

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY COMPANY

(Los Angeles Junction Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 11
Carrier File No. 14-07-0234
Organization File No. 180-1312-079.CLM
Claimant: Armando G. Cervantes

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 13, 2007 when Claimant, Armando G. Cervantes (5114855), was removed from service and dismissed for testing positive a second time within a ten year period violating the conditions of his leniency reinstatement letter dated October 31, 2002 and Los Angeles Junction Railway Company Policy on Drug and Alcohol; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 13, 2007, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Armando G. Cervantes, was employed by the Los Angeles Junction Railway Company, and was previously dismissed in 2002. The Claimant accepted leniency reinstatement in 2002 based on his assurance to the Carrier that he would comply with the Company's Rules and Regulations, more particularly the Los Angeles Junction Railway Company Policy on Drug and Alcohol Abuse, which provides, in relevant part that: "When a second positive test is taken within a ten-year period, it will result in a dismissal regardless of the type of test that resulted in the positive test screen." The Claimant was removed from service and dismissed after testing positive a second time within a ten-year period, thus violating the conditions of his leniency reinstatement letter dated October 31, 2002.

The Organization contends that the Carrier's imposition of discipline was:

...extreme, unwarranted and unjustified and is not supported by the flagrant abuse of any of the Carrier's rules. Even if the Carrier could produce evidence to support their charges, the discipline issued is excessive in proportion to the Carrier's allegations.

The Organization further contends that the imposition of discipline was improper in the instant case because the Carrier violated Rule 13 of the parties' Agreement, which provides:

Any employee who has been in service more than sixty (60) days will not be disciplined without first being given an investigation, which will be held within thirty (30) days if held out of service.

The Carrier denied the grievance, contending that the Claimant tested positive on July 13, 2007 for cocaine and marijuana. According to the Carrier, the test was conducted based on reasonable suspicion.

The Carrier contends that the Claimant was not entitled to an investigation in such cases, and that its imposition of discipline was justified under the pertinent circumstances.

The parties were unable to resolve their dispute , and the matter was submitted to this Public Law Board for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

The essence of the Organization's claim on behalf of the Claimant is that the Carrier failed to conduct an investigation before dismissing the Claimant from all service based on his having tested positive for a controlled substance for a second time within a ten-year period. The Claimant has no entitlement to a full investigation and formal hearing, as the fact that he tested positive would be sufficient to trigger his dismissal from all service based on a violation of a last chance agreement restoring the claimant to service on a leniency basis in October, 2002. Although the Claimant is not entitled to a full investigation, the Claimant is entitled to view the test results, and may elect to provide the results to the Organization in order better to represent the Claimant's interests in any subsequent adjudication or appeal.

The evidentiary record contains no information challenging the validity of the "reasonable suspicion" basis for the test, nor does the Claimant allege any procedural impropriety regarding the test. In the absence of an investigation, the Board requires documentary evidence that the Claimant failed a test as part of the record below in order to sustain the dismissal from all service. At the request of this Board, the Carrier has submitted the test results and other documentary evidence establishing that the Claimant tested positive for a second time within ten years. This result was also communicated to the Claimant. Given

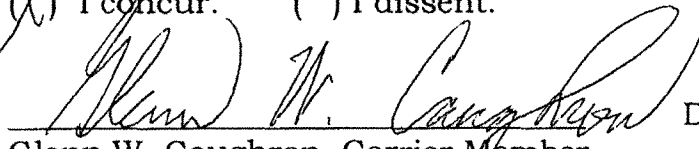
the submission of such material, the augmented record in the instant case established persuasively that the Claimant tested positive for cocaine and marijuana on July 13, 2007. Consequently, the Board now has a valid evidentiary basis to uphold the dismissal, as the Carrier has met its burden of establishing persuasively that the Claimant failed a second test result within a ten-year period in violation of the collective bargaining agreement between the parties and the October 2002 Return to Work Agreement.

Therefore, based on the evidence submitted, the Claimant, Armando G. Cervantes was properly removed from service and dismissed. The instant claim is hereby denied. We so find.


Daniel F. Brent, Impartial Chair

Dated: 6-3-09

(X) I concur. () I dissent.


Glenn W. Caughron, Carrier Member

Dated: 6-18-09

(X) I concur. () I dissent.


David Tanner, Organization Member

Dated: 6-15-09