

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41524  
Docket No. MW-41668  
13-3-NRAB-00003-110218**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 by letter dated August 25, 2009 and subsequent dismissal by letter dated October 27, 2009) imposed upon Mr. R. Thomas for alleged violation of BNSF Railway Policy on the use of Alcohol and Drugs and MOWOR 1.5 Drugs and Alcohol, in connection with charges that his follow-up test conducted on August 21, 2009 allegedly revealed the presence of a controlled substance while working as a track inspector in Dilworth, Minnesota was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3598-W/11-10-0024 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Thomas shall now receive the remedy prescribed by the parties in Rule 40(G).”**

**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.

On June 11, 2009, the Claimant was administered a drug and alcohol test. The Carrier determined that the test was positive for marijuana, in violation of the Carrier's Rules. Following that positive result, the Claimant entered the Employee Assistance Program (EAP) and successfully completed the steps necessary for his reinstatement. On July 23, 2009, the Claimant signed a return-to-duty Agreement which specified, among other things:

"You have satisfactorily completed the prescribed treatment program and complied with the requirements of BNSF's Employee Assistance Program following your violation of the BNSF Policy on the use of Alcohol and Drugs, dated April 16, 2009. As a condition of employment, you are now subject to periodic drug and/or alcohol testing up to five (5) years from the date you return to work. When a follow-up test is required, you will be notified by proper authority. Federal (FRA & FMCSA) Follow-Up tests may be conducted under observed conditions. Prior to returning to active service, you must contact your supervisor and comply with any other conditions required as a result of this violation.

**Violation of any one or more of the following conditions will subject you to dismissal:**

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

On August 21, 2009, the Claimant was required to provide a sample for a follow up test pursuant to the return-to-work Agreement. The record shows that the specimen was collected and transferred to the testing laboratory where it was tested in accordance with established protocols. In accordance with those protocols, a “split sample” was tested. The test pertaining to the first “split sample” returned a value four times the threshold level used to indicate a positive test for marijuana metabolites. The lab then ran a second test on the other portion of the “split sample” which confirmed the result of the first test. The Carrier’s Medical Review Officer reviewed the results of both tests and determined the test results to be positive.

By letter dated August 25, 2009, the Carrier notified the Claimant to report for a formal Investigation on September 1, 2009. The Notice of Investigation specified that said Investigation would be held:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violation of BNSF Policy on the Use of Alcohol and Drugs; dated September 1, 2003, when your Follow-Up test conducted on August 21, 2009, revealed the presence of a controlled substance while working as Track Inspector, Dilworth, Minnesota.”

The Investigation was postponed by mutual consent and was finally held on October 8, 2009. By letter dated October 27, 2009 the Carrier notified the Claimant as follows:

“This letter will confirm that as a result of investigation held on Thursday, October 8, 2009 at 0900 at 2nd Floor Conference Room, 801 Main Avenue, Fargo, ND, 58103 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for violation of BNSF Policy on the Use of Alcohol and Drugs, dated September 1, 2003, when your Follow-Up test

conducted on August 21, 2009, revealed the presence of a controlled substance while working as Track Inspector, Dilworth, Minnesota.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of the BNSF Railway Policy on the use of Alcohol and Drugs, dated April 15, 2009, and MOWOR 1.5 Drugs and Alcohol.”

After a thorough review of the record made during the handling of this dispute on the property, we find that the Carrier presented sufficient evidence to meet its burden of proof. We cannot say that the discipline of dismissal was excessive in this instance. Accordingly, the claim will be denied.

**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 19th day of February 2013.