

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42714
Docket No. MW-43358
17-3-NRAB-00003-160062**

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 Machine Operator T. Tate by letter dated September 2, 2014 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 ‘... violation of BNSF Policy on the Use of Alcohol and Drugs, dated April 15, 2009 during a Reasonable Cause UA Test conducted on June 11, 2014 in Minot, ND while assigned to SC30 working as a Machine Operator on Glasgow Subdivision.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2765-E/11-15-0069 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Tate 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 wage loss suffered including loss of wages to attend the investigation.”**

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 it provided substantial evidence based on the results of a reasonable cause test and split sample retest of the Claimant's urine that showed the existence of amphetamine and methamphetamine in his system. The findings, neither denied nor explained by the Claimant, were not explained by a review of his over-the-counter and prescription medications. Even if the Claimant is determined not to have fouled the track while using his cell phone, which triggered the drug test, the result should stand. The Carrier notes that this was the Claimant's second drug and alcohol policy violation within 10 years and it is a violation with critical safety implications. The untimely notice of investigation was remedied by a postponement that allowed ample time for preparation. Should the claim be sustained, the Claimant should be returned to service with only lost seniority and wages, less outside earnings.

The Organization insists that the Investigation was untimely because it did not come within 10 days of the Claimant being withheld from service or within 15 days of Carrier's knowledge of a possible violation. Moreover, the Claimant received only three days' notice of the Investigation. The Conducting Officer was biased because he also was the Conducting Officer in the previous investigation of Claimant Tate when he allegedly fouled the track while using his cell phone. Also, the Organization's request for additional witnesses was denied, depriving the Organization of the opportunity to contest testing procedures and results. Nevertheless, substantial evidence is lacking as there is no first-hand evidence of the conduct of the test or the test's reliability. The split-sample retest was performed by

the lab that did the original test rather than a different lab, and the retest results simply indicated confirmation with no numbers supplied. The Claimant should be returned to service and recover his lost seniority, wages and other benefits, with back wages unaffected by outside earnings.

There are several reasons why this claim must be sustained. Foremost is the fact that there was no reasonable cause for the drug/alcohol test. That test was ordered because the Claimant, although he showed no signs of impairment, allegedly was foul of the track without proper authority while using his cell phone. This determination was based essentially on his Roadmaster's determination from 150-167 yards away that the claimant was 48" or less from the nearest rail and not 49" or more, which would have meant that there was no violation of MOWOR 1.10 Games, Reading, or Electronic Devices. Nor could the Roadmaster testify with certainty that the Claimant had violated this rule. This Board, in Third Division Award No. 42713 a companion case, sustained the claim emanating from discipline assessed over the alleged violation of MOWOR 1.10. The Board believes that a clear-eyed, logical, fair and impartial assessment of the situation at the time Roadmaster Bickford spotted the Claimant using his cell phone would have concluded that there was less than substantial proof of a violation and thus no drug/alcohol test was warranted because reasonable cause could not be shown.

That aside, when the Claimant tested positive for amphetamines and methamphetamines, he had the right, set forth in Section 6.9 of the Carrier's Policy on the Use of Alcohol and Drugs, to ask for a split sample retest of his urine specimen. The August 4, 2014 written review of the Claimant's positive results by the Carrier's Medical Support Services stated that: "MRO reported that Mr. Tate was made aware of the opportunity to have his split urine specimen tested at a different laboratory." The Claimant submitted the necessary written request to have the retest done. However, instead of having the split sample retest done at a lab that had not performed the original analysis, the original lab performed the retest and simply reported the results as confirming, without providing the specifics of the analysis. Both shortcomings are considered fatal flaws.

Whether the employee has tenure of one year or 20 years and whether the employee has never tested positive for alcohol or drugs or has tested positive within the past year, he or she has the right to have every drug/alcohol test administered with absolute, unwavering conformity to the established protocols. When positive test results can place an individual's employment in jeopardy or worse, end that

employment, the individual must be afforded all the protection inherent in the testing process. The Claimant did not receive such protection when the original lab performed the retest and when the Claimant was not given sufficient information to determine whether the retest results should be questioned. For these reasons, as well as because there was no reasonable cause for the test in the first place, the results must be voided. Thus, the claim must be sustained.

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. 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 31st day of August 2017.