

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 44, (Case No. 44)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 4, 2009, when Claimant, Christopher A. Villegas (6448435), was dismissed for his second positive drug test within a 10 year period on April 30, 2009. The Carrier alleged violation of Policy on the Use of Drugs and Alcohol and Rule 1.5.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 4, 2009, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-09-0108) (Organization File No. 120-1312-093.CLM)

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that on May 25, 2007, Claimant tested positive for a controlled substance (Cocaine Metab.) and was medically disqualified from service by the Carrier on May 29, 2009. Claimant entered the Carrier's Employee Assistance Program (EAP) and was released for a return to duty on July 27, 2007. At that time, the Claimant was advised that he would be subject to periodic drug and/or alcohol testing for a period of five years from the date of his

return to service. Additionally, the Claimant was informed that he would be subject to dismissal for a second violation of the Carrier's Drug and Alcohol Policy within a ten year period.

On April 30, 2009, Carrier conducted a follow-up test which revealed that Claimant tested positive for the presence of cocaine. As a result, Claimant was dismissed from service on May 4, 2009.

It is the Organization's position that the Carrier erred in dismissing the Claimant. It contended that the Carrier violated the Agreement, in particular Rule 13 the Discipline Rule and Appendix No. 11, when it denied the Claimant a formal Investigation prior to the dismissal. It argued that because of prescribed medications the Claimant had a positive drug test. It further argued that the facts substantiate that the Claimant's test levels were quite possibly flawed because of the extremely high Creatinine level contained in the Claimant's urine which could cause a false positive test for drugs. Additionally, it asserted that after being notified of the positive test on May 4, 2009, the Claimant requested a split sample test and took a "hair follicle drug test" to prove his innocence. According to it, the split sample test was conducted by Quest Diagnostics and came back positive because of high Creatinine Levels which caused an inflated reading for Cocaine Metab. It further pointed out that the Hair Follicle test was conducted by the same laboratory, and it came back negative for Cocaine Metab which could not be explained by the Medical Department. Based upon the conflicting test results it concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant was afforded his contractual rights and it was not required to hold a formal Investigation before dismissing him. On the merits, it argued that the record is clear that Claimant was tested on April 30th during a follow-up test and the test results were positive for cocaine which was a violation of his July 27, 2007, Reinstatement Agreement. It further argued that with respect to the Claimant's additional test, the urine results still indicated a positive for cocaine, and even though the hair test was negative neither the Department of Transportation (DOT) or it recognize alternate testing as bona-fide methodology to balance or remove a Medical Review Office (MRO) verified test result, thus, it reasoned the discipline was appropriate and it closed by asking that it not be disturbed.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural argument that Claimant should have been afforded a fair and impartial Investigation prior to any discipline being exercised. In Award No. 258 of P.L.B. No. 4244 involving the same parties to the instant dispute that Board ruled the following:

"...Moreover, the Board finds that the claimant was properly notified, in accordance with the June 24, 1991 Letter of Understanding, of his dismissal by the Carrier. By that letter of understanding, the parties agreed that the Carrier was not required to conduct a formal investigation

prior to dismissing an employee such as the claimant who tests positive a second time for a controlled substance within a ten (10) year period...."
(Underlining Board's emphasis)

In addition to the aforementioned Award, there is extensive on-property arbitral precedent that that is consistent with the reasoning expressed above, therefore the Board determines that based upon the facts of this case Claimant was not denied his contractual rights when he was not afforded a formal Investigation.

Turning to the merits, it is clear that the Claimant tested positive for a controlled substance (Cocaine Metab.) twice within a period of less than two years. The first violation occurred on May 25, 2007, after which the Claimant accepted a conditional suspension/waiver on May 29, 2007, that included participation in the EAP and compliance with all of its instructions. On July 27, 2007, Claimant satisfactorily completed the program and signed a conditional reinstatement that he was subject to dismissal if he violated any one of the following pertinent conditions:

- "a. More than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during any 10-year period.**
- b. A single confirmed positive test for any controlled substance or alcohol obtained under any circumstances within three years of any 'serious offense' as defined by the Burlington Northern Santa Fe 'Policy for Employee Performance Accountability'."**

The Organization argued that the Claimant was taking medication that could result in a false positive test as attested to by his personal physician. The Carrier acknowledged there was a possibility that the drugs could show a positive for medications, but that its medical experts stated it would not register a positive for cocaine. Review of the Claimant's personal physician's statement reveals that he wrote the following:

"I ordered this medication for him and it would cause him to have a positive drug test."

The Claimant's personal doctor's statement is not inconsistent with the Carrier doctor's findings and it offers the Claimant no assistance as he never stated that the medications that Claimant was taking would cause a false positive for cocaine nor was there any proof offered that an above normal level of a Creatinine in the urine would contribute to a false positive for cocaine. The

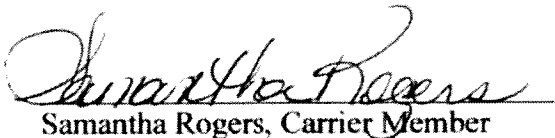
Hair Follicle test performed by the same laboratory raises concern as it registered negative for cocaine, however, that result is negated by the fact that the second urine test showed positive for cocaine and it was not disputed that the DOT does not recognize alternate testing as a legitimate methodology to balance or remove an MRO verified test result. Therefore, as a result of two positive drug tests for cocaine within less than two years of one another and his failure to follow the instructions of the Medical Department set forth in its July 27, 2007, Reinstatement Notice, the Claimant was subject to dismissal. The Board finds and holds that Claimant was properly notified in accordance with the June 24, 1991 Letter of Understanding, of his dismissal which will not be disturbed as it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 3/18/11