

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

NMB Case No. 36
Claim of Roy J. Berg
Dismissal:
1.5 Violation

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Division Conductor Roy J. Berg, for the exoneration of the alleged positive test on July 24, 2004, during a "Follow Up" drug test and the reinstatement to service with the BNSF Railway Company and paid for all time lost from July 24, 2004 until returned to service, including Health and Welfare Benefits for his alleged violation of the Policy on the use of Alcohol and Drugs effective September 1, 2003.

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 August 17, 2006, 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. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Conductor and was assigned to Los Angeles, California. He had been hired in 2000 as a Trainman.

Claimant had been found in violation of the Carrier's Policy on Drug and Alcohol Use on October 10, 2001, having tested positive for cannabinoids (marijuana) on a test administered for probable cause. He was issued a Conditional Suspension and was evaluated and released by the Carrier's Medical Department on August 29, 2002. The terms of the waiver which Claimant executed in connection with his conditional suspension advised Claimant that he would be subject to follow-up testing and that a second positive drug test within 10 years would subject him to termination.

Claimant was, in fact, subjected to a follow-up testing while he was working on July 24, 2004, less than two years after his release by the Medical Department. He tested positive for alcohol

at BAT of 0.034; a second test 24 minutes later produced a BAT of 0.022. The test cut-off for the test under the Carrier's Policy is 0.020. Claimant was removed from service as a result of the positive tests and was scheduled for an investigation.

The Organization requested in advance of the hearing the presence of the Breath Alcohol Technician who administered the test, the device that was used to perform the test and all records, logs, forms and other pertinent information required by DOT drug and alcohol testing regulations.

The Carrier failed to produce the technician or to provide the documentation requested other than the documents concerning Claimant's test and the testing of the machine used. The Organization specifically requested his presence to respond to the Organization's assertion that the machine was not tested or calibrated in Claimant's presence.

At the hearing, the Carrier called Renee Kimbriel, a representative of its Medical Department, to explain the testing procedure which had been utilized. Ms. Kimbriel testified that calibration of the machine used for the test was required monthly; and she produced documents that the machine had been tested on July 24th at 11:52 a.m., over two hours after Claimant's tests, and had been tested previously on July 9th.

Claimant did not dispute the test result at the hearing, but testified that he was a heavy smoker who had just brushed his teeth and used mouthwash upon arriving at the facility. He denied that he knew he was to be tested. Claimant testified that he did not inform the technician administering the examination that he had used mouthwash shortly before. He testified that the machine used to test him was not, itself, tested prior to administering the test to him. The record indicates that the initial BAT test was administered at 9:36 a.m. on July 24th and the second BAT was administered at 10:00 a.m.

The Organization did not place its oral, pre-hearing request for the presence of the technician, the machine and the documentation on the record at the hearing or specifically object to the use of Ms. Kimbriel to introduce the test-related documentation. The representative made a general objection to the investigation.

Based on the evidence adduced at the hearing, the Carrier dismissed Claimant from all service for a second positive alcohol test while still covered by his waiver agreement.

The Organization filed the instant claim protesting Claimant's dismissal and seeking his reinstatement. The Claim was presented in due course, was progressed on the property in the usual manner, but without resolution and was then submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it proved, by substantial evidence based on the record, that Claimant violated the Carrier's drug policy a second time and was properly dismissed. It points out that the second positive test took place less than two years following his release by the Medical Department following his first violation. BNSF also points out that Claimant had executed a waiver granting the Carrier the right to test him and making a second positive test result grounds for dismissal.

The Carrier rejects the Organization's argument that the failure to present as a witness the BAT technician who performed the test is not a basis to overturn the discipline, in that the technician is not a Company employee and that, in any event, properly authenticated test results from an accredited testing laboratory accompanied by evidence establishing proper custody and control are sufficient to establish the test result. It points to evidence that establishes the propriety of the test results and asserts that all proper procedures were followed. In particular, it points out that the evidence establishes that the machine used for the test was calibrated monthly, as required. BNSF also points to authorities that have held that in such situations the testimony of the technician who performed the test is not necessary.

The Carrier also rejects Claimant's defense that his use of mouthwash prior to testing somehow invalidated the result. It points to evidence that Claimant was tested twice and that any mouthwash would have dissipated between the first and second test, even if Claimant had used an alcohol-based mouthwash.

The Carrier further rejects the Organization's arguments that its determination to withhold Claimant from service following the positive test result violated Article 13. It denies any language in Article 13 which requires that Claimant be retained in service following a positive test and maintains that it would have been a possible endangerment to others, and certainly poor judgment, to have retained him in service after his positive test for alcohol. It denies that its action represents prejudgment.

The Carrier points out that a single positive test for either a controlled substance or alcohol is a serious offense under PEPA and that Claimant signed a waiver, consented to testing and acknowledged that a second positive test would subject him to dismissal. It points out that Claimant was offered rehabilitation

following the first positive test. BNSF maintains, on that basis, that dismissal was the appropriate penalty for Claimant's second positive test and urges that the claim be denied.

The Organization argues that the Carrier failed its obligation to provide Claimant with a fair and impartial hearing by failing to produce the technician who performed the test, the machine that was used to conduct the test and all documentation required by the DOT Drug Testing Regulations. It protests that the Carrier's failure to provide it with the witness and items requested deprived it of the opportunity to review the evidence in order to substantiate its position and defense.

The Organization also protests that the substitution of Ms. Kimbriel for Mr. Crespin, whom the Organization urges made the decision to remove Claimant from service was improper because Kimbriel lacked first-hand knowledge of Crespin's decision.

The Organization protests that the documents and testimony offered by the Carrier constituted hearsay and/or speculation, failed to afford the Organization the opportunity to cross-examine the evidence and was insufficient to meet the Carrier's burden of proof.

Citing authorities, the Organization argues that defects in the testing process invalidate the test and require a sustaining award. It also asserts, citing additional authority, that the failure of the Carrier to produce the technician to answer specific problems in the testing procedure as requested by the Organization is also a basis to overturn the discipline.

The Organization also protests that the Carrier violated Article 13 (a) of the Yardmen's Schedule by withholding Claimant from service without first conducting a fair and impartial hearing.

The Organization urges that the Carrier failed to afford Claimant a fair and impartial hearing, which requires a sustaining award. It also asserts that the Carrier failed to meet its burden of proof, also requiring a sustaining award. UTU urges that Claimant's dismissal be overturned and that he be reinstated to service and made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove, by substantial credible evidence on the record as a whole, Claimant's guilt of the violation charged and to establish that the penalty of dismissal was not arbitrary or excessive. The Board concludes that the Carrier met its burdens.

It was also the Carrier's burden to establish, when presented with argument and evidence to the contrary, that it provided Claimant with due process and a fair hearing. The Board concludes that the Carrier sufficiently provided those protections.

The record establishes that Claimant had previously tested positive for a controlled substance and, as conditions of his return to service following that positive test, was evaluated by the Medical Department, agreed to undergo follow up testing and was informed that he would be subject to dismissal if he tested positive for drugs or alcohol a second time.

The evidence persuades the Board that the test administered to Claimant on July 24th was properly administered and that the positive test results for alcohol were valid. The Board notes that the Carrier produced at hearing the documents reflecting the testing process and results, has considered the Organization's various challenges to the testing methodology and finds none convincing.

As to the Carrier's failure to produce the technician who administered test in response to the Organization's oral request made in advance of the hearing, the Board finds that the technician was not a Carrier employee, that the request was never made at the hearing and that the failure of the Carrier to produce the technician was not protested at the hearing. Moreover, the Board is not persuaded that the technician would have been able to provide additional evidence relevant to the case. As to the Carrier's substitution of one Medical Department representative for another, the Board is persuaded that the reasons for the MRO positive determination were contained in the record, but that Management, not the Medical Department, made the determination to dismiss Claimant based on his violation of the Carrier's Drug and Alcohol Policy.

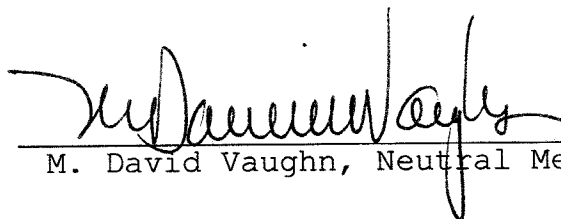
The Board finds nothing in Article 13 which required the Carrier to retain Claimant in service following his positive test result for alcohol. Indeed, the Carrier would act most imprudently if it were to retain in service employees who might be impaired until an investigation might be completed.

It is well established that the Carrier has the right to prohibit use of illicit drugs and alcohol by employees, to test employees under specified circumstances for the use of such drugs and to discipline employees who test positive. The evidence in the instant case is that Claimant had earlier tested positive for a controlled substance and was treated and returned to service subject to the Carrier's right to subject him to follow-on testing and with the understanding that if he tested positive again, he would be dismissed.


The Board is persuaded that Claimant tested positive for prohibited substances for a second time, that the test was valid, that Claimant had been placed on notice of the disciplinary consequences of a second positive test and that the penalty of dismissal was not arbitrary or excessive. The Award so reflects.

AWARD: The Carrier proved by substantial credible evidence that Claimant is guilty of the charges against him and that dismissal was an appropriate penalty. The claim is denied.

Dated this 20TH day of February, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member