

PUBLIC LAW BOARD NO. 4901

AWARD NO. 127

CASE NO. 127

PARTIES TO  
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained.

DATE: November 2, 2000

STATEMENT OF CLAIM:

“Request in behalf of Valley Division Yardman D. E. Cowger for removal of the Level 6 Dismissal from service, and the alleged violations of Rules 1.3.1, 1.13, and 1.5 of the General Code of Operating rules, Third Edition, effective April 10, 1994 and Rules 6.2 and 12.0 of the Santa Fe Policy on Use of Alcohol and Drugs dated January 1, 1995, concerning Yardman D. E. Cowger allegedly testing positive for substance abuse for a second time on January 2, 1996, from his personal record and that Yardman D. E. Cowger be reinstated to the service of The Atchison, Topeka, and Santa Fe Railway Company, Coast Lines, now the Burlington Northern Santa Fe 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 on February 5, 1996, and continuing until returned to service.”

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.

A urine sample Claimant provided on January 2, 1996 allegedly tested positive for cocaine metabolites. It is undisputed that Claimant had previously tested positive for D-methamphetamine

usage in March of 1995. At the time of the 1996 drug test, Claimant held the exempt position of Trainmaster. Although Claimant held Yardman seniority under the Agreement, he had been working in the exempt position continuously since February 2, 1990.

According to the record, Carrier received the results of a re-test on Claimant's sample on February 5, 1996 and issued Claimant a notice of dismissal from his Trainmaster position that same date. However, it was not mailed from Fresno until February 28, 1996 and Claimant did not receive the notice until March 4, 1996. Claimant sent a certified letter to Carrier dated March 8, 1996 expressing his desire to mark up at Richmond, California by exercising his Yardman seniority that he still retained under the Agreement. Carrier admits that its dismissal of Claimant from the Trainmaster position did not adversely affect Claimant's ground seniority. Carrier never responded to Claimant's March 8, 1996 letter.

It is undisputed that Carrier did not allow Claimant to use his ground seniority to mark up until late May of 1996. By letter dated May 28, 1996, Carrier said that it would allow Claimant's request to exercise his seniority if he met three listed conditions: Passing a physical exam, completing Form 1690-A within five days, and passing the 1690-R rules examination with a score of 90% or more. While Claimant was still in the process of satisfying the three conditions, Carrier notified Claimant to attend a formal investigation regarding the January 2, 1996 drug test. The notice was dated May 31, 1996 and set the initial date for the investigation for June 7, 1996. A postponement requested by the Organization delayed the investigation until June 25, 1996. By letter dated July 19, 1996, Carrier notified Claimant that he was dismissed for rules violations arising out of the allegedly positive drug test from the previous January.

While the Organization and Claimant raise a number of contentions in this dispute, they assert, as a threshold matter, that Carrier was foreclosed from taking any disciplinary action connected with the January 1996 drug test by the operation of Article 24(a) and 24(f)(D)(6) of the effective Agreement. Those rules read, in pertinent part, as follows:

#### **ARTICLE 24 INVESTIGATIONS**

(a) A yardman shall not be dismissed from the service of the Company or otherwise disciplined without a formal investigation . . . Investigations will be held promptly but in any event not later than thirty (30) days as amended, from

the date of occurrence of the incident to be investigated, except when a yardman or material witness is unable to attend an investigation because of sickness or injury the investigation may be deferred until such time as the yardman or material witness is able to attend the investigation. A yardman may be suspended pending investigation in aggravated cases, such as serious collision.

\* \* \*

(f)(D)(6) If there is a failure to comply with the time limit provision of this agreement by either party, the matter shall be considered closed, and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of either party for the handling of other similar discipline cases.

\* \* \*

In support of its position, the Organization asserts that Claimant was dismissed without the benefit of a formal investigation held within the 30-day time limit mandated by Article 24(a) of the Agreement.

The Carrier counters the Organization's position on the grounds that Claimant was not released to exercise his seniority until May 28, 1996. Because of the seriousness of Claimant's conduct, it would not have been appropriate to release him sooner. Carrier notes that the formal investigation was, therefore, scheduled within the applicable time limit.

Carrier also points out that Claimant initially explored the potential benefits associated with resigning from Carrier's service after his Trainmaster dismissal. Carrier sees this as another factor supporting its decision to prevent Claimant from exercising his ground seniority earlier.

Our careful review of the entire record developed by the parties on the property fails to disclose the necessary support for Carrier's position regarding Article 24. Carrier has not cited any Agreement provisions nor has it provided any binding practice evidence or prior precedent to uphold its position.

The role of a Public Law Board is a very limited one. Our review of a dispute is limited to examining the record developed by the parties on the property. In fulfilling this role, we may not create and impose any new Agreement provisions that the parties have not, themselves, collectively bargained, nor may we ignore the Agreement provisions that they have negotiated. We are limited to applying their Agreement as they have written it.

As it pertains to this dispute, the language of Article 24 is clear and unambiguous.

Claimant's initial expression of interest in resignation did not, nor could it have under the circumstances, constitute an authorized modification of that clear and unambiguous language.

Pursuant to Article 24(a), Carrier had two, and only two, options after it received knowledge of the re-test results on February 5, 1996: First, Carrier could have scheduled a formal investigation to be held within the 30-day time limit; second, Carrier could have sought an extension of the time limit to permit delaying a formal investigation. Carrier did neither. Accordingly, Article 24(f)(D)(6) was automatically activated on the 31st day after February 5, 1996. As a result, this matter became considered closed and settled without any disciplinary action. In practical effect, when Carrier chose not to take any action available to it in a timely manner, Carrier waived all rights to take disciplinary action against Claimant for the alleged results of his January 1996 drug test. The same result obtains even if the running of the time limit is measured from March 8, 1996, the date Claimant notified Carrier of his desire to exercise his ground seniority.

Given the fact that the parties closed and settled this matter without disciplinary action, by operation of their Agreement, this Board is compelled to find that Carrier's later attempt to conduct an investigation and dismiss Claimant was entirely invalid. Hence, Claimant's purported dismissal must be overturned. As a result of this finding, we do not reach any of the other issues raised in the parties' submissions.

The remedy aspects of this dispute require some brief discussion to place the situation in its proper context. It must be remembered that Claimant has been wrongfully deprived of employment with Carrier for over four years. When removed from service on February 5, 1996, there is no evidence to show that Claimant was not fully proficient on applicable Yardman duties, working rules and methods. He should have been able to exercise his ground seniority and immediately return to Yardman service. Given the length of the interruption in Claimant's employment, it would not be surprising if he has lost considerable proficiency in these areas. Under the circumstances, Carrier must bear the responsibility for any such loss of proficiency.

In light of the foregoing, the remedy has two aspects. First, Carrier is directed to offer Claimant reinstatement to a Yardman employment status commensurate with his seniority and other rights under the Agreement assuming he is physically qualified to resume such status. If Claimant accepts Carrier's reinstatement offer, he shall receive compensation commensurate with

his status immediately upon reporting for duty and continuing as long as he makes reasonable progress toward regaining the level of proficiency necessary, in Carrier's determination, to assume such status in active service. In this regard, the Board contemplates that Claimant will be reemployed and receiving pay as well as other economic benefits under the Agreement even though Carrier may withhold him from active Yardman service due to lack of proficiency. Carrier is also directed to provide such training and other appropriate assistance to Claimant as is reasonably necessary to counteract the deleterious effects of the four-year interruption in Claimant's employment. The provision of such assistance is a factor to be considered in resolving any dispute over whether Claimant is making reasonable progress toward regaining the requisite level of proficiency. If Claimant fails to make reasonable progress toward regaining the necessary level of proficiency, Carrier may remove Claimant from active payroll status and pursue any disciplinary action as may be appropriate to the circumstances. If Claimant is temporarily not physically qualified to return to Yardman service, the effective date of Carrier's reinstatement offer may be delayed until Claimant is physically qualified. If Claimant declines Carrier's reinstatement offer or is permanently disqualified physically from performing Yardman duties, then Carrier has no further obligation under this award to reemploy Claimant in any capacity whatsoever. Any disputes regarding Claimant's physical qualification shall be resolved in accordance with the provisions of the parties' Agreement, if any, or by this Board upon retained jurisdiction in the absence of such Agreement provisions.

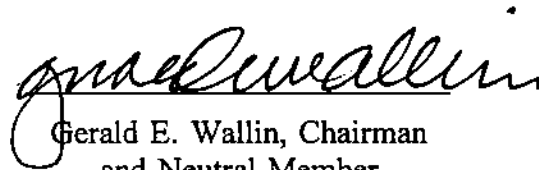
Second, Carrier is directed to make Claimant whole for all losses from February 5, 1996 to the date Claimant is reinstated to a Yardman employment status in accordance with the previous paragraph, the date Claimant declines Carrier's reinstatement offer, or the date Claimant became permanently disqualified physically from returning to Yardman service, whichever is earlier. In this regard, the make whole remedy contemplates back pay and other benefits only for the time Claimant was physically capable of performing Yardman duties. This make whole remedy may exclude back pay for such period(s) of temporary or permanent disqualification. Carrier may offset against any back pay compensation due Claimant under this make-whole remedy any amounts received from other employment or unemployment compensation benefits. In addition, Carrier may offset any compensation attributable to the delay, if any, between the date of Carrier's reinstatement offer to Claimant and the date Claimant reports for reemployment


by Carrier. The make-whole remedy described here is due and payable to Claimant regardless of whether Claimant accepts Carrier's reinstatement offer or regains the proficiency level necessary to be released to active Yardman service.

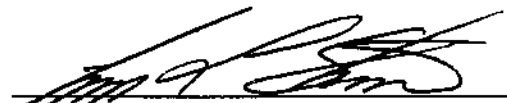
The Board retains jurisdiction to resolve any disputes related to the remedy aspects of this Award to the extent the parties' Agreement does not control.

AWARD:

The Claim is sustained in accordance with the Findings.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
P. L. Patsouras,  
Organization Member

  
Gene L. Shire,  
Carrier Member

*Concur with decision  
to reinstate Claimant  
and make whole for all  
losses. Dissent to  
offset of outside earnings.*