

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 15
Claim of M. D. Webster
Dismissal: Testing
Positive for Alcohol

STATEMENT OF CLAIM: Claim on behalf of M. D. Webster, for reinstatement to service with payment for all lost wages, account Carrier violated the current Yardmen's Agreement when it imposed the excessive discipline of dismissal against the Claimant as a result of an investigation held on August 14, 2003, without meeting the burden of proving the charges.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on December 9, 2004, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant was first employed by the Carrier on April 28, 1997. At the time of this dispute, Claimant was assigned to the position of Brakeman. On March 22, 2001, Claimant tested positive for alcohol during a probable cause testing. Pursuant to Rule 7.7 (Waivers) of Carrier's Policy on the Use of Alcohol and Drugs, Claimant waived his right to an investigation, successfully completed the required EAP Program and was returned to service on June 5, 2001.

Claimant's reinstatement agreement included a provision that he remain alcohol and drug free and that the Carrier had the right to perform random follow-up testing, both in accordance with the Carrier's Policy on the Use of Alcohol and Drugs (Car. Ex. 1, pp. 34-36), which states, in pertinent parts:

4.8 Follow-up Testing. Employees permitted to return to work following a violation of this policy, [sic] will be required to participate in follow-up testing as determined appropriate by a Substance Abuse Professional (SAP). . . . The tests may

include a urine drug screen and/or a breath alcohol test for a period of up to five (5) years.

* * *

7.4 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 . . .

* * *

7.9 Dismissal. Any one or more of the following conditions will subject employees to dismissal:

- More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period.

At the beginning of Claimant's day shift assignment, at approximately 0730 hours on July 4, 2003, minutes after Claimant said he took a breath strip after drinking coffee, Carrier arranged for a random follow-up drug and alcohol test. The first Breathalyzer test was administered to Claimant at 0810 hours with a resulting Breath Alcohol Content of 0.043. A second Breathalyzer test was administered to Claimant at 0830 hours with a resulting Breath Alcohol Content of 0.038 (Car. Ex. 1, p. 39).

As a result of this incident, by letter dated July 21, 2003 (Car. Ex. 1, p. 31), Claimant was directed to attend a formal investigation concerning the report of his having tested positive for alcohol on July 4, 2003, a possible violation of Sections 7.4 and 7.9 of the Policy on the Use of Alcohol and Drugs. After one postponement requested by the Organization, the Carrier convened an investigation, which was held on August 14, 2003, at which the evidence described herein was adduced. Claimant was found guilty of the charges brought against him; and he was dismissed from service August 27, 2003.

The instant claim for Claimant's reinstatement and payment for any time lost while attending his investigation, was presented in due course and progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that the record contains substantial evidence that Claimant tested positive for alcohol, thereby violating Sections 7.4 and 7.9 of its Policy on the Use of Alcohol and Drugs, and meeting its burden of proof. It contends that the discipline assessed was commensurate with the offense and that no change should be made in its decision.

The Carrier argues that, as a result of a prior positive test for alcohol, Claimant was properly subjected to a follow-up test on July 4, 2003. It contends that the follow-up test demonstrated that Claimant failed to comply with the obligations of his reinstatement agreement to remain alcohol and drug free. It maintains that Claimant was administered the follow-up alcohol and drug test in the usual and customary manner, that an independent tester met Claimant when he reported for service, administered two Breathalyzer tests, waiting the required amount of time between tests; and the results conclusively demonstrated that Claimant tested positive for alcohol.

The Carrier argues that the Organization made no claims, on the merits, to support its case. As to the procedural points raised by the Organization, the Carrier asserts that they are without merit. With regard to its alleged failure to provide information which the Local Chairman requested prior to the investigation, it maintains that the Agreement between the Parties has no provision for discovery. It contends that it allowed both Claimant and his representative time at the hearing to review and ask questions about documents entered as exhibits at the investigation but that, if the Organization desires the right to discovery, it must negotiate that right rather than obtain it through arbitration. With regard to the technician not attending the investigation as a witness, the Carrier contends that it entered all documents showing the test results into the hearing record and Claimant's representative was permitted to ask questions concerning the results. It notes that Claimant did not assert that the Breathalyzer tests were improperly conducted or that the test results were not his. As for the insinuation that the tester did not properly calibrate the equipment or do so in front of Claimant to assure him that it was functioning properly, the Carrier contends that the evidence showed that the Breathalyzer was properly calibrated prior to the test (Car. Ex. 1, pp. 37 and 38) and there is no requirement that equipment be calibrated in front of the testee.

The Carrier rejects the Organization's claim that the tester failed to wait 20 minutes after Claimant placed a mouth strip in his mouth, pointing out that Claimant used the mouth strip prior to his being called for the test at 0730 hours and the first test was

not administered until 0810 hours, some 40 minutes later, and the second test 20 minutes after that. Additionally, it contends that there is no medical data to support the Organization's claims concerning Listerine breath strips (noting that Claimant did not actually take a Listerine breath strip but something like a Listerine breath strip) and that one strip would not register the levels shown by Claimant's alcohol test.

Finally, the Carrier argues that, with regard to Claimant having been withheld from service pending investigation, Article 24 is a standard contractual provision providing that employees not be disciplined without a formal investigation and there is nothing restricting it from doing so. It contends that, if the Organization desires different language in the Agreement, it should negotiate such language, not obtain it through arbitration. The Carrier acknowledges that its letter to Claimant, dated July 21, 2003, citing a possible violation of Section 7.8 of its Policy on the Use of Alcohol and Drugs, should have cited Section 7.4, but asserts that its reference to the wrong section was an innocent mistake.

As to the penalty imposed, the Carrier points to numerous prior arbitration awards which have upheld dismissal as the appropriate penalty for a second positive drug or alcohol test. It maintains that Claimant understood the ramification of violating Carrier's rules on illicit drug or alcohol use and that his dismissal should be upheld. It urges that the claim be denied.

The Organization argues that Carrier failed to prove the charges against Claimant and argues further that it failed to provide the Claimant with a fair and impartial investigation, as is evident when it issued the harsh and excessive discipline of dismissal to the Claimant.

In specific, the Organization complains that the Carrier did not present at the investigative hearing, as requested by the Organization prior to the hearing (Org. Ex. 3), the technician who performed the Breathalyzer tests on Claimant, the devices used to perform the tests and all records, logs, forms and other pertinent information as required by Part 40 - Procedures for Transportation Workplace Drug and Alcohol Testing Programs - U.S. Department of Transportation. It maintains that the technician who administered the test is, in essence, the accuser and Claimant had a right to question his accuser. The Organization contends that, by failing to provide at hearing the technician and the other items requested, the Carrier failed to provide for a fair and impartial hearing. It notes that Terminal Manager Richard A. Mills, who arranged for Claimant's follow-up test, could not answer any questions about the

absence of follow up calibration at hearing. Similarly,

standard procedure does not require that a testing device be calibrated in front of the testee immediately prior to administration of a test. The results of the test speak for themselves. The Board notes, in this regard, that the Organization did not assert that the Breathalyzer test was not properly conducted or that the test results were not his.

As to the Organization's complaint that the technician failed to wait 20 minutes after Claimant smoked a cigarette and placed a breath strip in his mouth to administer the test, the Board is persuaded that the test was administered more than 20 minutes later. The evidence indicates that Claimant smoked a cigarette and placed a breath strip in his mouth prior to 0730, when he was informed that he would be subjected to a follow-up drug and alcohol test, and that the first Breathalyzer test was not administered until 0810 hours, some 40 minutes later. With regard to the effects of Listerine breath strips (Car. Ex. 1, pp. 41-42) and Aspartame (Car. Ex. 1, pp. 43-53) on drug tests, the Board notes, first, that Claimant testified that he did not take a Listerine breath strip, but something like it, and, second, that the Organization presented no medical data to support its suggestion that breath strips containing Aspartame would have the effect required to reject the test results.

The Board is also persuaded that the Carrier properly withheld Claimant from service pending the investigation and that its citation of Rule 7.8 (which only pertains to engineers), rather than Rule 7.4, in its correspondence with the Organization were innocent mistakes that did not affect Claimant's ability to defend himself or for the Organization to represent him.

Evidence That Claimant Violated Rule 7.4

It is undisputed that Claimant previously tested positive for alcohol on March 22, 2001, that he then exercised his right to waive investigation¹ and that, as provided for under the reinstatement agreement and in accordance with Carrier's Policy on the Use of Alcohol and Drugs, he was required to remain alcohol and drug free and that the Carrier had the right to perform random follow-up testing. The Organization does not complain that the Carrier needed probable cause in order to test Claimant for alcohol or drugs or that Claimant was, in some other way, improperly subjected to the follow-up test.

¹Under Rule 7.7 of Carrier's Policy on the Use of Alcohol and Drugs, waivers are available only for first-time drug and alcohol offenses.

The evidence persuades the Board that, on July 4, 2003, Claimant failed a follow-up Breathalyzer test that was properly administered as a result of his prior positive probable cause drug test and reinstatement agreement. On July 4, 2003, Claimant was notified at 0730 hours of a random follow-up test, and a technician administered a Breathalyzer test at 0810 hours which resulted in a Breath Alcohol Content of 0.043. After waiting approximately 20 minutes, the technician administered a confirming Breathalyzer test at 0830 hours which resulted in a Breath Alcohol Content of 0.038. Rule 7.4 of Carrier's Policy on the Use of Alcohol and Drugs states that "[e]mployees 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"

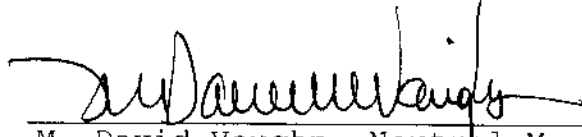
Given the indisputable results of the drug test, the Board is convinced that Claimant violated Rule 7.4

Penalty

As to the penalty imposed, the Board concludes that the penalty of dismissal was appropriate under the circumstances. The evidence is clear in this case that Claimant had a prior positive test for alcohol on March 22, 2001; only two years later, Claimant again tested positive for alcohol. Rule 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs provides that more than one confirmed positive test for alcohol, obtained under any circumstances during any 10-year period, will subject an employee to dismissal. Rule 7.9 is clear and unambiguous; and it is well established that the requirement to make second chance procedures, such as are contained in Rule 7.7, taken seriously by employees requires that they be enforced by their terms, the violation of which will lead to the employee's dismissal. Claimant's violation of his obligations under the 2001 reinstatement agreement is clearly established in the record. He must suffer the consequences. The Award so reflects.

AWARD: The claim is denied. There is substantial evidence that Claimant is guilty of the charges against him.

Dated this 3rd day of February, 2005.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member