

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41084
Docket No. MW-41381
11-3-NRAB-00003-100267**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Mr. M. Aaron in connection with charges of alleged violation of BNSF Policy on the use of Alcohol and Drugs, dated April 15, 2009 and MOWR 1.5 Drugs and Alcohol while working as a foreman on August 19, 2009 on the Chicago Division and the Carrier’s refusal to allow a Rule 1.5, First Violation Waiver and Conditional Suspension and Carrier sponsored EAP program was arbitrary, capricious, excessive and in violation of the Agreement (System File C-10-D070-2/10-10-0005 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the dismissal discipline imposed on Mr. M. Aaron shall now be overturned and he shall be ‘. . . allowed to voluntary enroll in his program as a first time violation.’”**

FINDINGS:

The Third 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.

Claimant M. Aaron has established and maintained seniority as a Foreman and was assigned as such on Gang TSEC 0266 at the time the instant dispute arose on August 19, 2009. R. Adams was regularly assigned as a Sectionman, but on the date in question was assigned to operate a front end loader, working with Gang TSEC 0266.

At approximately 2:00 P.M. on August 19, 2009, while assigned as a Foreman, the Claimant directed Adams, who was operating a front-end loader, into a light pole owned by the Westmont Public Works Department. As a result of this incident, the Claimant was asked to submit to a reasonable suspicion drug and alcohol test, the results which revealed the presence of cocaine in the Claimant's system.

An Investigation was held on September 3, 2009. Prior to the Hearing, the Organization requested that the Claimant be allowed to accept a waiver, a conditional suspension, and enter the EAP program. The Carrier did offer the Claimant EAP participation, but denied the requests for a waiver and a conditional suspension.

By letter dated August 27, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 1, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, in connection with your alleged positive urine drug test as a result of Reasonable Cause testing, while working as Foreman, on August 19, 2009, on the Chicago Division, and your alleged violation of BNSF Policy on the use of Alcohol and Drugs, dated April 15, 2009. . . .”

The Hearing took place on September 3, 2009, pursuant to which, in a letter dated September 30, 2009, the Claimant was notified that he was dismissed from service as a result of his violation of BNSF Railway Policy regarding the use of Alcohol and Drugs, as well as Maintenance of Way Operating Rule 1.5 - Drugs and Alcohol.

By letter dated October 30, 2009, the Organization appealed the decision base on the contentions (1) the Carrier did not meet its burden of proof (2) the discipline assessed was unwarranted and excessive, and (3) the Claimant was denied a fair and impartial Hearing. In addition, the Organization contended that the Claimant was unfairly denied a waiver. On December 18, 2009, General Manager R. Reilly denied the appeal. On January 4, 2010, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 3, 2010. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and asserts that burden has not been met. The Organization further claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimant (2) the Carrier abused its discretion, and (3) the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization further contends that the Claimant was unfairly denied a waiver. Lastly, it asserts that the Carrier should now be required to overturn the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant is guilty as charged. The evidence shows that the Claimant violated the Carrier's policies when he failed a drug screen. In addition, the Carrier contends that the Claimant was not unfairly denied a waiver. Based on his unacceptable behavior and his extensive disciplinary record, the Claimant's dismissal was appropriate.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

After a thorough review of the case record, the Board found substantial evidence to uphold the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant violated BNSF Policy on the use of Alcohol and Drugs when he tested positive as a result of a Reasonable Cause test, which led to his dismissal. Further, the Board does not find that the Claimant was unfairly denied a waiver based on the past practice of the Carrier and the PEPA Policy. Thus, based on the Claimant's positive drug test and his poor prior record, the Board concludes that his dismissal was appropriate. Accordingly, the Board will not overturn the assessed penalty.

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 Third Division

Dated at Chicago, Illinois, this 18th day of October 2011.