

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 438 – Award No. 438 – Claimant: Chowning
Carrier File No. 14-13-0095
Organization File No. 20-13-12-1210

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 14, 2012, when Claimant, James Chowning (6483051), was dismissed for his alleged second positive test within a 10-year period. Positive test result of marijuana on a random drug test was conducted on December 7, 2012. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.5 Drugs and Alcohol, and Sections 3.1 and 7.5 of the BNSF Railway Policy on the Use of Alcohol and Drugs.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing December 14, 2012, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, James E. Chowning, had been employed by the Carrier since 1972. On December 17, 2012, the Carrier notified Claimant to attend an investigation on December 22, 2012 "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged positive drug test as a result of a random drug and alcohol test while working as foreman, December 7th, 2012 at approximately 0735 hours

at Baring, MO and (his) alleged violation of BNSF Policy on the use of Alcohol and Drugs, dated April 15, 2010.” The letter stated that the Carrier’s first knowledge of the alleged violation was December 14, 2012. On December 20, 2012, the Carrier sent Claimant a letter indicating that the investigation had been postponed by mutual agreement until January 3, 2013. At the opening of the investigation, the Organization representative asserted that the Organization had never agreed to a postponement and that an Organization representative and Claimant had appeared at the time and location specified in the original Notice. Claimant acknowledged at the investigation that he had received the postponement notice. Following the investigation, on January 29, 2013, the Carrier determined that Claimant had committed the misconduct alleged and, giving consideration to his personal record and the Carrier’s Policy for Employee Performance and Accountability (PEPA), dismissed him from employment.

Carrier Maintenance of Way Operating Rule 1.5 provides, in relevant part:

Drugs and Alcohol

* * *

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluid when reporting for duty, while on duty, or while on company property.

The Carrier’s Policy on the Use of Alcohol and Drugs provides, in relevant part:

Section 3. Policy on the Use of Alcohol and Drugs:

- 3.1 While on BNSF property, on-duty, or operating BNSF work equipment or vehicles, no employee may:
- Use or possess alcohol;
 - Use or possess controlled substances . . . or illegally obtained drugs. Prohibited for on or off-duty FRA covered employees;
- * * *
- 3.2 The following additional restrictions apply . . .:
- Use of controlled substances at any time, whether on or off-duty is prohibited . . .

Section 7. Guidelines for Alcohol and Drug Violations

- * * *
- 7.5 All alcohol and drug violations are considered serious. Drug and alcohol violations will be considered with any and all existing violations on an individual’s employment record for assessing appropriate discipline.

Claimant was subjected to random drug/alcohol testing on December 7, 2012, and the Carrier was notified on December 12, 2012 that Claimant had tested positive for marijuana. Carrier Manager Medical Services Martin Crespin testified at the investigation that along with the Director, he was responsible for day-to-day operation of the Carrier's Drug and Alcohol testing program. By letter dated December 14, 2012, Mr. Crespin notified Chicago Division Engineer Nathan Waller of Claimant's positive result, and requested that an investigation be scheduled. Mr. Crespin testified that shortly thereafter he received a telephone call from Claimant's Organization representative, the Assistant General Chairman, requesting additional time for a reconfirmation test. Mr. Crespin stated that he felt the request was reasonable, and, by e-mail to the Medical Review Office dated December 17, 2012, Mr. Crespin requested an extension for the reconfirmation test until December 18, 2012.

Mr. Crespin testified that that he had an understanding with the Organization representative that Mr. Crespin had extended a professional courtesy to make certain Claimant was able to submit the request for reconfirmation testing. Mr. Crespin stated he was informed on December 20, 2012, while on vacation, that the investigation was still scheduled for December 22. Mr. Crespin therefore requested that the Chicago Division postpone the hearing, because no retest had been received and he had guaranteed the Union representative he would look out for it.

The record also includes an e-mail from Mr. Crespin dated December 26, 2012, requesting an update as to Claimant's reconfirmation test. The record further includes two December 27, 2012 letters, one from the Organization General Chairman to Carrier Division Engineer West Nathan Waller, disputing that the Organization had agreed to a postponement, and another from Mr. Crespin to the Organization Assistant General Chairman, confirming a conversation on December 14, 2012. That letter listed the various documents concerning the testing and results, and the outcome of Mr. Crespin's review of the situation. It stated, in relevant part, that, "Reconfirmation testing was allowed. Time was extended to accommodate a late request by employee. No request was received from the employee, therefore, reconfirmation testing was not conducted."

The record further includes a January 2, 2013 letter from Mr. Waller to the Organization General Chairman, disputing the Organization's contention that it had not agreed to a postponement of the investigation. The letter confirms Mr. Crespin's testimony as to his interactions with the Organization Assistant General Chairman, and notes that the postponement notice was issued the day Mr. Crespin requested it.

At the investigation, Mr. Crespin explained the substantive documentation concerning Claimant's December 7, 2012 test. In particular, he stated that the MRO Written Report is a support document from the Medical Review Officer which sets forth various findings. The upper left-hand corner of the document showed Claimant's name, and the middle of the page noted that the drug test result was positive and showed the

date and time that Claimant was so notified. The bottom of a column on the right side of the document showed a notation of split specimen test requested, unsure. Mr. Crespin explained that the notation showed that the Medical Review Officer informed Claimant of his right to have a reconfirmation test of the split sample at a different laboratory, and that he was unsure as to whether Claimant planned to do so. The document was signed by the Medical Review Officer.

Mr. Crespin also explained that on the Federal Drug Testing Custody and Control Form the collector had failed to check the box indicating that the temperature of the sample was between the required 90 and 100 degrees. The form indicated that an Affidavit, also known as a Certificate of Correction, was attached, attesting that the temperature of the specimen was within the required range.

Mr. Crespin also stated that, during a follow-up conversation after the testing, Claimant indicated that he had some concerns about the collection procedure. Mr. Crespin asked Claimant whether he had in fact witnessed the sealing of the bottles, and Claimant responded that he had not really paid attention. Mr. Crespin explained that he asked the company that had performed the work to have the collector provide a signed statement regarding the procedures followed; the collector's statement is included in the investigation record. Mr. Crespin added that he also obtained lab documentation of the chain of custody indicating that the sample had been received in a sealed condition.

The record also includes a document dated December 27, 2012, which Mr. Crespin referred to as a Detailed Review, an overview of all the different elements of the event. He stated that he reviews collection to verify whether it is valid, and identifies the type of test, in this case, random selection. He verified that the collector was properly certified. He also examined whether anything unusual had occurred with the lab. He stated that the test findings had been reported to the Medical Review Office as positive for marijuana, and everything appeared to be normal. He stated that he also reviewed the Medical Review Officer's handling to ensure that a doctor actually interviewed Claimant, and found that there was no legitimate medical explanation provided for the test result. He added that he looked at all of the records to find if there was any problem that would constitute a fatal flaw in the testing and did not find any.

Mr. Crespin stated in summary that the reason for testing was valid, the test procedures were acceptable, the collector was certified, and the chain of custody was intact. There was an affidavit correcting the temperature omission. The bottle seals were verified as received whole and undamaged at the lab. The Medical Review Officer had a face-to-face discussion with Claimant, and found no legitimate medical explanation for the test result. Claimant was informed of the opportunity for a retest, and, for whatever reason, decided against obtaining that test.

Carrier Roadmaster Eric Gillespie testified at the investigation that he was Claimant's supervisor at the time of the incident. He stated that on December 20, 2012, he received a call from Mr. Crespin's office, informing him that a reconfirmation on Claimant's test had been ordered, and the results would not be received in time for the

scheduled investigation. He stated that he was informed there would be a postponement, as a result of the Organization's request to Mr. Crespin that more time be allowed for the reconfirmation. Mr. Gillespie testified that he personally informed Claimant on December 21, 2012 that the investigation would be postponed until January 3, 2013 to allow him the opportunity for a reconfirmation.

At the investigation, Claimant initially testified that he did not smoke or take marijuana. He maintained that he could not explain how marijuana came to be in his system. He stated that he did not request a re-test because he believed it would do no good, as marijuana should not have been in either sample so if one tested positive the other would as well. He added that he took exception to the collection process as it was much more casual that it had been during previous tests, but did not say anything to the collector as he had no reason to be worried. Claimant also testified that he had used marijuana once or twice per year, usually on vacation. He stated that he took a vacation prior to December 7, 2012, but maintained that he had not used marijuana on that occasion. Claimant acknowledged that he had accepted a waiver for a positive test for marijuana in 2007.

Claimant acknowledged that Mr. Gillespie contacted him on December 21, 2012 to inform him that the investigation had been postponed. Claimant's personal record shows a Level S conditional suspension on December 4, 2006, and a reinstatement on November 28, 2011, concerning a positive random test.

The Carrier first asserts that the Organization's procedural arguments lack merit. With respect to the Organization's contention that the investigation was not properly postponed or held within the requirements of Organization Rule 40, the Carrier points out that Organization Assistant General Chairman, on December 14, 2012, requested a postponement from the Carrier's Medical Manager to allow Claimant time to obtain a reconfirmation test. The Carrier also points to the testimony of Roadmaster Gillespie that the postponement was granted at that representative's request and Mr. Gillespie personally contacted Claimant to inform him of the postponement. The Carrier further notes that Mr. Crespin also testified that the Carrier had granted the postponement so Claimant could obtain a reconfirmation test.

Further, the Carrier states, the Organization's attempt to cast doubt upon the testing itself and chain of custody must fail, as Mr. Crespin detailed the process, and there was no defect. The Carrier further notes that Claimant acknowledged he did not pay much attention to the test.

On the merits, the Carrier contends that this case is not complicated. Claimant tested positive on November 28, 2006. On February 20, 2007, he was advised that he had satisfactorily completed the requirements for returning to his position. On that date, Claimant signed a Conditional Suspension Waiver, an acknowledgement of the conditions attached to his return, including that he could be subject to dismissal if he tested positive for any controlled substance or alcohol within a 10-year period. Claimant was subjected to a random test on December 7, 2012, and the Carrier was notified on

December 12, 2012 that he had tested positive for marijuana. The Carrier subsequently dismissed Claimant.

The Carrier asserts it has met its burden of proving Claimant's guilt by substantial evidence. In addition to the test results, the Carrier notes, Claimant admitted he used marijuana on vacation, although he denied that he had done so on the vacation he took shortly before his positive test. The Carrier points out that Claimant had no explanation for the positive test, or for why he did not request that the sample be re-tested. The evidence, including Claimant's own testimony, overwhelmingly establishes his guilt. As the dismissal comported with both the Conditional Suspension Waiver and the PEPA, the Carrier urges that the claim be dismissed.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states, the Carrier did not comply with Agreement Rule 40 D, which requires a Carrier decision within 30 days of an investigation, as the investigation concluded on January 3, 2013 and the Organization did not receive the transcript until February 4, 2013, 32 days later. In addition, the Organization points out, Organization Rule 40 B requires that an investigation be conducted within 10 days of an employee's removal from service, and the instant investigation was not held until 20 days after Claimant was removed. The Carrier, the Organization states, could provide no written record of the Organization having agreed to a postponement, and the conclusion that it did not do so is bolstered by the fact that the Organization representative and Claimant appeared at the time and place specified in the original notice.

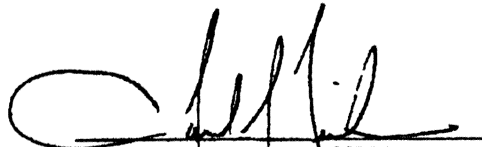
The Organization also asserts that the Carrier's exhibits were inaccurate, incomplete and required affidavits of correction, that the Hearing Officer refused to rule on its objection to the Carrier's attempt to enter evidence outside the date, time and location specified in the Investigation Notice, and refused to allow the Organization representative to question a Carrier witness. The Organization concludes that the Carrier has failed to substantiate its charges against Claimant and that, even if it had, the discipline assessed is extreme and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. In particular, the record supports the Carrier's contention that Mr. Crespin initiated the postponement in order to fulfill the commitment he had made to an Organization representative to allow Claimant additional time to obtain a confirmation test. The Organization's argument that the fact that Claimant and his representative appeared on the original hearing dates proves its point is unconvincing, as Claimant acknowledged that Mr. Gillespie informed him the day before that the hearing would be postponed. As for the Organization's objection to the Hearing Officer's acceptance into the record of an event outside this record, there was no prejudice to Claimant as his previous violation of the Carrier's drug and alcohol policy is clearly noted in his personal record.

On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. Mr. Crespin gave a detailed explanation of the documentation concerning Claimant's testing, and any minor discrepancies were explained and corrected. Claimant chose not to submit his sample for reconfirmation testing, and admitted that he used marijuana, the substance for which he tested positive, although he denied that he had done so close in time to the testing. There was no reasonable conclusion to be drawn other than the one arrived at by the Carrier, that Claimant was guilty of violating the Carrier's drug and alcohol policy. His guilt has been proven by substantial evidence. As this was Claimant's second such violation within 10 years, the Carrier's PEPA subjects him to dismissal, and we cannot find the Carrier's decision to impose that sanction arbitrary, capricious or unjust.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 20th day of Feb, 2014.