

BNSF Railway (Former Burlington Northern Railway)
- and -
Brotherhood of Maintenance of Way Employees

Public Law Board No. 7585
Case No. 12
Award No. 12
Carrier File No. 10-12-0269
Organization File No. C-12-D070-7
Claimant: Todd Dietrick

FACTS:

Claimant Todd Dietrick was hired in 2007. He received a 10-day record suspension in 2009 for failure to report injury of an officer of the Company by the first available means, and a Level S 30-day record suspension in 2011 for failure to lock out and tag out a tamper. He was dismissed on February 2, 2012 for failure to comply with instructions regarding mandatory respirator medical clearance and fit testing process per MOWOR 1.13, 1.6 and S21.3.1.

MOWOR S-21.3.1 requires all employees who use a respirator to follow the Respiratory Protection Program. Such employees must be trained, fit-tested and medically qualified annually. The collective bargaining agreement states "It is the responsibility of the employee to keep the Carrier advised of address changes in the usual manner." P. 82.

On June 30, 2010, the Carrier sent out a letter to all affected employees advising that they would have to be medically cleared to wear a respirator and would also have to be fit for one. "Employees not having the above two qualifications will not be allowed to hold a position and will be removed from service until these requirements are met." The letter was sent to the residential address Claimant Dietrick had on file with the Carrier. At some point, Claimant was fit tested, but he did not receive medical clearance to wear a respirator.

On November 1, a second letter was sent to all employees who were not yet compliant. It stated as follows in pertinent part:

The deadline for becoming medically cleared to wear a respirator was Monday October 31, 2011. If you are a recipient of this letter, you are not on the list as medically cleared to wear a respirator. To avoid being removed from service, you need to take immediate action to become medically cleared.

The Carrier provided proof of delivery of this letter at hearing. On December 6, the Employer received notification that Claimant had moved without a forwarding address. On December 9, a letter was sent to the remaining 40 employees explaining this was an

OSHA requirement and the deadline would be extended to December 31, after which disciplinary action would follow. That letter stated as follows in pertinent part:

If you do not take immediate action to become medically cleared by December 31, 2011, you will be disqualified from holding, bumping or bidding to any Maintenance of Way position until such time you submit your Respirator Medical Questionnaire.

When Claimant did not comply with the deadline, he was removed from service. By letter dated January 4, 2012 he was notified that he was being withheld from service pending investigation.

Claimant admits he did not send in a medical questionnaire in 2011. He said he went to the medical van for a fitting, but was never offered a questionnaire to fill out. He denies receiving the letters sent to his home because he was staying with his girlfriend. He denied being warned that he could lose his job if he failed to fill out the form.

Claimant's removal was also based on a separate allegation of testing positive on a breathalyzer test. Because this allegation is the issue in a separate case, it will not be addressed here.

CARRIER POSITION:

In the Carrier's view, Claimant Dietrick blatantly failed to pick up instructions from the Company in his mail. Under the applicable collective bargaining agreement, it was Claimant's responsibility to keep the Carrier apprised of his mailing address. He already had serious rules violations on his record and this would be his third Level S. He admitted to violating Maintenance of Way Safety Rule S-21.3; numerous awards support the principle that where there is an admission of guilt, there is no need for further proof. Leniency is within the sole discretion of the Carrier, it points out, and is beyond the purview of an arbitrator.

ORGANIZATION POSITION:

The Union argues the Claimant never received proper notice. The Company never called him on the telephone or advised him at work that his employment could be jeopardized by noncompliance. In the Union's assessment, the hearing officer prejudiced the case by accepting the testimony of Director Engineering Support Melodi Tripp by telephone instead of requiring that she testify in person. It further contends the proceedings were prejudiced by the hearing officer's receipt of exhibits prior to hearing. There was no refusal to comply, it argues, concluding the Carrier should just leave him off from working until he qualifies.

DECISION:

Under the terms of the collective bargaining agreement, it was the employee's responsibility to give the Employer his or her correct and current mailing address. Claimant Dietrick's failure to receive notice was the direct result of his failure to meet this responsibility. The Carrier cannot be made responsible for any failure of notice in this instance; it met its responsibility to give adequate notice; it was Claimant's lapse that caused the lack of notice.

Claimant Dietrick plainly knew of the requirement that he be medically qualified and fit tested because he made a good faith attempt to comply. He was fit tested, and should have been given a questionnaire at that time to fill out. The Carrier's requirement was not of its own device, but stemmed from an OSHA requirement which it was mandated to meet. The Carrier was not in a position to ignore, unduly delay or revise OSHA requirements. Hence, it had every right if not the obligation to remove Claimant from service when it did so. However, the right to dismiss Claimant is a distinguishable issue. The problem in this case is one of notice to the employee, not as a result of Claimant moving in with his girlfriend, but as a result of the wording in the communications to employees. The June 30 letter advised employees that noncompliance would result in removal from service "until these requirements are met." This wording does not mention dismissal as a possible result of noncompliance. Rather, it specifically states that the employee will be removed from service until the compliance requirements are met.

The November letter did nothing to alter the understanding of a noncompliant employee. It stated "To avoid being removed from service, you need to take immediate action to become medically cleared." There is no mention here of a disciplinary dismissal, only a repeated admonition that noncompliant employees would be removed from service. This letter appears to be consistent with the June letter which advised employees that the removal would continue only "until these requirements are met." This interpretation was yet again affirmed in the December 6 letter to Claimant.

The Carrier had every right to require that Claimant meet the requirements of his position. However, it did not have the right under the facts of this case to refuse him the opportunity to fill out the Questionnaire and meet the requirements of his position.

The problem facing the Board, however is that an effective a remedy in this case is barred. In Case 13/Award 13 of this Board, we determine that Claimant Dietrick's dismissal for testing positive on an alcohol breathalyzer test was for just cause. Because we uphold the Claimant's prior dismissal in Case 13, we find there was no period of time during which Claimant could have worked but was denied the opportunity. As a result, there is no remedy available in this case.

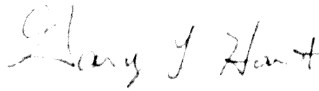
AWARD:

The claim is sustained in accordance with the findings.

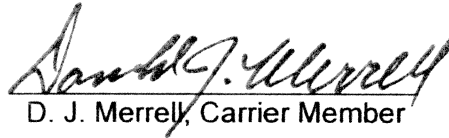
August 30, 2013; Cleveland, Ohio

Handwritten signature of Patricia T. Bittel in cursive script.

Patricia T. Bittel, Neutral Member

Handwritten signature of Gary Hart in cursive script.

Gary Hart, Organization Member

Handwritten signature of D. J. Merrell in cursive script.

D. J. Merrell, Carrier Member