

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 577
Carrier File No.: 14-22-0026
Organization File No.: 0361-SL1312-2114
Claimant: R. Anderson

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization is writing this claim on behalf of the Claimant, Robert M. Anderson {1166776}, who was unjustly dismissed from BNSF Railway on December 10th, 2021, without an unjust treatment hearing. We request all record of discipline be removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's actions.

CARRIER POSITION:

On March 18, 2020, Claimant tested positive for a random FRA drug /alcohol test. Claimant acknowledged guilt and waived his right to an Investigation. He successfully completed the terms of his waiver and signed a Return to Service Agreement on July 24, 2020. This Agreement stated:

This letter will confirm that as a result of our conference on April 20, 2020, concerning your positive random FRA drug/alcohol test, you are hereby issued a Level S Conditional Suspension effective April 20, 2020, for your violation of MWOR 1.5 Drugs and Alcohol; and BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs. In assessing discipline, consideration was given to your personnel record. The Level S Conditional Suspension you have been issued includes a review period of Three (3) Years from the date of this letter. In addition, a second Drug and Alcohol violation within ten years of the signing of this waiver could result in your dismissal.

This suspension is conditional based upon: 1) your acknowledgment of responsibility for violation of MWOR 1.5 Drugs and Alcohol and/or the BNSF

Policy, Rules, and Procedures on the Use of Alcohol and Drugs, 2) your placing yourself into the Employee Assistance Program, and 3) your full compliance with the program and with all instructions issued you by the Employee Assistance Program Manager.

Your suspension will be considered served when you are released to active service by the Medical and Environmental Health Department upon the recommendation of the Employee Assistance Program Manager. Failure to receive a favorable recommendation or failure to abide by the instructions or program set forth by the Employee Assistance Program Manager and/or the Medical and Environmental Health Department, will automatically result in dismissal if such charges are proven in a separate formal investigation.

This letter will be placed in your personnel file. Your signature below signifies your acceptance of this a Level S Conditional Suspension for violation of BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs and agreement to waive your right to formal investigation and appeal in this matter. All applicable rules for return to work must be complied with as outlined in the BNSF Policy, Rules, and Procedures on the Use of Alcohol and Drugs.

Claimant agreed to contact the Employee Assistance Program Manager and to comply with the recommendations made by them. Following successful completion of the recommended program, the Carrier issued Claimant the following letter on July 24, 2020:

You have satisfactorily completed the prescribed education and/or treatment program and complied with requirements of BNSF's Employee Assistance Program following your violation of the BNSF Policy, Rules and Procedures on the Use of Alcohol and Drugs, revised April 22, 2019. As a condition of employment, you are now subject to periodic follow-up drug and/or alcohol testing. When a follow-up test is required, you will be notified by proper authority (FRA, FMCSA, or BNSF). Federal (FRA or FMCSA) follow-up tests will be conducted under observed conditions and BNSF follow-up tests may be conducted under observed conditions. Prior to returning to active service, you must contact your supervisor and comply with any other conditions required as a result of this violation.

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

- More than one confirmed policy violation for any violation covered in the BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, revised April 22, 2019, for any controlled substance violation or alcohol violation under any circumstances during any 10-year period.

- A single confirmed policy violation for any violation covered in the BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, revised April 22, 2019, under any circumstances within three years of any "serious offense" as defined by the BNSF Railway "Policy for Employee Performance Accountability."
- Failure to provide a urine specimen or alcohol sample without a valid, verified medical explanation.
- Adulteration or substitution of urine samples.
- Possession of alcohol, any controlled substances, adulterating substances, urine substitutions, or drug paraphernalia on BNSF property.
- Failure to abide by the instructions of the Medical & Environmental Department and/or Employee Assistance Program (EAP) regarding treatment, education and follow-up testing. Including but not limited to:

*Failure to participate in or attend self-help meetings. Not getting an AA/NA sponsor.
Failure to remain in contact with EAP. Not completing aftercare
Not abstaining from all mood altering substances
Not reporting a change of address/work location/supervisor to the EAP
Failure to cooperate with EAP*

- Note to CDL Drivers: Non compliance with any of the aftercare provisions will result in revocation of CDL certification. When, in the future, you are completing medical history information for CDL certification, please record the Drug and Alcohol Policy violation and treatment you received.

BNSF Railway strives to provide a safe work environment. A workplace free from the effects of drugs and alcohol is essential to achieve this goal. In order to maintain a working relationship with BNSF, you must remain in full compliance with the BNSF Policy on the Use of Alcohol and Drugs. I wish you continued success and encourage you to stay in contact with your Employee Assistance Manager. If you have any questions, please contact this office.

On November 20, 2021, Claimant tested positive for a controlled substance, and was subsequently dismissed.

The Carrier contends that nowhere in the side letters between the parties is there any recognition of a right to an Unjust Treatment Hearing. The Organization asserts, without evidence, that it "repeatedly" asked BNSF to hold an Unjust Hearing for Claimant. However, the Carrier maintains that the only record of such a request was dated December 30, 2021, and asked for an Investigation as opposed to an Unjust Treatment Hearing.

The Carrier denies that it has any obligation to provide Claimant with an Unjust Treatment Hearing. It asserts that the Organization agreed back in 1991 that an employee testing positive for a second time during any 10-year period is only entitled to submit a grievance disputing their

dismissal. It notes that nowhere in the side letters between the parties about discipline under BNSF's Drug and Alcohol policy does it mention a right to an Unjust Treatment Hearing, or for that matter, a disciplinary Investigation.

BNSF argues that no flaw is evident in the testing process or results. It maintains it acted in accordance with the various rules, including Appendix No. 11 of the South Agreement, policies in effect for an employee with a second positive test within a 10-year period, as well as with the terms of the Condition of Employment Agreement Claimant signed when he returned to service in July 2020. It references on-property, arbitral precedent confirming that dismissal is the appropriate discipline under these circumstances without investigation or hearing.

The Carrier points out that neither the DOT nor BNSF recognizes alternate testing as bona-fide methodology to remove an MRO verified test result. Even if such a test was acceptable evidence for a required FRA follow-up test, which it is not, no such test results were provided to the Company at any point during the handling of this case.

ORGANIZATION POSITION:

On November 15th, 2021, Claimant was instructed by Supervisor W. Sweetwood to take a random drug test. He cooperated and the results were reported by an unknown third-party Drug and Alcohol Testing Facility as positive for a controlled substance. Manager of Service Support B. Maly advised Claimant of the allegedly "positive" test on December 10, 2021. The Carrier terminated Claimant because this Drug Urinalysis Test was within ten years of a previous violation of the Drug and Alcohol Policy.

The Organization has repeatedly asked for and continues to request an Unjust Hearing to no avail. Claimant has evidence that the urinalysis on November 15, 2021 was inaccurate and incorrect. In the Organization's assessment, the Letter of Understanding is without merit because this would not have been a second violation of the Carrier's Drug and Alcohol Policy.

Claimant has taken it upon himself to take a hair follicle test to prove his innocence. The Organization maintains that hair follicle test results show what was in Claimant's system on November 15, 2021. It argues the dismissal was without cause because the Carrier's test cannot be credited under the circumstances.

DECISION:

Claimant was hired in February of 1998. His positive test in 2020 and the resulting Conditional Employment Letter are not contested.

In November of 2021, he tested positive for methamphetamines. He was not offered either a Disciplinary Investigation or Unjust Hearing prior to his dismissal. The Organization protests that this denial renders his dismissal procedurally unsustainable. It asserts that it "repeatedly" continued to ask BNSF to hold an Unjust Hearing for Claimant. However, the Carrier maintains that the only record of such a request was dated December 30, 2021, and it asked for an

Investigation as opposed to an Unjust Treatment Hearing. Having reviewed the record, we find that the only documented request in the record is a single request for an Investigation.

The Carrier's Employee Performance Accountability Policy states as follows:

D. Stand-Alone Dismissible Violation

1. Stand-Alone Dismissible Violations include, but are not limited to: * * *

- d. Refusal to submit at any time to required testing for drug or alcohol use, adulterations of sample, second violation of the Use of Alcohol and Drugs Policy within 10 years, or failure to comply with instructions of the Medical Director.**

In 1991, the Parties negotiated the following regarding the Carrier's Policy on Use of Alcohol and Drugs:

LETTER OF UNDERSTANDING DATED JUNE 24, 1991

This will confirm our understanding reached on June 20, 1991, in connection with the application of Rule 9.0 of the Santa Fe's "Policy on Use of Alcohol and Drugs," which became effective on March 1, 1991, and which all Santa Fe employees were notified by letter dated February 1, 1991, which reads as follows:

9.0 DISMISSAL

Any one or more of the following conditions will subject employees to dismissal for failure to obey instructions:

- (a) A repeat positive urine test for controlled substances obtained under any circumstances. Those employees who have tested positive in the past ten (10) years would be subject to dismissal whenever they test positive a second time.
- (b) Failure to provide a urine specimen for testing when instructed under the terms of this policy or Federal or State regulations. Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal. Effective June 1, 1991, an employee who is subject to dismissal under the afore-quoted provisions of Rule 9.0 shall be notified in writing by Certified Mail, Return Receipt Requested, to the employee's last known address, copy to the General Chairman, of termination of his seniority and employment. The notice shall contain adequate statement of the circumstances resulting in the employee's termination of employment. It was also understood that the above will not preclude the filing and progression of claim filed on the employee's behalf for reinstatement, which must be submitted to this office within 60 days from the date

he is notified of termination of employment. The Letter of Understanding dated April 1, 1990 will remain in effect.

This Letter of Understanding sets forth a claimant's rights when testing positive within 10 years of a prior positive test for drugs and alcohol. The only review provided for in the Letter of Understanding is a claim for reinstatement; there is no mention of either an Investigation or an Unjust Treatment Hearing. It is clear that in this Letter, the parties set out to articulate the rights of and processes available to an employee in Claimant's circumstances. In identifying only a claim for reinstatement, without providing for Investigation or an Unjust Treatment hearing, the parties agreed that Claimant's rights would be limited to making a claim for reinstatement. If the parties had negotiated other rights for claimants in this situation, they would have said so. It is not for this Board to alter the parties' negotiated agreements by inserting rights and/or obligations that the parties have not agreed to. It follows that this Board does not recognize any right to Investigation or other Unjust Treatment Hearing prior to dismissal of an employee who tests positive for drugs and/or alcohol within 10 years of an earlier, positive test.


The Corporate Rule regarding Alcohol and Drug Test Results states in Paragraph K "The results of a Drug test verified by the MRO are considered final and valid. Alternate testing such as hair, urine, or other tests done outside of the control of BNSF does not change the findings verified by the MRO."

The Organization has provided no persuasive basis for calling into question the results of the Carrier's drug test. David Watts, who administered the test, was fully certified and trained. The Policy is very clear that upon verification, the test results will be considered valid. The evidence in this case does not provide a basis for deviation from this standard. The Policy is explicit in stating that subsequent hair testing will not change the findings of the MRO. The evidence in this case shows that Claimant tested positive for an illicit drug within two years of his conditional reinstatement. As a result, he was properly subject to dismissal.


AWARD:

The claim is denied.

Dated: January 7, 2024



Patricia T. Bittel, Neutral Member



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member