

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 351, (Case No. 351)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing June 12, 2020, when Claimant De Andre Harvis (1779669) was removed from service and subsequently dismissed July 21, 2020, for positive test for a controlled substance during a FRA Random Worker test on June 4, 2020, in violation of BNSF 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 remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing June 12, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0216) (Organization File No. 2409-SL1312-207)**

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 Claimant was a Sectionman working in Hardin, MT, on June 4, 2020, when he was subjected to a FRA Random Worker test that he allegedly failed and because of that Claimant was directed to attend a formal Investigation on June 19, 2020, which was mutually postponed until July 14, 2020, concerning in pertinent part the following:

“...to develop the facts and circumstances concerning your alleged positive test for a controlled substance during a FRA Random Worker test while working as Sectionman in Hardin, MT on June 4, 2020 at 0750 hours and alleged violation of BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs. The date BNSF received first knowledge of this alleged violation is June 10, 2020.”

On July 21, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization’s position that Claimant should have been granted a Waiver of Investigation for a first time violation of the Carrier’s Drug and Alcohol Policy. Claimant and the Organization never denied that Claimant tested positive for marijuana on June 4, 2020. It asserted that Claimant admitted his error and complied with Carrier requirements for treatment. It argued that Claimant was singled out and not offered the 1.5 Waiver for a first-time offense and it requested Claimant be reinstated to service and the claim be sustained as presented.

It is the position of the Carrier that the claim is procedurally defective because it failed to identify the governing Agreement under which it was filed or any Rule that was allegedly violated. It asked that the claim be dismissed and/or denied without reviewing the merits.

Turning to the merits, the Carrier stated the record shows that Claimant admitted to testing positive for the use of marijuana on June 4, 2020. It argued Claimant was not eligible for a Waiver because he had an active Level S violation on his record at the time of the instant violation, therefore, dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and is not persuaded by the Carrier's procedural argument. It is determined that the case will be resolved on its merits.

There is no dispute between the parties that on June 4, 2020, Claimant reported to work on TTPX0007 near Hardin, MT, and was informed he had been selected for a FRA Random drug test. The results of that test were provided to the Carrier on June 10, 2020, and showed Claimant had tested positive for a controlled substance – marijuana.

The Organization argued that the Claimant should have been granted a Waiver whereas the Carrier argued that the Claimant was not eligible for a Waiver because he had an active Level S violation on his record. Review of Section IV.F of BNSF’s Violations Corporate Rule supplementing BNSF’s current Use of Alcohol and Drugs Policy reveals that it states:

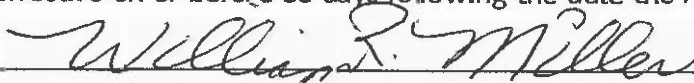
“An employee is eligible for a waiver only if it’s his or her first Alcohol or Drug violation and only if of the he or she does not have an active Level S violation at the time Alcohol or Drug violation.” (Underlining Board’s emphasis)

At the time of the subject dispute Claimant had an active Level S violation on his record. Claimant signed a Waiver of Investigation admitting to violating MWOR 1.6 and MWOR 1.13 when Claimant failed to comply with his Foreman’s instructions on November 20, 2019 and accepted assessment of a Level S Record Suspension with a One-Year Review Period, therefore, the Carrier was correct when it did not grant the Claimant a Waiver of Investigation for the drug violation of June 4th. The record 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 Claimant had approximately 12 years of service. Claimant’s violation in this instance was his second serious violation within an active review period and made him subject to possible dismissal. Based upon a generally good work record and Claimant’s truthfulness about his offense the Board finds and holds that discipline was appropriate, but dismissal was excessive and is reduced to a lengthy suspension that is corrective in nature. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Because of the serious nature of the instant offense a Three Year Review Period should be attached to the Claimant’s Disciplinary Record upon Claimant’s reinstatement. The Board also forewarns the Claimant that after reinstatement the Claimant should be careful to adhere to all Carrier and Safety Rules as failure to do such could result in harsher discipline depending upon the severity of a subsequent violation.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: March 25, 2022