

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42708
Docket No. MW-43255
17-3-NRAB-00003-150508**

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

**(Brotherhood of Maintenance of 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 Foreman K. Hewitt by letter dated April 30, 2014 for alleged violation of ‘... BNSF Railway Policy on the use of Alcohol and Drugs, dated April 15, 2009 and MWOR Rule 1.5 Drugs and Alcohol.’ in connection with his alleged ‘... failure to comply with BNSF Drug and Alcohol policy, when you tested positive on a breath alcohol test conducted on March 24, 2012, while working as a Gang/Section Assistant Foreman, assigned to TMGX – 1690, headquartered at Bend, Oregon,’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File S-P-1872-G/11-14-0242 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Hewitt shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all losses suffered including but not limited to wages, including overtime and benefits.”**

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 asserts that the dismissal was proper following the Claimant's second positive alcohol or drug violation in 10 years. Should the claim be sustained, the Claimant should be returned to service and receive only lost seniority and wages, less outside earnings.

The Organization insists that Claimant did not receive a fair and impartial investigation because the designated Conducting Officer did not appear and was replaced. Also, the Carrier did not record the investigation and used the Organization's recording, which did not lend itself to a proper transcript. Other procedural defects include an exhibit with the wrong date, a false indication that a urine specimen was collected, the refusal of exculpatory evidence and the withholding of the Claimant from service before the Investigation. The Carrier did not provide substantial proof given the disputed accuracy of the breathalyzer test and the absence of breath odor or behavior that would indicate alcohol. Even if a violation is found, dismissal was excessive for a 23 year employee with one prior discipline. At a minimum, the dismissal should be reduced and the Claimant should be returned to service and regain his lost seniority and wages, with no offset for outside earnings.

The last-minute replacement of the Conducting Officer was not prejudicial to the Claimant. In fact, if the replacement knew less about the allegation to be investigated, it is possible that his questioning would be less influenced by prior knowledge and more in line with the neutrality that a Conducting Officer should exhibit. Nor did the use of the Organization's recording to make the transcript

prejudice the Claimant because the critical testimony has been captured. Because there was a possibility that the Claimant was working under the influence, the Carrier had the right in accordance with Rule 40.B to withhold him from service so that he would not endanger himself or others. Other procedural issues raised by the Organization are viewed as inconsequential.

While the results of the breathalyzer tests were only slightly above the .020% cutoff, there must be a cutoff and the .020% used as the maximum allowable blood/alcohol content is not a new or disputed standard. This was the Claimant's second positive test in slightly over 13 months. Therefore, he cannot argue that the first positive test was in the distant past, even if still within 10 years. The Claimant violated the Policy on the Use of Alcohol and Drugs, the conditions attached to his return to work after the first positive test and MOWOR 1.5 Drugs and Alcohol. Whatever the cutoff is, there will always be a margin of error. The evidence of the Claimant's violations is substantial. In an industry as inherently dangerous as the railroad industry, there can be no place for an employee working under the influence of drugs, alcohol or even prescribed medications that might alter judgment and/or actions.

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 31st day of August 2017.