

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY COMPANY

(Former ATSF Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 13

NMB Case No. 16

Carrier File No. 14-08-0012

Organization File No. 190-1312-081.CLM

Claimant: Carlos P. Franco

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing January 7, 2008 when Claimant, C.P. Franco (6556450), was dismissed for testing positive a second time within a ten year period violating BNSF Policy on the Use of Alcohol and Drugs; and
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 January 7, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, C.P. Franco, was dismissed from all service because he failed a drug and alcohol follow-up test on January 7, 2008. The Carrier contends that the valid results of the drug test constituted just cause to remove the Claimant from all service and to dismiss him, as the Claimant had previously tested positive for a controlled substance or alcohol on May 7, 2007, and was issued a Level S Conditional Suspension effective May 7, 2007 for violation of BNSF policy on use of alcohol and drugs dated September 1, 2003.

According to the Carrier, the Claimant had previously been reinstated to his employment on the condition that he would be subjected to follow-up random testing and that his employment would be terminated if he tested positive the second time within a ten-year period. "In assessing discipline, consideration was given to your personal record. This suspension is conditional based upon: 1) Your first-time violation of Rule 1.5 or BNSF policy on use of alcohol and drugs, 2) Your placing yourself into the Employee Assistance Program, 3) Your full compliance with the program and with all instructions issued you by the Employee Assistance Manager."

The grievant was informed by letter dated October 23, 2007 that:

“You have satisfactorily completed the prescribed treatment program and complied with requirements of BNSF’s Employee Assistance Program; following your violation of the BNSF policy on the use of alcohol and drugs, dated September 1, 2003. As a condition of employment, you are now subject to periodic drug and/or alcohol testing up to five (5) years from the date you return to work. When a follow-up test is required, you will be notified by proper authority ... Violation of any one or more of the following conditions will subject you to dismissal:

- more than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during any ten-year period.
- A single confirmed positive test for any controlled substance or alcohol obtained under any circumstance within three years of any “serious offense” as defined by the Burlington Northern Santa Fe “Policies for Employee Performance Accountability”

The Claimant acknowledged in writing that “I have read and understand the above conditions” on October 23, 2007.

The Organization grieved the imposition of discipline as being improper, contending that the Claimant had not been afforded an investigation as he was entitled pursuant to the Agreement between the Carrier and the Maintenance of Way Organization. The Organization

contended that the failure to provide a proper investigation was a procedural flaw that invalidated the imposition of discipline. According to the Organization, the Claimant was entitled to appear in person at an investigatory hearing to dispute the basis for terminating his employment.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The evidentiary record contains credible documentary evidence demonstrating persuasively that the Claimant was subjected to a drug and alcohol screen on January 7, 2007, and that the three samples produced positive results of .035, .036, and .038. There is no evidence of a false positive or an inadequate chain of custody. Because the Claimant had previously been returned to service under an agreement which

provided for follow up testing and further provided that the Claimant would be dismissed if he tested positive for alcohol or a controlled substance, the positive test results offered into evidence by the Carrier create a rebuttable presumption of just cause to terminate the Claimant's employment.

Pursuant to the Letter of Understanding between the parties, a hearing or further investigation is not required in cases involving a second positive drug or alcohol test. Thus, the Carrier was not obligated to conduct further investigation, as the presumed validity of the drug tests need not be established at an investigation conducted on the Carrier's property, provided that the Claimant is given a copy of the test results, which the Claimant may then elect to share with the Organization and which he can refute and challenge. Such a challenge alleging improper collection, labeling, or chain of custody techniques can be made during the testing process and, if made in reasonable detail, could require the Carrier to convene a hearing on its property to address such an allegation.

If the Claimant had observed a procedural defect in the collecting of the specimen to be tested, the Claimant should have petitioned the Carrier for a hearing on the Carrier's property, as the Organization could not have interposed an objection on his behalf directly to this Board.

Although no useful purpose would be served in requiring the Organization to bring an allegation of procedural infirmity before an investigatory hearing conducted by an official of the Carrier at the local level, as such an investigatory officer would not have the expertise or the authority to invalidate a presumably valid drug and alcohol test, the Organization may demand such a hearing if the Organization has reasonable evidence of a procedural defect in the testing procedures that would invalidate the test result.

The evidentiary record reflects that the Claimant was provided access to a copy of the test results, thus creating an opportunity to dispute the validity of the test result if the Claimant has any reasonable basis to impugn the validity of these results. No claims asserting specific improprieties in the testing procedures were interposed by the Claimant or the Organization.

The positive test results in the instant case are evident from the face of the document from the testing lab communicating the test results on which the Carrier relied in dismissing the Claimant. This document, which was submitted into the evidentiary record, appears to communicate a second positive test result. Unless there is a demonstrably valid basis for discarding the test results, the Carrier has established by clear and convincing evidence that the Claimant violated

the terms of his return to work agreement by testing positive for a second time within a ten-year period. This proof of violation is sufficient to justify dismissal of the Claimant from all service regardless of whether an investigation was conducted on the property before the Carrier made its determination to dismiss the Claimant in reliance on test results, which results are presumably scientifically valid and were obtained in accordance with the protocols for testing applicable in the railroad industry.

The Organization does not claim in the instant case that the Carrier did not have the right to require the Claimant to submit to such a test pursuant to prior agreements between the parties. Nothing in the record alleges a flaw in the testing procedure. Consequently, no due process right of the Claimant has been violated by imposing discipline without an investigatory hearing being conducted by the Carrier on its property. Moreover, the Carrier has introduced multiple examples of prior Public Law Board decisions in support of the Carrier's contention that an investigatory hearing is not required before dismissing an employee for a second positive drug test within a ten-year period.

Consequently, based on the evidence submitted, the Carrier did not violate the Agreement commencing January 7, 2008 when Claimant, C.P. Franco (6556450), was dismissed for testing positive a second time

within a ten year period violating BNSF Policy on the Use of Alcohol and
Drugs.

The instant claim is hereby denied.

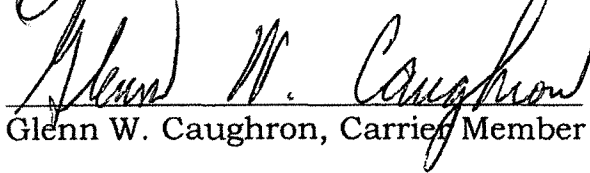
We so find.



Daniel F. Brent, Impartial Chair

Dated: 6-3-09

☒ I concur. ☐ I dissent.



Glenn W. Caughron, Carrier Member

Dated: 6-18-09

☒ I concur. ☐ I dissent.



David Tanner, Organization Member

Dated: 6-15-09