

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41525
Docket No. MW-41683
13-3-NRAB-00003-110294**

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 (dismissal) imposed upon Mr. M. Jones by letter dated May 14, 2010 on charges of an alleged violation of BNSF Policy on the use of alcohol and drugs, dated April 15, 2009 and MOWOR 1.5 Drugs and Alcohol in connection with alleged positive results of a follow-up breath alcohol test while working as a machine operator in Murray Yard, Kansas City, Missouri on April 22, 2010 was arbitrary, capricious, excessive and in violation of the Agreement (System File C-10-D070-7/10-10-0278 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Jones shall now ‘. . . be returned to service immediately and that he be made whole for all losses suffered and that any mention of this case be removed from his personal record.’”**

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 January 17, 2008, the Claimant was administered a drug and alcohol test under circumstances that are not revealed in the record, but which are not at issue here. The Carrier determined that the test was positive for alcohol, 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 April 21, 2008, 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 September 1, 2003. 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 April 22, 2010, the Claimant was required to submit to a breath alcohol test (Breathalyzer Test) for the presence of alcohol and to provide a urine sample for a follow up test pursuant to the return-to-work Agreement. The record shows that the parties stipulated that the urinalysis results were negative for the presence of prohibited substances. However, the evidence adduced at the Investigation shows that the initial breath test indicated a blood/alcohol level of 0.031%. The protocol for administering the Breathalyzer Test mandates that a confirmatory test be performed after waiting at least 15 minutes. In accordance with that protocol, the Claimant was administered a second Breathalyzer Test 17 minutes after the first, which returned a reading of 0.027%. The threshold level used to indicate a positive test is a reading of 0.02%. As a result of the confirmed positive test for the presence of prohibited levels of alcohol, the Carrier immediately withheld the Claimant from service pending a formal Investigation.

By letter dated April 23, 2010, the Carrier notified the Claimant to report for a formal Investigation on April 30. 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 positive results of follow-up breath alcohol test, Murray Yard, Kansas City, MO, on April 22, 2010, while working as Machine Operator.”

The Investigation was held as scheduled. By letter dated May 14, 2010, the Carrier notified the Claimant as follows:

“This letter will confirm that as a result of investigation held on Friday, April 30, 2010 at 1000 hours at Roadmaster's Conference

Room, 1650 Murray Drive, Kansas City, MO, 64116 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for positive results of follow-up breath alcohol test, Murray Yard, Kansas City, MO, on April 22, 2010, while working as Machine Operator.

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 substantial evidence to meet its burden of proof. The follow-up test was administered to the Claimant in accordance with the conditions of his reinstatement. It was confirmed to be positive. The conditions of reinstatement clearly communicated to the Claimant the consequences of a second confirmed positive test during any ten-year period. 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.