

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42874
Docket No. MW-43643
18-3-NRAB-00003-160430**

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
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Foreman M. Kjos, by letter dated March 6, 2015, for alleged violation of BNSF Policy, Rules and Procedures on the Use of Alcohol and Drugs, effective September 1, 2014 and MWOR 1.5 Drugs and Alcohol in connection with his alleged ‘... failure to pass (reasonable cause, reasonable suspicion, random) test conducted on December 1, 2014 at approximately 0900 hrs. while employed as Foreman on Gang TSEC 1368, LaCrosse Section.’ was arbitrary, excessive and in violation of the Agreement (System File C-15-D070-6/10-15-0182 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Kjos 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.”**

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 Claimant was randomly selected for a December 14, 2014 drug test, which resulted in a positive finding for amphetamine and methamphetamine. Initial test results were confirmed by a second test, both certified and properly administered. After a February 6, 2015 Investigation, the Claimant was found to have violated the above noted Policy and MWOR and was dismissed. The resulting claim was not resolved on the property and the matter was referred to the National Railroad Adjustment Board for arbitration.

The Carrier notes that the essential facts are undisputed and the Claimant has neither denied nor explained the findings. The Claimant had a CDL, thus the Carrier had a right to randomly test. This is the Claimant's second violation of the aforementioned Policy and MWOR but is also a stand-alone dismissible violation. Leniency, which the Organization requests, is the prerogative of the Carrier, not the Board, which should not substitute its judgment for that of the Carrier. Should the claim be sustained, the Claimant is due only reinstatement with seniority restored and compensation for lost wages, less outside earnings. He must attempt to mitigate damages. The Board is not authorized to alter the negotiated health plan that sets out related benefits for reinstated employees. The Organization has not shown that alleged procedural defects prejudiced the Claimant, whose absence from the investigation was his own fault and does not negate the findings.

The Organization asserts that the Investigation was not fair and impartial because the Conducting Officer and Carrier's main witness were father and son. The Claimant missed two of the three same-day Investigations in order to attend an EAP meeting after the Carrier would not postpone the Investigations. Also, a postponement to review documents not provided prior to the Investigation was denied. Charges were pyramided, with three Investigations held on one day resulting in three dismissals. The Carrier has not met its burden of proof because testimony was ignored, including testimony that the Claimant was not allowed to complete his EAP program before being investigated and dismissed. The dismissal was arbitrary and excessive as it served only to punish and not to correct. NRAB awards indicate that Rule 40G remedies should include lost overtime wages and reimbursement for premiums, deductibles and co-pays covered by health insurance had the Claimant not been wrongfully terminated.

This case is the third of three involving Claimant Kjos that were heard by this Board at the same sitting. In Third Division Award 42872 the Board denied the claim arising from the dismissal of the Claimant. That denial renders moot consideration of the claim advanced herein.

AWARD

Claim dismissed.

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 10th day of January 2018.