

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE**

**RAILWAY COMPANY**

and

NMB Case No. 37

**Claim of William Advocate**

**Dismissal:**

**Second 1.5 Violation**

**UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Claim on behalf of Conductor William Advocate for the exoneration of the alleged positive test on April 6, 2004, during a "Follow Up" drug test and the re-instatement to service with the BNSF Railway Company and paid for all time lost from April 13, 2004 until returned to service, including Health and Welfare Benefits for his alleged violation of the Policy on the use of Alcohol and Drugs effective September 1, 2003.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on August 17, 2006, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Gang Foreman beginning in 1996. At the time of the incident giving rise to the claim, Claimant was working as a Conductor at Needles, California.

In December of 2003, Claimant was found to be in violation of the Carrier's Policy on Use of Alcohol and Drugs. For this, his first violation, he was given a Conditional Suspension, was assessed by the Medical Department and then returned to work pursuant to a waiver which he executed. The waiver included his consent to follow-on testing and the condition that any additional positive test within 10 years would subject him to dismissal.

Claimant was subjected to a follow-on drug and alcohol test on April 6, 2004 for which the result was positive for Amphetamines LOD and D-Methamphetamines LOD, controlled substances prohibited by the Carrier's rules. Claimant was withheld from service pending investigation, for which a hearing was held on May 6, 2004. Based on evidence adduced at the hearing, Claimant was dismissed from service for violation of the Carrier's Drug Policy.

The instant claim protesting Claimant's dismissal and seeking his reinstatement was presented in due course, was progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

**POSITIONS OF THE PARTIES:** The Carrier argues that it proved, by substantial evidence based on the record, that Claimant violated the Carrier's drug policy and was properly dismissed. It points out that the positive test was Claimant's second in less than four months and followed his execution of a waiver granting the Carrier the right to test him and making a positive test result grounds for dismissal.

The Carrier argues that the failure to present as a witness the laboratory technician who performed the test is not a basis to overturn the discipline, in that the technician is not a Company employee and that, in any event, properly authenticated test results from an accredited testing laboratory accompanied by evidence establishing proper custody and control are sufficient to establish the test result. It points to evidence that establish the credentials of the laboratory, the propriety of the test results and the chain of custody as satisfying that obligation. BNSF also asserts that the Organization presented no evidence that the test was inaccurate.

The Carrier argues, citing authorities, that dismissal is the appropriate penalty for a second positive drug test. It urges that the claim be denied.

The Organization argues that Carrier failed to provide the Claimant with a fair and impartial investigation, evident when it failed to call as a witness the laboratory technician who performed the test, failed to identify the device used to perform the test and failed to provide records, logs, forms and other information required by Department of Transportation Regulations governing drug and alcohol testing. The Organization contends that there was a break in the chain of custody, pointing to Claimant's testimony at the hearing that his sample was placed in the same box as another sample and was not sealed by the specimen collector, despite Claimant's inquiry.

The Organization maintains that it was entitled to review all of the laboratory's records required by Part 40 of the DOT drug testing Regulations and that the Carrier's failure to allow it to do so violated its right to confirm whether there was a break in the chain of custody and denied Claimant of the right to a fair hearing, since a break in the chain of custody would invalidate the test result.

Claimant also maintains, for the above reasons, that the Carrier improperly withheld Claimant from service pending the hearing and denied him due process by the failure of the hearing officer to ensure the development of a complete factual record through introduction of appropriate testimony and documents.

The Organization urges that the claim be sustained, that Claimant's dismissal overturned and that he be reinstated to service and made whole for wages and benefits lost.

**DISCUSSION AND ANALYSIS:** It was the Carrier's burden to prove, by substantial credible evidence on the record as a whole, Claimant's guilt of the violation charged and to establish that the penalty of dismissal was not arbitrary or excessive. The Board concludes that the Carrier met its burdens.

It was also the Carrier's burden to establish, when presented with argument and evidence to the contrary, that it provided Claimant with due process and a fair hearing. For the reasons which follow, the Board concludes that the Carrier sufficiently provided those protections.

The Carrier's evidence establishes that Claimant's urine sample was collected, processed and tested by an accredited laboratory in accordance with the procedures required by the Carrier and the Federal Government and that the results of the test were positive for prohibited substances.

It is well established that the Carrier has the right to prohibit use of illicit drugs by employees, to test employees under specified circumstances for the use of such drugs and to discipline employees who test positive. The evidence in the instant case is that Claimant had earlier tested positive for a controlled substance and was treated and returned to service subject to the Carrier's right to subject him to follow-on testing and with the understanding that if he tested positive again, he would be dismissed.

Claimant may escape the consequences of the positive drug test if the testing process is shown to have been materially defective. As indicated, the Board finds the test to have been conducted in accordance with all procedural and technical requirements by a properly accredited laboratory. The chain of custody documents which were introduced at the investigation as Hearing Exhibit E contain no break or other irregularity of the type asserted by the Organization.

The Carrier's Policy and Federal Regulations provide for the collection and sealing of the specimen cup to prevent tampering.

The evidence convinces the Board that the procedure was followed. See the Certification of collection, labeling and sealing documented at Steps 2, 3 and 4 of Exhibit E.

Claimant testified that the box into which his specimen was placed was not sealed. The Board accepts as true for purposes of this analysis his testimony that the collecting agent failed to seal the box into which the agent placed the samples. A review of the applicable Federal Regulations reveals no provision requiring the separate sealing of the box into which sealed cups might be placed. Each specimen must be placed in a labeled cup, sealed and placed in a tamper-proof bag, sealed with evidence tape. As indicated above, the evidence convinces the Board that was done, thereby effectively eliminating the chance of undetected tampering or inadvertent switching of Claimant's specimen. Thus, concludes the Board, the failure of the collecting agent to seal the box into which sealed specimen containers are placed did not compromise the chain of custody and is without evidentiary significance.

Having accepted as true the testimony of Claimant that the collecting agent failed to seal the box into which the agent placed the samples and having concluded that the failure was not evidentially significant, the Board is persuaded that the Carrier's failure to present the collection agent (the Organization describes this person as the "technician" or "tester", but it appears from the description that the person to whom the Organization refers is the collector) and/or the "person who performed the test" (presumably a different person than the specimen collector) as a witness or witnesses is a violation of the Agreement or of Claimant's right to due process and fair hearing and is not a basis upon which to overturn the discipline. The collector and technicians were not employees of the Carrier. More importantly, the Organization's purpose for requiring him to be called is stated in its Submission to challenge the failure to seal the box, which the Board has already concluded is not a basis to challenge the test result.

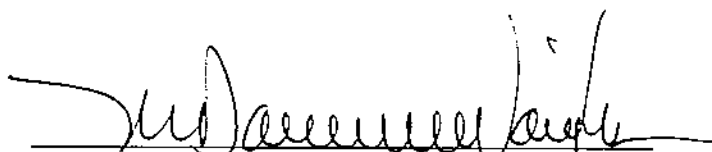
The Organization also protests the failure of the Carrier to provide documents relating to the laboratory's procedures for processing samples. Again, the Board is not persuaded. The record reflects that the documents sought by the Organization which relate to the processing of Claimant's sample and the conduct<sup>ing</sup> of the test were provided to it. See Hearing Exhibit E. The documents not provided appear to relate to the testing laboratory's qualifications and procedures; but those documents go to the Laboratory's certification and internal procedures, which is not challenged, or challengeable, in this procedure. Again, the Board is not persuaded that the Carrier's failure in this regard warrants overturning the discipline.

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The Board holds that Claimant tested positive for prohibited substances for a second time, that the test was valid, that Claimant had been placed on notice of the disciplinary consequences of a second positive test and that the penalty of dismissal was not arbitrary or excessive. The Award so reflects.

**AWARD:** The Carrier proved by substantial credible evidence that Claimant is guilty of the charges against him and that dismissal was an appropriate penalty. The claim is denied.

Dated this 16<sup>th</sup> day of January, 2007.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member