

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 212, (Case No. 212)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION – IBT RAIL CONFERENCE**

**VS**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Samantha Rogers, Carrier Member  
David R. Scoville, Employee Member

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier violated the Agreement commencing June 1, 2016, when Claimant Jon Schneider (1779719), was dismissed for testing positive on a drug test. The Carrier Alleged violation of BNSF’s Policy, Rules, and Procedures on the use of Alcohol and Drugs.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing June 1, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-16-0350) (Organization File No. 2409-SL1312-162)**

**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 February 10, 2016, the Claimant was working as a Track Supervisor and it was alleged that he may have exceeded the limits of his track authority while working with rail detector car after which he allegedly failed a drug test and because of those

allegations the Claimant was directed to attend a formal investigation on March 11, 2016, which was mutually postponed until June 1, 2016, concerning in pertinent part the following charge:

**“...to develop the facts and circumstances concerning your alleged positive drug test and alleged positive drug test and alleged violation of Rule 1.5 of the General Code of Operating Rules, effective April 7, 2010, as amended; and BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, effective September 1, 2014, on February 26, 2016 at 1105 hours.”**

On June 30, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Carrier changed the Notice of Investigation at the Hearing. It argued that the Carrier first charged the Claimant with violating GCOR 1.5 and changed the Rule to MWOR 1.5 which was done in an untimely manner. The Organization argued that because of the aforementioned procedural error the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier should have offered the Claimant a Waiver for his first time offense of having a positive drug test especially since the Claimant voluntarily entered the Employee Assistance Program (EAP). It argued the Claimant was a good employee and should not be dismissed for a first-time error. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier’s position that there were no procedural errors on the part of the Hearing Officer during the holding of the Claimant’ formal Investigation. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted the record shows that the Claimant had exceeded his track authority on February 10, 2016, and he subsequently failed a reasonable cause drug and alcohol test that followed having exceeded track authority. It argued there is no dispute that the Claimant was guilty of all charges since the Claimant admitted his guilt. It further argued that contrary to the Organization’s arguments regarding Claimant’s motives to voluntarily join the EAP it suggested that the Claimant knew his drug test would be positive and took part in that program in an effort to mitigate the consequences of his violation of Carrier Policies and Rules regarding controlled substances. Lastly, it argued that after having proven its allegations against the Claimant it appropriately disciplined the Claimant. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural argument. The Organization argued that the Carrier improperly changed the charges at the Hearing. Examination of the record reveals that the Hearing Officer explained during the Investigation that the Notice of Investigation contained a typographical error and should have read MWOR 1.5 rather than GCOR 1.5. The record further shows that both Rules contain the exact same language and there was no showing that the Claimant or Organization did not understand the charges or that they were "blindsided" by anything that arose during the Investigation. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

Review of the transcript shows that the parties did not dispute that on February 10, 2016, the Claimant exceeded his track authority while working with a rail detector car. The Carrier's protocol in like situations require those employees involved submit to a reasonable cause drug and alcohol test and the results of that test showed that Claimant tested positive for a controlled substance, cocaine, while he was on duty and responsible for the safety of himself and others. Claimant admitted he tested positive for having a controlled substance in his system. It is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately eight years of service. The Organization argued that denial of the Claimant's request for a Waiver for "a first time violation of Rule 1.5 Drugs and Alcohol was uncustomary and unjust", however, the Carrier's Policy for Employee Performance Accountability (PEPA) states that an employee **may** be eligible for a conditional suspension as described in Carrier's Drug and Alcohol Policy. It does not state that the employee **must** be given a conditional suspension. In this instance, the Claimant was subject to dismissal because this was his Third Serious Level S violation within a 36 month active review period. Under these circumstances, a Waiver, admission of guilt, would have been for dismissal, not a conditional suspension that an employee without any other active Level S violation might have been granted. The discipline assessed was in accordance with PEPA. The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

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Claim denied.

  
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William R. Miller, Chairman and Neutral Member

  
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Samantha Rogers, Carrier Member

  
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David R. Scoville, Employee Member

Award Date: 1/5/18