that timely appeal from the Carrier's decision must be made within one day from the date of said decision, it would be illogical to hold the appeal must be taken on the same day as the denial. If the Carrier's decision were presented by mail, such an interpretation would deprive the Organization of any effective right of appeal. If the prescribed appeal period were 5 days, this interpretation would in fact afford only 4 days for appeal.

The Board holds that the time limit in Agreement Rule 40.B. was complied with. The evidence is clear and convincing that the Claimant tested positive for the second time within a ten-year period. His personal record of disciplinary events precludes the Board from granting the relief sought by the Organization. The claim is denied.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

3/10/04
Date