PUBLIC LAW BOARD NO. 4244

Award No. 334
Case No. 341

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 March 4, 2004, when it dismissed the Claimant, Mr. M. A. Espinoza, for allegedly violating Maintenance of Way Operating Rule 1.5; BNSF Policy on the Use of Alcohol and Drugs, a second time within 10-years; and BNSF policy on Employee Performance Accountability, when he tested positive for alcohol in a follow-up test on February 27, 2004.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service, remove any mention of this incident from his personal record, and make him whole for any wages lost account of this incident. [Carrier File No. 14-04-0053. Organization File No. 50-13I2-044.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. Michael A. Espinoza, became employed by the Carrier in its Maintenance of Way Department in 1975. On June 18, 2003, he was required to undergo a reasonable cause test for the use of alcohol and/or drugs. A urine specimen taken at that time disclosed the presence of a cocaine metabolite in excess of the confirmation cut off level prescribed in the applicable Federal Regulations.

Provisions of the Carrier's Employee Assistance Program permit employees who test positive for the first time to be placed on a leave of absence for the purpose of evaluation, treatment, and education. If they are determined to be free of a mental or physical disorder, and can pass a return-to-work drug/alcohol test, they will be permitted to resume work, subject to follow-up testing from time to time.

The Claimant apparently completed the necessary requirements, and was reinstated to service on August 22, 2003. He was thereafter subject to periodic testing for a period of five years. The Carrier's Policy for Employee Performance Accountability ("PEPA") provides that more than one confirmed positive test either for any controlled substance or alcohol during any ten-year period subjects an employee to dismissal.

On February 27, 2004, the Claimant was required to submit to a follow-up test, and a breath alcohol test yielded a breath alcohol concentration of 0.074% on the screening level and 0.082% on the confirmation level. Either reading exceeds the allowable breath alcohol concentration of 0.020% prescribed by the Carrier's rules and the U. S. Department of Transportation's Regulations. This occurring just six months after his return to service in 2003, he was sent a letter by the Carrier's Division Engineer on March 4, 2004, reading as follows:

> I have been advised by the Carrier's Medical Department, that you have violated the Carrier's Policy on the Use of Alcohol and Drugs by testing positive for alcohol, during a follow up drug and alcohol test on February 27, 2004. Furthermore, Carrier records disclose that this is the second in a ten year period that you tested positive under the Carrier's policy. The first violation occurred on June 18, 2003, when you tested positive for Cocaine.
>
> In accordance with Carrier's stated policies and practices, Carrier shall dismiss from service employees who have more than one confirmed positive test for alcohol or a controlled substance, obtained under any circumstances, during any 10-year period. Therefore, effective immediately the Carrier is terminating your seniority and employment with the Burlington Northern Santa Fe Railway.
>
> Pursuant to Letters of Understanding dated June 24, 1991, and December 29, 2003, between the Carrier and the Brotherhood of Maintenance of Way Employees [*sic*]; if you dispute this action, a claim for your reinstatement may be filed on your behalf within sixty (60) days from the date of this letter.

A claim was promptly and timely submitted by the Organization, which argues that the Letter of Understanding dated June 24, 1991, cited by the Division Engineer, was only intended to amend an earlier Letter of Understanding dated April 1, 1990, because the Carrier had reduced the period from 90 days to 45 days within which an employee must provide a negative test result, following the first-time positive result. The Organization further argues that the Letter of Understanding dated June 24, 1991 was not intended to be used as an instrument to dismiss employees without an investigation, nor to endorse the Carrier's Policy on the Use of Alcohol and Drugs. The Organization concludes that the Carrier acted improperly in terminating the Claimant under the Drug/Alcohol Policy, it being a rule outside the terms of the Collective Bargaining Agreement.

The Organization also contends that the Carrier violated Agreement Rule 13 when it denied the Claimant his right to an investigation. It cites several Awards of the National Railroad Adjustment Board holding that Agreement rules prevail over a carrier's operating rules, and an investigation is required before discipline is administered.

The Carrier responds that the breath alcohol test results clearly show that the Claimant twice tested positive for alcohol and a controlled substance within a ten-year period. It further contends that it properly used the provisions of the two Letters of Understanding, which permit it to dismiss an employee without holding an investigation, although the Organization has an opportunity to present a claim on the employee's behalf. The discipline was within the scope of the Agreement and the PEPA.

The Carrier denied the Organization's claim, and the dispute has been referred to this Board for its decision, based on the record.

The Organization does not contest the validity of the breath alcohol test results, which indicate in the February 27, 2004, follow-up test, the presence of breath alcohol in excess of the Carrier- and Federally-prescribed concentration of 0.02%. The only issues before the Board are whether the Claimant was improperly denied an investigation, whether the Maintenance of Way Operating Rules, the Drug/Alcohol Policy, and the PEPA are superseded by the Collective Bargaining Agreement, and whether the discipline is excessive.

Rule 13, the Discipline Rule, in the Parties' Agreement, reflects a universally fundamental right of represented employees in the railroad industry: "[N]o employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation." The Parties, however, over a period of years, have entered into letters of understanding which provide exceptions to the pre-discipline investigation requirement. For example, in 1979, they reached an understanding that an employee who accumulates 60 or more demerits might be terminated without holding an investigation, provided the Carrier notifies the employee and the Organization of each instance in which demerits were assessed. This letter states that the employee's only recourse is the processing of a claim.

The April 1, 1990 Letter of Understanding reads as follows:

> It is agreed that, effective April 1, 1990, the provisions of Rule 13 will not be applicable to employees who are placed on medical leave of absence for sixty (60) days as a result of testing positive for a substance prohibited by Carrier's rules, and who, during the sixty (60) day period, fails to furnish a negative urine sample. Such employee will be notified in writing by certified mail, return receipt requested, after the sixty day period has expired of the termination of his seniority and employment. The written notice shall contain an adequate statement of the

circumstances resulting in the employee's termination of employment. Copy of this letter will be furnished to the General Chairman together with copy of the letters written by Carrier's Medical Director to the employee.

It was also understood that the above will not preclude the filing and progression of claim filed on the employee's behalf for reinstatement which must be submitted to this office within 60 days from the date he is notified of termination of his employment.

Clearly, this Letter of Understanding permits the Carrier to terminate an employee who fails to provide a negative urine specimen during the period of his medical leave of absence, subject only to the outcome of a claim filed on his behalf. The Organization's General Chairman signified his concurrence by affixing his signature to this letter. When it was agreed that "the provisions of Rule 13 will not be applicable," the Parties thereby agreed to waive all the terms of that Rule, including the provision that employees may not be disciplined without first being given an investigation.

Then, on June 24, 1991, the Parties executed another Letter of Understanding, which was referred to in the Division Engineer's letter to the Claimant dated March 4, 2004. (See page 2, *supra*). It reads:

This will confirm our understanding reached on June 20, 1991, in connection with the application of Rule 9.0 of the Santa Fe's "Policy On Use Of Alcohol and Drugs" which became effective March 1, 1991, and which all Santa Fe employees were notified by letter dated February 1, 1991, which reads as follows:

[Santa Fe's Rule 9.0 has been supplanted by Section 7.9 of the Policy, but its provisions are substantially the same].

Effective June 1, 1991, an employee who is subject to dismissal under the aforequoted [*sic*] provisions of Rule 9.0 shall be notified in writing by Certified Mail, Return Receipt Requested, to the employee's last known address, copy to the **General Chairman**, of termination of his seniority and employment. The notice shall contain ad [*sic*] adequate statement of the circumstances resulting in the employee's termination of employment.

It was also understood that the above will not preclude the filing and progression of claim filed on the employee's behalf for reinstatement which must be submitted to this office within 60 days from the date he is notified of termination of employment.

The Letter of Understanding dated April 1, 1990, will remain in effect.

If the above correctly reflects our understanding of the manner in which Rule 9.0 cases will be handled, please indicate your concurrence by affixing your signature on the line provided below.

The Organization's General Chairman signified his concurrence by affixing his signature to this letter.

The Board has compared these two Letters of Understanding and considered the Parties' respective arguments. The only essential differences in the two Letters are (1) the circumstances which could result in an employee's summary termination, and (2) the reference to Agreement Rule 13 in the first Letter and its omission in the second Letter.

Although the second Letter, unlike the first, does not contain the phrase, "[T]he provisions of Rule 13 will not be applicable," the Board has to consider whether it was intended, that Rule 13 should be applicable to those employees who are the subject of the second Letter. The Carrier argues that the reference to the first Letter in the second Letter — "The Letter of Understanding dated April 1, 1990, will remain in effect" — determines that no investigation is required. The Neutral Member does not find the issue disposed of so easily.

If, however, the Parties intended in the second Letter to retain the provisions of Rule 13, the Board is caused to question why the second Letter was written at all. If Rule 13 were intended to be applicable under the circumstances described in the Letter of Understanding dated June 24, 1991, the provisions for notice, an adequate statement of the circumstances, and the manner of filing and progressing a claim, with its attendant time limits, would not be necessary. Furthermore, there is no plausible reason why an investigation would be required before termination in the one instance, and not required in the other. One would expect to find consistency among the Agreement's various parts. The Board holds that an investigation is not required under the circumstances provided for in the Letter of Understanding dated June 24, 1991.

The Board notices, in passing, that a third Letter of Understanding dated December 29, 2003, addresses changes in numbering and placement of the Maintenance of Way Operating Rules, the Drug/Alcohol Policy, and the PEPA. It indicates that certain provisions in the Drug/Alcohol Policy have been incorporated, intact, into the PEPA. This Letter of Understanding and concludes with the following paragraphs:

> Therefore, this letter will confirm the Party's understanding that the intent of the June 24, 1991 Letter of Understanding will remain intact as long as the Rule exist [*sic*], regardless of its location or numbering.

If the above correctly reflects our understanding of the June 24, 1991 Letter of Understanding, please sign where indicated.

The signatures of representatives of both the Carrier and the Organization are affixed, indicating their concurrence.

The next issue before the Board is whether a Carrier-promulgated Rule, such as those provisions in its Drug/Alcohol Policy and PEPA, are superseded by the Rules in the Parties' Collective Bargaining Agreement. The Organization quoted Third Division Award 15590, which reads, "We have ruled on many occasions that agreement rules prevail over operating rules when there is a conflict." In that case, an agreement rule provided that an employee had no right to claim work on the sixth or seventh day of his work week. The carrier's rule required employees subject to call to be in place where they could be contacted. When the carrier attempted to call that claimant on the sixth or seventh day of his work week, and he was unavailable, he was charged with a rule violation. The Third Division held that he was not required to be available on those days, notwithstanding the carrier's operating rule, because he had no right to claim work on those days, in accordance with the agreement's rule.

In the instant case, the Board has considered whether any Agreement rule "prevails over" the Carrier's Drug/Alcohol Policy and PEPA. Rule 13 is such an Agreement rule. Employers have the right to promulgate rules for the guidance of their employees. The Drug/Alcohol Policy and PEPA are such rules. When an employer enters into a Collective Bargaining Agreement with its employees' designated representative, however, that Agreement may modify or even supercede the employer's rules if there is a conflict. With respect to these Parties, Agreement Rule 13 provides such a modification. As to a specific application, the PEPA provides that an employee is "subject to dismissal" for certain specified offenses. But the Carrier's right to dismiss is superceded by Agreement Rule 13, to the extent that "[N]o employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation." As it happens, however, as the Board observed above, the Parties agreed, in 1991, to forego the requirement that an investigation be held before discipline is imposed. Therefore, in a case of this kind, the Carrier is not precluded from summarily dismissing an employee, but the Organization retains the right to file and progress a claim disputing the Carrier's action. That is exactly what has been done here. The Board finds no Agreement rule which prevents the Carrier from dismissing an employee for violation of the conditions found in Appendix C, Section 4, of the PEPA: "[S]econd positive test within 10 years."

The final question which remains is whether the discipline is excessive. The Board finds that the Claimant was clearly put on notice in the Carrier's Drug/Alcohol Policy that he would be subject to periodic testing after his return to service on August 22, 2003. When he tested positive for the presence of alcohol some six months later, he violated provisions of the Carrier's PEPA,

which subjects employees to dismissal for "More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period."

He was tested in compliance with the regulatory requirements of the U. S. Department of Transportation. The Carrier's Drug/Alcohol Policy is consistent with those and other Federal regulations pertaining to drug and alcohol use in transportation industries. The Board has no reasonable grounds to sustain the Claim; it will be denied.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

OCT 19 2004
Date