

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 77, (Case No. 77)**

**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, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing September 14, 2010, when Claimant, Ricardo M. Corchado (1100403), was Dismissed for his refusal to test for controlled substances on September 14, 2010. The Carrier alleged violation of Conditional Suspension Waiver signed by Claimant on November 23, 2009, BNSF Policy for Employee Performance Accountability and Appendix 11 of the ATSF Agreement.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0201) (Organization File No. 190-1312-1010.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 August 10, 2009, Claimant tested positive for a controlled substance and was suspended on the condition that he enter the Carrier's Employee Assistance Program (EAP). On November 23, 2009, Claimant was advised he had satisfactorily completed the prescribed treatment program and complied with the requirements of EAP. 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 second violation of the Carrier's Drug and Alcohol Policy within a ten year period.

On September 14, 2010, following a suspicion of alcohol Carrier conducted a follow-up test. Claimant took the breathalyzer test, but would not take the urine test. After refusing the latter test Claimant left the property telling everyone "I quit". On September 17, 2010, Claimant's seniority and employment were terminated.

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. Additionally, it argued that Claimant was advised on September 14th that he was being taken in for testing for alcohol because he allegedly smelled of alcohol. According to it, Claimant informed his Supervisor that he no longer drank, but agreed to the test. The Claimant went with the Supervisor and took the breath test which came back "00" or no trace at all. Despite passing that test the Carrier then incorrectly decided to administer a test for drugs which the Organization argued the Carrier had no basis for other than to continue to harass and make false accusations against the Claimant. It concluded the Claimant was advised he was going to be tested for possible alcohol violation and after he passed that test the matter should have been closed. It concluded by requesting that the dismissal be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record proves the Claimant was afforded his contractual rights and it was not required to hold a formal Investigation before dismissing him. On the merits, it argued the record is clear that Claimant failed to submit to a urine test for drugs and failure to do such was a violation of one of the conditions of his reinstatement. It reasoned the discipline was appropriate and it closed by asking that it not be disturbed and the claim remain denied.

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. That same argument was addressed in Award No. 44 of this Board and was rejected on the basis there is extensive on-property precedent that has ruled that the Carrier was not required to conduct a formal Investigation prior to dismissing an employee such as the Claimant that was returned to service under a conditional reinstatement agreement who tests positive a second time for a controlled substance within a ten year period after reinstatement. Therefore, it is determined in this case Claimant was not denied his contractual "due process" Agreement rights when he was not afforded a formal Investigation.

Turning to the merits, the Organization makes a strong argument in behalf of the Claimant that on September 14, 2010, Claimant was taken in for testing because of suspicion of alcohol usage and after having passed that test, the test should have concluded. However, examination of the November 23, 2009, reinstatement letter signed by the Claimant reveals in pertinent part:

"...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...."
(Underlining Board's emphasis)

In accordance with the aforementioned letter the Carrier was not prohibited from doing a drug test on September 14th even though it initially brought the Claimant in for an alcohol test. The November 23, 2009, letter also stated the following:

"Violation of any one or more of the following conditions will subject you to dismissal:

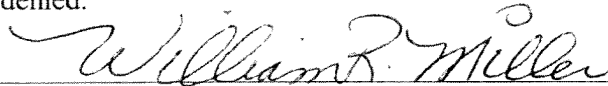
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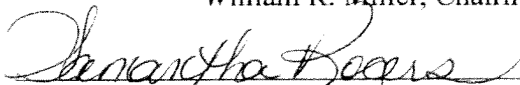
*** Failure to provide a urine specimen or alcohol sample without a valid, verified medical explanation."**

Review of the record substantiates that at the time of the test three different Supervisors were at the test site and they advised the Claimant that he should not leave and failure to provide a urine sample was the equivalent to testing positive. Even though he was forewarned, Claimant chose to leave at his own peril. The Board cannot ignore the Claimant's error because it amounted to a positive test. Therefore, the Board finds and holds that Claimant was properly notified in accordance with the June 24, 1991 Letter of Understanding and the November 23, 2009 Reinstatement Letter, 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: May 3, 2012