

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44252
Docket No. MW-45675
20-3-NRAB-00003-190635**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
(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. R. Rodgers, by letter dated May 23, 2018, for violation of MWOR 1.5 Drugs and Alcohol in connection with an alleged positive result for alcohol on a follow-up testing conducted at Vancouver, Washington was on the basis of unproven charges, excessive and in violation of the Agreement (System File S-P-2196-G/11-18-0298 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Rodgers shall ‘... be removed from Mr. Rodgers record, he me (sic) returned to service and that he be made whole for all loses and all 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.

On January 4, 2018, the Claimant signed a document signifying his completion of a prescribed treatment program and compliance with the Employee Assistance Program. The document, which is a contract between the Claimant and BNSF, provided the following:

“Violation of any one or more of the following conditions will subject you to dismissal:

- More than one confirmed policy violation for any violation covered in the BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, revised January 13, 2017, for any controlled substance violation or alcohol violation under any circumstances during any 10-year period.”

At the time this letter was executed, the Claimant was an hourly employee covered by the parties’ Agreement. He subsequently became an exempt employee. On March 20, 2018, the Claimant was asked to submit to a follow-up drug and alcohol breath test. Initially, the Claimant blew into the mouthpiece and registered 0.035. Because this result is in violation of BNSF’s rules and policies, a second confirmation test had to be performed. The Claimant was retested fifteen minutes later. This time the result was 0.033.3. Since both results were in excess of BNSF’s maximum allowable amount of .020%, the Claimant was removed from service pending a formal investigation. Since this was his second such violation within ten years, the Claimant was dismissed from service. The Carrier’s practice is to allow a dismissed exempt employee with craft seniority to go back to the craft and have a hearing. This practice is based on the following language:

“RULE 16. OFFICIAL, SUPERVISORY OR ORGANIZATION POSITIONS

- A. An employee assigned to an official or supervisory position with the Company or an employee who accepts an official position with the Brotherhood of Maintenance of Way Employees will retain and accumulate seniority while so assigned. * * *

- C. An employee relieved from an official or supervisory position with the Company, or an employee relieved from an official position with the Brotherhood of Maintenance of Way Employees, or an employee who voluntarily relinquishes such an official or supervisory position may, within thirty (30) calendar days thereafter, exercise seniority over a junior employee in accordance with Rule 8, or displace a junior employee from an assignment secured by bulletin that was both posted and closed during the absence of the returning employee. ***

CONCERNING PARAGRAPH C ABOVE: During discussions regarding this change to Rule 16 C and D, the parties agreed that employees returning from an official or supervisory position with the Company, or an employee relieved from an official position with the Brotherhood of Maintenance of Way Employees, will exercise their displacement option upon their return. The parties also agreed that the Carrier will provide an employee returning from such absence, information as to all junior employees who are assigned to positions that were both posted and closed during their absence, that the returning employee is eligible to displace. It is understood that the information provided will include junior employees who are currently assigned in a class with seniority gained by assignment to a position that was both posted and closed during the returning employee's absence. If the returning employee has not already established seniority in the class, he will be awarded "the same seniority date of the junior employees being displaced by the returning employee under this rule. ***"

The Organization explained that he allowed a prescription to lapse, but had it renewed right away. At hearing, the Claimant admitted he was not in compliance with the applicable rule.

In the view of the Board, the 2018 letter controls. That letter sets up a prospective 10-year period, during which more than one violation would warrant dismissal. Logic would indicate that the intent might have been to have any further violation following the letter trigger dismissal, but the letter does not say that. It specifically refers to "more than one violation," that is, multiple violations.

The record is utterly devoid of any evidence of past practice or accepted application upon which the Board might rely in effectuating the terms of this letter. As a result, we follow its clear and specific terms. Since this was the Claimant's first violation

of the Drug and Alcohol Policy under the letter, his dismissal cannot be substantiated as more than one violation.

Because the record is devoid of any evidence regarding application of the letter's terms, the interpretation offered here is not intended to have precedential value or to serve as a basis for applying identical terms in the future.

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier's return to service policies. The Carrier shall remove the discipline from the Claimant's record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

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 23rd day of October 2020.