

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7394
AWARD NO. 14, (Case No. 14)**

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

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michele McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it dismissed Ms. Gina M. Lindsey for alleged violation of Maintenance of Way Operating Rule 1.5 Drugs and Alcohol on April 6, 2010, decision upheld on May 28, 2010.**
- 2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the Claimant be allowed a waiver to work with BNSF Employee Assistance Program to attend an approved Drug Rehabilitation Program, successfully complete the program, and return to work with BNSF."
(Carrier File No. 12-10-0076) (Organization File No. B-2634-24)**

FINDINGS:

Public Law Board No. 7394, 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 Board notes that this is the second in a series of two cases involving the same Claimant. The origin of this case arises from a former case discussed in greater detail in Award No. 13 of this Board which required the Claimant to take a return to work physical for reinstatement. On March 23, 2010, Claimant took the test and because on March 30th the test came back positive for a controlled substance -- methamphetamine, the Carrier took disciplinary action against her.

Because of the aforementioned test, on April 6, 2010, Division Engineer D. F. Befort sent the Claimant a letter which stated in pertinent part:

"This letter will confirm that you tested positive for drugs during your fitness-for-duty examination conducted on March 23, 2010, this is in violation of Maintenance of Way Operating Rule 1.5 and BNSF's Policy on the Use of Alcohol and Drugs effective April 15, 2009. This is a serious rule violation as outlined in the BNSF's Policy for Employee Performance Accountability (PEPA), effective July 1, 2000. Effective immediately, you are hereby dismissed from the service of the BNSF Railway for your second serious (Level S) rule violation within a 36-month period, in accordance with PEPA. Consideration was given to your personnel record when assessing this discipline."

On April 8, 2010, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on May 20, 2010, concerning in pertinent part the following charge:

"...in connection with your failure on a fitness-for-duty examination and to develop the facts and circumstances concerning your alleged violation of Rule 1.5 of the Maintenance of Way Operating Rules and BNSF Railway Policy on the Use of Alcohol and Drugs on March 23, 2010."

On May 28, 2010, Claimant was notified that she had been found guilty as charged and her dismissal remained intact.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It asserted that the Carrier's (PEPA and BNSF Policy on the Use of Alcohol and Drugs) allow for a waiver for a first time positive drug/alcohol test with the employee allowed to go through drug/alcohol rehabilitation and upon successful completion of the program a return to their position with the Carrier. It argued that in this instance the Carrier issued a Level S 30-day (Award No. 13) record suspension on the same day it administered the subject dismissal against the Claimant, so that an offense which should have been handled with a waiver could be turned into a second severe (Level S) rule violation within 36 months making it a potential dismissible violation.

The Organization further argued that the Claimant is a long-term employee who has been drug tested many times and had never failed a test. It stated she explained the presence of the drug in her system was because it had been absorbed through her skin while employed to clean a house that had been contaminated by methamphetamines as it had been used as a laboratory. The Organization concluded by requesting that the dismissal be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the Claimant was guilty as charged. It argued that the record confirms that the Claimant tested positive for a controlled substance -- methamphetamine and offered no legitimate medical explanation for the positive test. It further argued that the Claimant declined the opportunity to have her specimen retested at another laboratory, thus, it was correct to determine that she tested positive for an unauthorized controlled substance as the only valid defense defined in its rules for having a controlled substance in her system was if it were a medication prescribed by a medical practitioner and it was being used as prescribed which was not the case in this instance. It concluded that it was not obligated to offer a waiver and in this case the Claimant was not eligible for that consideration due to the fact that this was her second Level S offense within her probationary period, thus dismissal was proper. It closed by asking that the discipline not be disturbed and the Claim remain denied.

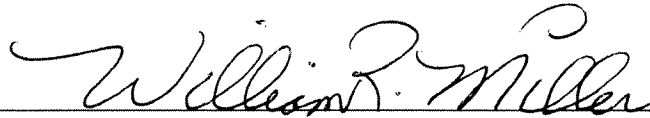
The Board thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule and it is clear that the Hearing was conducted in a fair and impartial manner and Claimant was not denied her Agreement "due process" rights.

There is no dispute between the parties that the Claimant failed her return-to-work physical when she tested positive for methamphetamines. The Claimant raised an affirmative defense for her positive test results. She alleged that she had been contaminated with methamphetamines while cleaning a house that had been used as a methamphetamine laboratory. Whether or not it is possible to be contaminated in such a fashion cannot be determined as the Board was presented no medical evidence supporting that assertion. The record is clear that substantial evidence was adduced at the Investigation that Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was appropriate. At the time of the offense Claimant had 16 years of service with two non-serious violations on her record both of which had been worked off. The Carrier argued that dismissal was proper in this instance because it had previously administered a Level S 30-day record suspension (Award No. 13) and this was the Claimant's second serious offense within the probation period and in accordance with the Carrier's Policy for Employee Performance (PEPA) dismissal is allowable. In Award No. 13 of this tribunal we determined that the Carrier did not meet its burden of proof and set aside that discipline in its entirety. Because the aforementioned discipline was rescinded the Claimant's violation of the Carrier's Rules and Policies in this instance became her first serious offense. Therefore, the Board finds and holds that the Claimant shall be allowed a waiver to work with the Carrier's Employee Assistance Program to attend an approved Drug Rehabilitation Program and after completing the program and passing all required medical examinations she will be returned to service with seniority intact, benefits unimpaired, but with no back pay. Upon return to service Claimant's disciplinary status pursuant PEPA will indicate that she has one Level S violation on her record with a 36 month probationary period. The Claimant is also forewarned that she needs to be careful to adhere to all Carrier Rules and Policies.

AWARD

Claim sustained in accordance with the Findings and the Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in cursive script, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Chairman & Neutral Member

Award Date: 3-11-11