BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 5
AWARD NO. 5
NMB Subject Code: 16

BROTHERHOOD OF RAILROAD SIGNALMEN	**)**	
(Organization file: 10-042-BNSF-121-T)	**)**	**PARTIES TO THE**
vs.	**)**	**DISPUTE**
BNSF RAILWAY COMPANY	**)**	
(Carrier file: 35-11-0007)	**)**	

STATEMENT OF CLAIM:
The Organization requests that the dismissal assessed Mr. Kevin D. Jackson on September 7, 2010 be removed from his record, that he be immediately returned to work, and that he be paid for all time lost and have all employment rights restored as if he were never dismissed.

FINDINGS:
The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011 that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that on July 19, 2010 Mr. Jackson was a BNSF Signal Maintainer in Carthage, Texas, with over 10 years of service. On that date, Mr. Jackson was required by the Carrier to undergo a follow-up test for drugs and tested positive for cocaine.

After a series of agreed-upon postponements, Mr. Jackson underwent an investigation by the Carrier on August 11, 2010 and was subsequently dismissed from service on September 7, 2010.

The Carrier stated that this was in accordance with their Rule 1.5 and Policy, outlined below, and in violation of a continuing employment letter dated May 3, 2010 and signed by Mr. Jackson on May 4, 2010. This letter resulted from a previous positive test by Mr. Jackson.

BNSF Maintenance of Way Rule 1.5 states:

"The use or possession of alcoholic beverages while on duty or on Company property is prohibited. Employees must not have any measurable alcohol in their breath or in their body fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect the 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 substance in their body fluids when reporting for duty, while on duty, or while on company property."

The BNSF Policy on the Use of Drugs, Alcohol and Drugs, Section 3.1 states:

"While on BNSF property, on-duty, or operating BNSF work equipment or vehicles, no employee may:

- Use or possess alcohol;
- use or possess controlled substances (except as described in FRA Regulation 219.103 and Sections 3.2, 3,and 3.3 below) or illegally obtained drugs. Prohibited for on or off-duty FRA covered employees;
- Possess drug paraphernalia;
- Possess drug test alterations or specimen substitutions;
- Report for duty or remain on or on property when his or her ability to work safely is impaired by alcohol, controlled substances, or illegally
- obtained drugs;
- Report for or remain on-duty or on property with a blood or breath alcohol concentration greater than or equal to 0.02%;
- Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs."

The letter of May 2010, signed by the Claimant, says in relevant part: “More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period” would subject the Claimant to dismissal.

Organization Argument:
The Organization states that the Carrier violated Rule 54 of the Signalmen’s Collective Bargaining Agreement by denying Mr. Jackson a fair and impartial investigation and failing to prove the charges against him. The Organization argues that the positive test was as a result of Mr. Jackson being set-up by his wife, who confessed to secretly spiking his food with an illegal drug and then calling his Signal Supervisor, who then acted upon the call. The Organization says that this evidence was put before the Carrier, but that the Carrier failed to take it into consideration in the decision to terminate Mr. Jackson. Mr. Jackson’s evidence at the investigation was that his wife had also spiked his food prior to the first positive test in February of 2010.

The Organization goes on to claim that the Conducting Officer in the hearing was unfair by asking leading questions of the Carrier Witness, introducing documents himself, and by pre-rehearsing questions. They claim that he also had prior knowledge of events in this case and was therefore not impartial. They say that all of this leads to demonstration of preconceived guilt against Mr. Jackson.

They further argue that, as a result of a lack of opportunity to seek representation from the Organization in Mr. Jackson’s first violation of Rule 1.5, as required under CBA Rule 54C

and 54F, the first violation should be expunged from his record, resulting in the current one being considered his first, not his second, violation within 10 years.

Rule 54C of the CBA states:
At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire.

Rule 54F states:
An employee may waive his right to a formal investigation provided that such waiver specifies the discipline to be assessed and is confirmed in writing in the presence of his duly authorized representative and proper officer of the Carrier.

The Organization also offers results of 2 subsequent drug tests which show that Mr. Jackson did not have cocaine in his system.

Carrier Argument:
The Carrier argues that the letter was allegedly written by Mr. Jackson's wife, but was not authenticated, nor was Ms. Jackson produced by the Organization for cross-examination by the Carrier. They state that the letter was unsigned and undated. They therefore argue that the letter is not valid.

They go on to argue that there is no dispute that the Claimant tested positive for a second time.

With respect to the 2 subsequent tests performed at the request of Mr. Jackson after the July 19 positive test, the Carrier says: 1) They are in violation of FRA regulations 40.13, 40.151 and 40.285; 2) they were not observed tests, therefore the sample could have come from some other person; and 3) they were performed more than 72 hours after the positive test and therefore are irrelevant since the metabolites of cocaine are normally gone from the system within that time.

With respect to the conduct of the Hearing Officer, the Carrier says that the record shows that there was no evidence of prejudgment or lack of impartiality.

With respect to the February test, the Carrier says that there is no doubt that Mr. Jackson tested positive for cocaine twice in a 6 month period; that the Organization contacted the Carrier prior to the latest investigation, inquiring about the February positive test and was therefore clearly informed of it. They say that the Organization representative, during the investigation, pointed out that Mr. Jackson had tested positive in February and signed a waiver. The Organization failed to file a claim about any violation of Rules 54C and F in the first instance. Therefore, they argue, the February positive test should not be in issue.

Result:

Conduct of the Hearing
Upon a full review of the record produced during the investigative hearing, the Board finds that nothing therein rises to the level of lack of fairness nor lack of impartiality on the part of the investigating officer.

Letter
The Board notes that the letter, allegedly from Ms. Anita Jackson, has no signature other than "your wife" and that the letter is undated. The Board also notes that, for whatever reason, Ms. Jackson was not called as a witness during the investigation on August 11, 2010. On the whole, the Board finds that the unsigned, undated, uncorroborated letter is not convincing evidence.

Subsequent Tests
Following the July 19, 2010 positive cocaine test, performed by Quest Diagnostics under direction of the Carrier, Mr. Jackson had further drug tests performed. These were also done by Quest Diagnostics resulted from urine samples collected on July 22, 2010 and on August 5, 2010. From the test documents, it does not appear that either test was an "observed" test. The urine tested in these two later Quest reports came back negative.

The Board finds that these subsequent tests by Quest, performed at the request of Mr. Jackson, are not relevant since they occurred beyond the time required for cocaine metabolites to clear his system and they were not observed tests.

The February Waiver
It is clear from the record that Mr. Jackson tested positive for cocaine on February 11, 2010, based on a sample collected on February 8, 2010.

The February 11, 2010 letter waiving Mr. Jackson's right to an investigation and imposing a suspension on him was signed by both Mr. Jackson and the Carrier. However, it was not signed by the Organization, even though there is a space for such a signature.

The parites have a collective bargaining agreement which states in Rule 54F:

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An employee may waive his right to a formal investigation provided that such
waiver specifies the discipline to be assessed and is confirmed in writing in
the presence of his duly authorized representative and proper officer of the
Carrier.
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It is clear from the record that there is no evidence that the waiver was confirmed in the presence of Mr. Jackson's duly authorized representative. Nor did the Carrier introduce any evidence to the contrary during the investigation. The Carrier arguments on appeal that the Organization must have known of the previous waiver prior to July 2010 miss the point. There is no evidence that the waiver, when done in February, was witnessed by a representative of Mr. Jackson. The Board notes that the rule does not require that the authorized representative actually sign the waiver (although this obviously would be a good form of proof); merely that it be confirmed in the presence of such person. Therefore, even though the representative's signature is not on the waiver letter, this is not fatal. What is

fatal, however, is that there was no evidence produced before this Board to indicate that the requirements of Rule 54F had been met.

This CBA rule is one for which the parties have bargained. This Board had no jurisdiction to amend or disregard this rule. It confers a substantive requirement which must be followed in order for a waiver of investigation to be valid. When clauses such as this are present in an agreement, it is typically to ensure that the claimant is aware of his or her rights before waiving them. It is, therefore, integral to the concept of procedural fairness to ensure that such a rule is properly followed when it is present in an agreement.

The Board therefore, as urged by the Organization, finds that the February investigation waiver was not valid.

Is this a Second Violation?

Does the invalidity of the February waiver mean that Carrier cannot dismiss Mr. Jackson? This does not end the matter. Under the terms of the CBA, and under Article 7.6 of the BNSF Policy, a waiver is only one possible outcome. If there had been no waiver, the Carrier could have gone to an investigation at the time. There might have then been discipline. Since there was no investigation concerning the first positive test, the Carrier cannot now issue discipline for that February event. Further, the time frames in the agreement for any such investigation have now passed.

However, the lack of a waiver does not necessarily invalidate any of the positive tests – it merely precludes discipline for that February event.

The investigation of August 2010, following the positive test of July 2010, clearly proves to this Board that Mr. Jackson was in violation of MWOR 1.5 and BNSF's Policy on the Use of Drugs and Alcohol for the July event.

During that investigation, Mr. Jackson admitted to 2 positive cocaine tests, both verified by MRO's, within a 6 month period (Page 28, line 24 and page 30, lines 5-7 of Mr. Jackson's testimony). Mr. Jackson attempts to explain away both positive tests through allegations of his food and drink being "spiked". The Board finds that, all evidence considered, this explanation lacks weight. Therefore, in spite of the very able arguments advanced by the Organization, including the invalidity of the waiver, which they won, it is the testimony of the Claimant himself that provides the evidence against him.

The Board finds that Mr. Jackson's testimony in the August investigation confirms that he did test positive for cocaine in February of 2010 and in July of 2010.

Therefore, the Board finds that Mr. Jackson violated the Rules and Policy twice within a 6 month period. As a result, the Carrier was within it's discipline policy to dismiss Mr. Jackson following the August 2010 investigation.

AWARD

The Claim is denied.

Roger K. MacDougall
Chair and Neutral Member

John Bragg
Vice-President
Employee Member

Michelle McBride
Director Labor Relations
Carrier Member

Dated: _____ At: Chicago, IL