

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

Public Law Board No. 7585
Case No. 13
Award No. 13
Carrier File No. 10-12-0312
Organization File No. C-12-070-10
Claimant: Todd Dietrick

FACTS:

On December 1, 2011, Claimant Todd Dietrick was deemed to exhibit reasonable suspicion for alcohol use and tested positive on an alcohol breathalyzer test. The established limit was .02% and Claimant Dietrick's test was .021%. The test was performed by a certified breath alcohol technician and the results were not contested.

The Carrier's applicable Guidelines for Drug and Alcohol violations address waivers and state as follows:

7.5 All alcohol and drug violations are considered serious. Drug and alcohol violations will be considered with any and all existing violations on an individual's employment record for assessing appropriate discipline.

7.6 Available for first time drug and alcohol violations only. Upon written notification of the investigation, the employee may also be offered, in writing, a Waiver of the formal investigation required under collective bargaining agreement. The employee may exercise the Waiver at any time prior to the investigation date specified in the written notification.

Claimant Dietrick requested a waiver as a first time offender, but it was denied. He contacted the Employer's EAP and complied with all their instructions, successfully completing their recommended program. The Carrier explains that though Claimant Dietrick was a first time offender, he was not waived because he had a prior Level S suspension for lockout/tagout.

CARRIER POSITION:

The Carrier contends that where there is an admission of guilt, there is no need for further proof. It was Claimant's second Level S, it notes, concluding that the Organization is only making a plea for leniency. It cites a number of prior decisions in support of the principle that Boards do not grant pleas of leniency for compassion.

ORGANIZATION POSITION:

The Union maintains the denial of Claimant's requested waiver constitutes an arbitrary and whimsical approach to waivers. He was directed to EAP and fully complied with all instructions and completed all programs. Such an abuse of discretion should not be countenanced in its view.

DECISION:

This case revolves around the Carrier's exercise of discretion as it pertains to granting waivers. The Guidelines for granting waivers are not negotiated and are not mandatory; they are Guidelines only.

Certainly it is part of the parties' mutual expectations that the Carrier will not abuse its discretion by exercising it in a manner which is arbitrary, capricious, discriminatory or unreasonable. In this instance, the Carrier justified its decision by reference to the employee's disciplinary record and the fact that he had a prior serious violation which was still active. In September of 2011, approximately six months before the events here concerned, Claimant was issued a Level S 30-day record suspension with a twelve month review period for failure to lock and tag out a tamper.

Applicable Guidelines give the Carrier discretion in offering waivers to eligible first-time drug and alcohol offenders. The Guidelines make it clear that disciplinary history will be an important factor in the decision of whether or not to take disciplinary action.

Given these Guidelines, it was reasonable for the Carrier to take into account Claimant's active discipline when deciding whether to offer a waiver. Its decision not to offer a waiver was not an abuse of managerial discretion. Without a waiver, Claimant Dietrick was in the situation of having committed a very serious rules violation while under review for a prior violation. Under these circumstances, the Carrier had just cause for dismissal.

AWARD: The claim is denied.

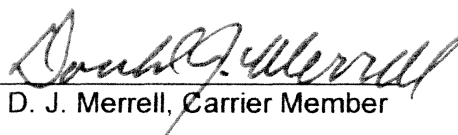
August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member


D. J. Merrell, Carrier Member