

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42614
Docket No. MW-42881
17-3-NRAB-00003-150073**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Machine Operator T. Penner by letter dated September 4, 2013 for alleged violation of BNSF Railway Policy on the use of Alcohol and Drugs, dated April 15, 2009 and MWOR 1.5 Drugs and Alcohol in connection with his alleged ‘... positive breath alcohol test result during a random drug and alcohol test conducted on July 17, 2013 at approximately 0915 hours at Minneapolis, MN while you were working as a Machine Operator at Northtown Yard.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4284-M/11-13-0361 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Penner shall ‘... be immediately returned to service, he must be paid for his lost time, including any and all overtime paid to the position he was assigned to work, any expenses lost and we also request that Mr. Penner be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on September 13, 2013 letter....’”**

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.

The Carrier states that the Claimant's failure of a breath alcohol test, the second such violation within ten years for this individual in a safety-sensitive position, requires dismissal. Alleged procedural defects did not prejudice the Claimant's right to a fair and impartial Investigation. Should the claim be sustained, Mr. Penner is due only the return of lost seniority and wages offset by outside earnings, but nothing more.

The Organization sees a lack of substantial evidence because improperly sealed blood samples were discarded and not tested and there is no showing that the breathalyzer had been calibrated as required. Thus, the Claimant should be returned with seniority intact and with wages and other benefits lost, but there should be no offset for outside earnings.

The Board omits consideration of the fact that the annual wet bath calibration required for the Drager Alcotest 6810DOT, known informally as a breathalyzer, apparently had not been performed as required before the Claimant was tested. The Board has another, more serious concern. When the Claimant tested positive for alcohol, he requested a blood test as was his right. Manager of Medical Support Services Crespín testified that, "I believe that we instructed the collector to make certain that the employee was aware of the ability, the right, if you will, to have a blood test." Blood was drawn, but thereafter, according to Manager Crespín, the Carrier's contracted Medical Review Officer cancelled the blood test because the laboratory, not finding seals on the vials containing the Claimant's blood, refused to test the blood. Thus, the Claimant was deprived of the right to

have his blood tested as a safeguard against the possibility of a false positive breathalyzer test.

That right cannot be overlooked or diminished because of the positive breathalyzer results or because it was the Claimant's second positive test within ten years. It is a right that must be unimpeded by attendant circumstances. Moreover, the Carrier's contention that it cannot be faulted for the mistake of a contractor is unpersuasive in the extreme. The Claimant's right to have a blood test adheres through the employer-employee relationship so that the Carrier cannot shed responsibility for ensuring that right, which is all the more critical for both parties when, as in this case, there is a question about the calibration of the breathalyzer and/or the Claimant insists that the breathalyzer produced a false positive result.

Circumstances herein can be distinguished from those in Third Division Award No. 28940 where there were no chain of custody concerns and Third Division Award No. 39311 in which, at least implicitly, the Board dismissed the Organization's procedural issues and there is no indication that the Claimant requested a blood test. More closely aligned to the facts of the instant case is Third Division Award No. 36216 in which a Claimant who had previously tested positive was considered to have tested positive for a second time because of an adulterated urine specimen. However, the containers provided for the specimen "were not wrapped and sealed" when given to the Claimant. In overturning the dismissal, that Board said, in part, "The requisite standard of proof in the form of substantial evidence applies just as forcefully in drug testing cases as in other disciplinary matters. Part of the Carrier's burden in such cases is to show the security and integrity of the chain of custody of the supplied material." We agree.

In Third Division Award No. 33858, the Claimant tested positive for cannabinoids (TYHC) based on a urine sample that "was not protected by forensic seals, and was not collected using a chain of custody." The Board found a lack of substantial evidence and sustained the claim, thereby setting aside a dismissal. In Public Law Board 7633, Award No. 39 the Claimant, one of five tested that morning, tested positive for alcohol but was the only one of the five whose urine was not also tested, leading to the Board's conclusion that substantial evidence was absent.

The Board in the instant case fully agrees with the principle that employees in this inherently dangerous industry cannot be allowed to work under the influence of

alcohol or banned substances and supports the Carrier's right and obligation to test employees to ensure as best possible an alcohol-free and drug-free workforce committed to safe and efficient work practices. But testing must be in strict conformance with accepted procedures and done in a way that honors employee rights and establishes the substantial evidence necessary for the Carrier to prevail. In this case rights have not been honored and substantial evidence has not been obtained.

The remedy is intended to be consistent with that provided in recent on-property cases. The Claimant's dismissal is hereby rescinded and must be expunged from his records. He shall be returned to service without loss of seniority or benefits. In addition, the Claimant is entitled to compensation for all lost wages including overtime he would have been offered and likely would have worked from the date of his removal from the payroll to the actual date he is returned to service. Any monies earned or paid to the Claimant, except all monies that he was receiving before being dismissed and that continued after dismissal, are to be deducted from lost wages owed to him. The Claimant is further entitled to be reimbursed for any and all out-of-pocket healthcare expenses that he incurred as a consequence of his dismissal which would have been covered by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of June 2017.