

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 18
NMB Case No. 106
Carrier File No. 14-08-0166
Organization File No. 210-1312-089.CLM
Claimant: Sammie Whittington

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 29, 2008 when Claimant, S. Whittington (1734565), was dismissed from service for testing positive for marijuana for a workplace violence cause test. The Claimant was found in violation of General Code of Operating Rule 1.5 and BNSF Policy on the Use of Drugs 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 May 29, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, S. Whittington, was dismissed from service for testing positive for marijuana after an incident on May 29, 2008, when the Claimant allegedly participated in an altercation during which he punched another Carrier employee. Because of the incident, the Claimant was required to submit to a reasonable cause test for drug and alcohol. Following receipt of positive test results for a cannabinoid metabolite, the Carrier dismissed the Claimant for violation of Maintenance of Way Rule 1.5 – Drugs and Alcohol, which provides in relevant part that:

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

According to the Carrier, the Claimant had 30 ng/mL of a cannabinoid metabolite in his system, double the 15 ng/mL cut off level for this metabolite of marijuana.

The Organization grieved the imposition of discipline, contending that the Claimant suffered from a serious medical condition, advanced kidney disease that, as evidenced by creatinine counts that were eight to twenty-four times the normal level, causing the Claimant to be

hospitalized for treatment. The Organization contends “the creatinine level throws off all the counts for any test conducted during this time frame.” The Carrier reasonably discounted this explanation, as the Claimant had not discussed this aspect of his medical condition in his interview with the Carrier’s Medical Review Officer before his dismissal. The Carrier further contended that the Organization did not submit adequate evidence that a medical physician had diagnosed the Claimant with kidney disease or kidney failure, relying instead on speculative conjecture in the face of an unchallenged positive test result indicating marijuana use. The Organization also contends that the Claimant should have been permitted to elect a waiver under Section 7.6 of the Carrier’s PEPA Policy.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

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

As the Carrier aptly asserts, a railroad is “a safety sensitive workplace and has no tolerance for unsafe practices, especially with regard to the use of drugs or controlled substances.” The penalty of dismissal for such misconduct has been upheld by this Board and many other Boards.

The event precipitating the Carrier’s decision to test the Claimant was an altercation in which he was involved with another co-worker. This incident justified the Carrier’s requirement that the Claimant submit to drug and alcohol testing. In view of the apparently valid test results indicating the presence of a metabolite of marijuana in the Claimant’s system when he was tested, the Carrier’s determination that the Claimant violated Maintenance of Way Operating Rule 1.5 is unassailable.

Also at issue in the instant case is whether the Claimant was entitled to elect a PEPA waiver prior to the investigation. The Organization contends that the Claimant should have been offered the opportunity to elect a waiver under the Carrier’s PEPA Policy, Section 7.6. This policy provides, in relevant part:

Waivers: Available for first-time drug and alcohol violations only. Upon written notification of the investigation, the Employee will also be offered, in writing, a waiver of formal investigation required under collective bargaining agreements. The Employee may exercise the waiver at any time prior to the investigation date specified in the written notification. When the Employee elects to

complete and sign the waiver, the Employee is admitting to the violation. The violation will be recorded in the Employee's transcript.

Formal investigations were held in July 23, 2008, almost two months after the May 29, 2008 incident. During this interval, the Claimant did not formally request a waiver under PEPA or protest the Carrier's failure to offer such a waiver. Consequently, this potential alternative to discipline was not properly invoked or grieved by the Claimant.

The record contains no credible evidence supporting the Organization's claim that the Claimant's kidney disease skewed the test result, creating a false positive for a cannabinoid metabolite indicating marijuana use. Neither did the medical records describing the Claimant's admission to a hospital for treatment on June 30, 2008, well after the incident that precipitated the instant case, disprove the substantial evidence offered by the Carrier that the Claimant tested positive for the marijuana metabolite. The result of a drug test taken by the Claimant either on July 15, 2008 or July 2, 2008 is also immaterial, as the original cannabinoid metabolite would have disappeared from the Claimant's system after thirty days.

Notwithstanding the excerpts from professional publications submitted by the Organization that purport to establish unusual conditions that might, in ill-defined circumstances, cause an individual

falsely to test positive for marijuana or a cannabinoid metabolite, the record does not contain sufficient credible evidence to mandate overturning the Carrier's imposition of discipline in the instant case. Moreover, even if the penalty of dismissal for the altercation were to be reduced to a Level S Suspension, the August 13, 2008 dismissal that precipitated the instant case would constitute a second Level S violation within a twelve-month period, further justifying the Carrier's decision to dismiss the Claimant.

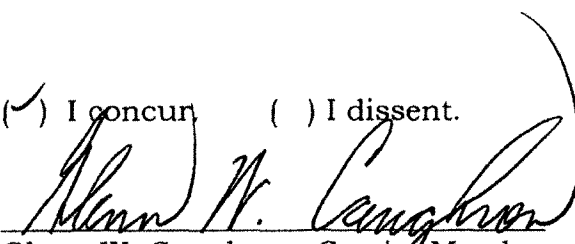
Therefore, based on the evidence submitted, the dismissal of the Claimant, S. Whittington, was for just cause. The instant claim is hereby denied.

We so find.


Daniel F. Brent, Impartial Chair

Dated: October 14, 2009

☒ I concur. ☐ I dissent.


Glenn W. Caughron, Carrier Member

Dated: 11-23-09

☐ I concur. ☐ I dissent.


David Tanner, Organization Member

Dated: 11-12-09