

SBA No. 1112
BNSF/BMWE
Case No. 28
Award No. 29

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 28
AWARD NO.29**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 29, 1998 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 49) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of the proceedings are to be reviewed by the Referee.

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The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant was hired by the Carrier in 1995 as a trackman. He was conditionally suspended on January 5, 2000 when he was arrested for possession of a controlled substance. The suspension was conditioned on his enrollment and successful completion of, and compliance with, the Carrier's Employee Assistance Program. On April 14, 2000 he was reinstated subject to periodic random testing.

Following notice and investigation the Claimant was dismissed for violating BNSF Maintenance of Way Operating Rule 1.5 and the Carrier's Policy on the Use of Alcohol and Drugs, all of which provide, in relevant part, as follows:

Rule 1.5 Drugs and Alcohol

...The use or possession of...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...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.

Policy on the Use of Alcohol and Drugs

7.9 Dismissal. Any one or more of the following conditions will subject employees to dismissal:

More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period...

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FINDINGS AND OPINION

On August 27, 2000 the Claimant took two Tylenol tablets and ten milligrams of Dexedrine because he was suffering from a headache. The Tylenol was an over-the-counter drug, but the Dexedrine was a prescription drug. Moreover, the prescription was not provided to the Claimant by his own physician. Rather, it was a prescription drug obtained by a friend of the Claimant.

The following day while the Claimant was on duty he was summoned for a drug screen. He submitted a sample for testing, but he neglected to inform the testor of the drug that he had allegedly taken the night before. Later, the Carrier was informed that the drug screen tested positive for amphetamines and the Claimant was removed from service.

The Claimant contends that his dismissal should be overturned because he has no history of amphetamine use. The Organization adds that the Board should take into account that the Claimant made an error and that he was truthful when confronted with the charges.

It is true that the Claimant did testify truthfully during the investigative hearing and indeed he candidly admitted that he was aware of and understood the rules applicable to his situation and that he did in fact violate those rules. We do not mean to belittle such candor and congratulate the Claimant for his forthrightness and hope that it will hold him in good stead in the future.

On the other hand, we cannot ignore that in just one short year the Claimant was first suspended for his arrest in conjunction with the possession of a controlled substance and then, most recently, tested positive for another controlled substance. Thus, at worst, the Claimant has demonstrated a proclivity to violate the Carrier's policy by possessing controlled substances when he should not. At best, he still violated the policy by using a prescription drug that was not proscribed for him. In either event, and coupled with his short tenure of service, we cannot countenance his rule violations despite his candor and truthfulness.

AWARD

The claim is denied.


Robert Perkovich, Neutral Chair

DATED: 