

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 232

CASE NO. 232

PARTIES TO  
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings

STATEMENT OF CLAIM:

“Request on behalf of Southern California Division Conductor M. P. Magdalinski that the dismissal from service and the alleged violations of Rules 9.3 and 9.5 of the General Code of Operating Rules, Fourth Edition, effective April 2, 2000, be removed from the personal record of Claimant and for his reinstatement to the service of the BNSF Railway Company, Coast Lines, with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare benefits beginning May 30, 2002, and continuing until returned to service as a result of the investigation conducted on July 24, 2002 with no deductions for outside earnings during this period.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for a red signal violation that occurred on May 29, 2002. At the time of his dismissal, Claimant had just over five years of service. Prior to the date of the signal violation, his work record contained only two disciplinary events. Both of them, in July of 2001 and February of 2002, were attendance infractions.

The probable cause drug test administered in connection with the red signal violation detected the presence of marijuana metabolites in Claimant's urine sample. Claimant admitted the offending marijuana usage and waived formal investigation. He was assessed a Level S conditional suspension in accordance with Carrier's policy for dealing with first infractions of the Drug and Alcohol Rule.

Because of the disposition of Claimant's drug test failure, the issue before this Board is limited to signal violation. In addition to Claimant's admission that the signal for Track 3 was mis-read as the signal for Track 2, our review of the record discloses substantial evidence in support of the Carrier's finding that the signal rules were violated.

The Organization raised several procedural arguments during the handling of this case. With one exception, we find they must be rejected for lack of merit. The one surviving procedural

contention arises out of a Memorandum of Agreement (“MOA”) between the Carrier and the Organization effective April 18, 2002 that established a process for the “alternative handling” of many disciplinary situations.

Although alternative handling of the signal violation was requested for Claimant, the Carrier refused to provide it to him. Carrier denied the request because there were two Level S violations involved in the incident (the drug test failure and the signal violation) as well as a previous disciplinary entry in the Claimant’s personal record.

For the following reasons, the Board finds that the Claimant should have been afforded the opportunity to participate in alternative handling. First, the drug test failure is specifically excluded from alternative handling and was, in fact, separately disposed of in accordance with the Carrier’s drug and alcohol policy addressing first time offenders. Second, the signal rule violation has been recognized by this Carrier to be a violation that qualifies for alternative handling under the MOA subject only to the ineligibility exceptions listed therein. Third, the Organization correctly argues that the drug test failure is inextricably intertwined with the signal violation in that the drug violation may well have been a contributing factor to the signal infraction. Finally, the “third” violation on Claimant’s personal record occurred prior to the effective date of the MOA; therefore, it should not have been considered as an event rendering Claimant ineligible for the application of that agreement. The MOA explicitly provides that events prior to the effective date of the MOA “... will not be used to determine eligibility for alternative handling.”

Per the MOA, the signal violation, standing alone, qualifies for alternative handling as a Class I offense under Part I, VI, A (i) in that failure to observe a signal indication violates a rule designed to “... protect people and equipment ...” The question thus turns to whether the Claimant was entitled to alternative handling for the signal rule violation notwithstanding the concurrent drug and alcohol policy violation and the previously existing entries in his personal record.

Part I, VI, B of the MOA defines employee eligibility for alternative handling and also lists, in subparagraph (i), the conditions that make an employee ineligible. The subparagraph reads as follows:

- (i) Class I offenses – an employee is ineligible for alternative handling if he/she has: (1) more than three prior alternative handling events for Class I violations, (2) three violations of any kind in the previous 12 months, (3) a Class I violation in the previous 12 months, or (4) a violation of the same Class I offense in the previous 24 months.

Reviewing the facts of this record in light of the unambiguous MOA language, we cannot find that Claimant fit any of the ineligibility criteria that would have disqualified him for alternative handling. He had no prior alternative handling events for Class I violations. He did not have three violations of any kind in the previous 12 months; indeed, his prior record was forgiven by the explicit terms of the MOA. He did not have any Class I violations in the previous 12 months. Finally, he did not have any violations of the same Class I offense in the previous 24 months. Thus, the Carrier’s refusal to extend alternative handling to Claimant when requested was incorrect.

However, the Organization also erred. While it has been the Organization’s position

throughout the handling of this dispute on the property that the Claimant was entitled to alternative handling, it appears that it did not properly comply with the applicable requirements. The MOA establishes a specific dispute resolution process in Part II, VII. That process obligates the Organization to resolve any dispute not disposed of locally by requesting a conference with the "... line AVP or his/her designee." The record does not show that the Organization satisfied this procedural requirement.

The foregoing conclusion is not altered by the Organization's contention that the procedure applies only when there is a dispute concerning the structure of an alternative handling process and not employee eligibility. The preamble to Section VII specifically states:

Disputes may arise between the parties regarding issues such as whether a particular employee is eligible for alternative handling, appropriateness of a specific alternative handling plan, safety coordinator duties or safety committee handling. In the event such disputes cannot be resolved locally, the following process will be followed:

(Underscoring supplied for emphasis)

While the Organization asserts procedural error and asks this Board to sustain the Claim on that basis, two important facts are unmistakably clear: The Claimant was entitled to alternative handling, but the Organization did not procedurally preserve that right as required by the MOA. As a result, while two wrongs do not always make a right, on this record, both parties committed error and the Claimant is caught in the middle.

Certain other features of the MOA call for some discussion at this point. While the MOA speaks in terms of Class I violations, it is noted that the MOA contemplates that Level S offenses, as defined under the Carrier's prior discipline policy, are equivalent to Class I violations. It is recognized that the prior discipline policy continues to run concurrently for application to employees ineligible for alternative handling. In general terms, the Carrier has significant latitude to determine eligibility for alternative handling and is restricted only to the extent specifically identified in the MOA. If the Organizations disagrees with the Carrier's decision, it must comply with the dispute resolution process contained in the MOA.

In this case, however, the Level S drug and alcohol policy violation and the signal violation were part of the same incident. It is not unreasonable to conclude that the one violation may have had a causal influence on the other. That may have led to confusion. To find that these were two distinct violations subject to the doctrine of progressive discipline could lead to abuse. Stated another way, the nature of Carrier's rules is such that any single course of conduct could arguably be in violation of several rules. This could lead to multiple charges filed for a single event that could be interpreted as rendering an employee ineligible for alternative handling. Our reading of the MOA shows that it contemplated that ineligibility decisions would focus primarily on the pre-existing disciplinary record of the employee. The MOA did not contemplate that multiple violations arising out of a single course of conduct would, in and of themselves, negate the eligibility terms of the MOA and, perhaps, also thwart the doctrine of progressive discipline and its objective of employee rehabilitation.

We are mindful of the fact that the MOA was very new at the time of Claimant's infraction. It was just over one month old and represented a significant departure from the traditional handling of many disciplinary situations. It is likely that local officials from both the Carrier and the Organization were not thoroughly familiar with their respective rights and responsibilities under the MOA when this dispute arose. Against this backdrop, however, we must recognize that Claimant's signal rule violation constitutes very serious misconduct. There could have been a catastrophic collision resulting in serious personal injury or death as well as substantial property damage. Accordingly, the Carrier is entirely within its rights to expect its employees to be drug and alcohol free and to perform their duties in strict compliance with applicable rules. Significant discipline, therefore, is appropriate.

In light of the foregoing discussion, the unique record before us calls for a modification of Claimant's discipline. Claimant is to be offered reinstatement to service, with seniority and other rights of employment unimpaired, but without back pay for time lost and without any other economic benefits or payment of any kind, including that associated with Health and Welfare Benefits, for the time he has been out of service. Further, if Claimant accepts reinstatement, he shall be subject to evaluation by Carrier's Employee Assistance Program's (EAP) administrators and shall comply with any and all programs and/or directions deemed appropriate by EAP both prior to and subsequent to actual reinstatement to active service.

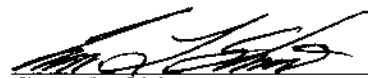
Given the unique nature of this record, this award shall not set a precedent for the handling of future similar matters nor shall it be cited in connection with such future disputes.

AWARD:

The Claim is sustained in accordance with the Findings.

  
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 Gerald E. Wallin, Chairman  
 and Neutral Member

  
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 Rick Marceau,  
 Organization Member

  
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 Gene L. Shire,  
 Carrier Member

DATE: 3-4-04