

PUBLIC LAW BOARD NO. 7564

Case No. 121/Award No. 121
Carrier File No. 10-21-0082
Organization File No. C-21-D070-3
Claimant: T.P. Reuter

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION)

Statement of Claim

By letter dated November 5, 2020, T.P. Reuter received a Rule 1.5 Dismissal, effective immediately, "for a positive test for a controlled substance from a follow up test collected at or near McCook, NE." The Claimant allegedly violated BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs effective September 1, 2014, and MWOR 1.5 Drugs and Alcohol.

The Organization's December 23, 2020, claim from Jim L. Varner, Vice General Chairman, appealed the discipline. The Organization requested that the discipline outlined in the Carrier's November 5, 2020, letter be "removed as...excessive and... removed from [Claimant's] records in accordance with Rule 40 of the current agreement, and he be reinstated with all monies which include all straight and overtime lost out on, any lump sum payments due... All vacation earned during this dismissal and all medical out of pocket monies and benefit losses."

Facts

By letter dated August 17, 2020, the Claimant received notice to attend an "[I]nvestigation at 0900 hours, Tuesday, August 25, 2020, at ... McCook, NE ... to develop the facts and circumstances concerning your alleged positive test for a controlled substance from a follow up test collected at/or near McCook, NE on August 5, 2020 at 0920 hours and alleged violation of BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs." The investigation, postponed by mutual agreement on two occasions, was held on October 21, 2020, at 1000 hours in Cheyenne, WY.

Carrier Position

The Carrier avers that the investigation was fair and impartial, and the record proved by substantial evidence that Claimant violated BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs effective September 1, 2014, and MWOR 1.5 Drugs and Alcohol. Claimant conceded he used a CBD product. His dismissal was in accordance with the Carrier's Policy for Employee Performance Accountability ("PEPA").

Organization Position

The Organization asserts that Claimant's dismissal is excessive and without merit due to the Carrier's procedural errors when collecting Claimant's drug specimen(s). Moreover, the Carrier failed to meet its burden of proof because the record lacks sufficient facts and evidence.

Findings

The following facts are not at issue. On March 20, 2020, Claimant tested positive for a controlled substance after taking a random Federal Railroad Administration (FRA) mandated test. After signing a conditional waiver admitting guilt, Claimant received a Level S Actual Suspension with a three-year review period.¹ Pursuant to BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, Claimant was subjected to a minimum of six unannounced drug tests during the first year following the initial positive test.²

According to the Carrier, on August 5, 2020, Claimant's urine tested positive when administered a follow-up drug and alcohol test. As a result, Claimant is charged with violating BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs effective September 1, 2014, and MWOR Rule 1.5.

BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs state that notwithstanding any statute, ordinance, regulation, or other law that legalizes or decriminalizes the use or possession of marijuana, ...the Carrier's policy prohibits an employee from reporting for duty or remaining on duty or on the Carrier's property with any detectable amount of marijuana in his or her body.³ Further, MWOR Rule 1.5 precludes the following:

the use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited

¹ Discipline Section, Investigative Transcript ("Tr").

² Follow-up testing is a Department of Transportation requirement outlined in the Carrier's policy.

³ Employer Exhibit 5, Section IV(E).

substances in their bodily fluids when reporting for duty, while on duty, or while on company property.⁴

This case presents a unique set of facts for the Board's consideration. The collector agent at the test site identified Claimant's initially sealed sample as Specimen #1899914. Claimant signed a form that the specimen was sealed in his presence and not adulterated in any manner. Approximately 15 to 20 minutes after Claimant left the test site, Claimant was recalled to the testing site and informed that the seal on the first specimen had torn.

Claimant testified that after returning to the testing site, the Carrier's collector agent requested Claimant initial a second sealed specimen. The Carrier's collector agent identified the second sealed drug specimen as Specimen #6901248. The Carrier's collector agent again asked Claimant to execute a form attesting to the fact that the specimen was resealed in his presence and not adulterated in any manner. Claimant testified that although he was not present for the sealing of the second specimen, it was his understanding, based on what the Carrier's collector agent explained to him regarding the first form, that if he failed to execute the form, his refusal would constitute an admission that the specimen was positive for drugs.⁵ Unfortunately, the Carrier's collector agent failed to advise Claimant that under these unique circumstances, Claimant had a right to refuse to sign the form, and his refusal would not constitute an admission.⁶

The Carrier failed to produce the individual who collected the drug specimen(s) as a witness. As a result, it is unclear from the record what specimen collection procedure was used to collect the second sample. It is unclear whether Claimant was called back to initial the bottle of the original test specimen with a new sealing, whether Claimant was signing off on a specimen in a new bottle with a new sealing, or whether Claimant was signing off on another employee's drug test.⁷

The Carrier's witness, Julie Murphy, Manager of Medical and Employee Health Services, conceded that she had no first-hand knowledge of the methodology of the collection procedure for the second specimen. She acknowledged that neither the Carrier's protocol nor the Regulations address how to handle a situation where a seal is broken or torn shortly after collection.⁸ However, she admitted that if a specimen with a torn seal arrived at a lab, it would be rendered void.

Despite Claimant's admission that he had consumed a CBD concentrate, and the Board's consideration of the Carrier's safety protocols, Claimant raises legitimate objections regarding

⁴ Carrier Exhibit 6.

⁵ *Id.* at 32, 39, 48. Carrier Exhibit 7.

⁶ *Id.*

⁷ Tr.42.

⁸ *Id.* at 29. She also acknowledged that she had no way of knowing whether the specimen tested by the lab was the specimen which had the broken seal or if it was a second specimen. Tr. 30.

the test collector's adherence to test protocols and procedures.⁹ Based on the failure of the Carrier to present the test collector as a witness the Carrier has failed to prove by substantial evidence that the application of the test followed the Carrier's procedural requirements and Federal Regulation 49 CFR Part 40.¹⁰ As a result, the Carrier has failed to prove by substantial evidence that Claimant engaged in the conduct as charged.

Award

Claim sustained.

Order

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made with the discipline to be removed from the Claimant's records. The Carrier is to make the Award effective on or before thirty (30) days after the Award is adopted.



Zachary Voegel, Organizational Member



Joe Heenan, Carrier Member



Melinda Gordon, Neutral Referee

DATED: June 20, 2023

⁹ *Id.* at 40. Claimant acknowledged that he thought there was a possibility that the test would come back positive because CBD concentrates may contain THC.

¹⁰ *Id.* at 11.