

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13875
Docket No. 13768
05-2-05-2-20

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

(Michael J. Brossart

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

"After being laid off for 15 years BNSF was required by union rules seniority agreements to notify me about a job opening in my division. They didn't notify me although I have lived in the same town all my life, paid property taxes and have always been listed in the phone book. I learned from other BNSF employees that my job was open. I went to the mechanical supervisor at the Grand Forks BNSF and he denied that there was a job opening. A few weeks later I received a certified letter from BNSF to bid on this job, I was later hired because of my seniority.

I went to Altru Hospital Clinic and passed the RR DOT physical and drug test. I was then hired by BNSF. Later in my employment with BNSF I developed some health problems. I had hernia surgery, back problems and respiratory problems. These were all reported to BNSF, recorded and doctor excused.

After this happened I experienced many random drug test and other intimidations and harassments when ever I had any health problems. The random drug tests were lost, seals were broken and others were contaminated causing inaccurate results. These tests resulted in me being suspended. Later I returned to work and received back pay and seniority. I also passed a drug test at Altru Clinic.

On January 2, 2004 after one or two days of doctor excused time off, I was notified to come in to work. I stated that I was still ill. I was told I would be written up and maybe be fired if I did not report to work. Although sick and taking Nytol with codeine and alcohol, I went to work. I punched the time clock and was immediately told to take a random drug test. I protested but complied. Then I immediately punched out sick and went to Altru Clinic, where I got a DOT spec drug test. I received an all negative result from the DOT drug test later. I did this test at my expense because I believe the railroad drug testing company was incompetent with test results, lost tests, broken seals on previous tests.

The railroad claimed a positive drug test from me that same afternoon. I was suspended then fired. I was not allowed to use my vacation time in a 3 month period therefore I lost my job, 10 year retirement and half of my unemployment.

I believe I was not treated in a fair or competent way. My private DOT test was also not recognized. This test was done by the same facility that administered the railroad hiring drug test. I have worked for Burlington Northern Santa Fe Railroad Superior Mechanical Division since March 1977. I am seeking full reinstatement and back pay or at least to be allowed to reuse my vacation days in a manner so which will allow me to earn my retirement."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, Michael J. Brossart, was recalled to service with the Carrier after fifteen (15) years. On June 27, 2002 the Claimant tested positive for a controlled substance. He waived his right to an investigation and complied with the Carrier's Employee Assistance program (EAP) Coordinator in order to be returned to work. He was returned to work under a number of specific conditions and was conditionally reinstated on January 17, 2003. On December 29, 2003 the Claimant was asked to provide a certified sample. The Carrier took great care as there had been some question of adulterated samples in the past. The sample tested positive for the metabolite of marijuana. The Claimant was dismissed from service for violations of his conditional reinstatement.

The individual Claimant argued that during his latest employment with the Carrier he had developed some health problems. Subsequently, he experienced many random drug tests and other intimidations and harassments regarding his health problems. During January, 2004 he was ordered to take another random drug test. He was suspended and discharged and not allowed to use his vacation time and was not eligible for his retirement. The Claimant went to a private DOT testing facility where he received a negative result. The Claimant did this because of problems with previous tests. The Carrier did not consider this negative test.

The Claimant stated that he has a good work record. He is asking that the Carrier consider his second test at a DOT testing facility which he has passed. He is asking that he would be fully reinstated including back pay and allowed to complete his retirement time.

The Carrier argued that the Claimant failed to meet his burden of proof showing that the Carrier violated any of the rules cited in his claim to this Board. The charges against the Claimant were proven and the discipline assessed was warranted. The Claimant's dismissal from service was based on use of drugs which violated the conditional reinstatement and the Carrier's policies. These were the only issues considered on the property. Even if other issues can properly be considered, nothing changes. In this case there can be no doubt that the urine tested was that of the Claimant. Because he had been suspected of adulterating samples in

the past, special care was taken and the Carrier provided for an observed test. The voided urine was split into two samples and one sample was tested promptly. The first sample tested positive for the THC metabolite by use of the GC/MS test. Results of the second test reconfirmed the results of the first test. Since the samples were tested twice, there is no concern that there was an improper reading. This is the Claimant's second violation of Rule 1.5. Private tests by individuals are generally not considered. Therefore, the dismissal was warranted and in line with the Carrier's policies.

Upon complete review of the evidence, the Board finds that the individual in this matter wrote a detailed submission. This was a special case since there had been a question of adulterated samples in the past. The Carrier provided for an observed sample gathering. The samples were split and both tested positive. This is the second incident for this Claimant, plus the adulterated sample situation. The Board finds no determinative procedural issues in this matter and no valid vacation claim. The Carrier appropriately did not consider the Claimant's private test.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 22nd day of December 2005.