

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44309
Docket No. MW-45764
20-3-NRAB-00003-190686**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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. Martens, by letter dated June 19, 2018, for violation of MWOR 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions in connection with his alleged failure to follow instructions when he failed to be present at the designated time and place for a drug and alcohol screening on April 23, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-18/10-18-0337 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Martens shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses 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 Claimant has established and holds seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute, he was assigned as a machine operator with over twenty-six years of seniority. On January 25, 2018, the Claimant's previous dismissal was overturned and he was exonerated of all charges by Public Law Board 7585 Award 66.

After his exoneration, the Claimant was completing his return to work process. The Carrier initially scheduled a return to work drug test for April 16, 2018, but it was rescheduled for April 23, 2018. The test location was eighty miles from the Claimant's home. Due to car trouble, the Claimant arrived approximately thirty minutes late and could not find anyone who expected him at the designated testing site. The Carrier agreed to re-schedule the test for the next day, April 24, 2018, but the Claimant was not advised of the new test. As a result, he did not appear for the rescheduled test.

On April 25, 2018, the Claimant was given notice of an investigation in connection with the following charge:

“An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions when you failed to be present at the designated time and place for multiple drug and alcohol screenings set for Monday, April 23, 2018, and Tuesday, April 24, 2018, in relation to your reinstatement to service.”

After a formal investigation on May 21, 2018, the Carrier notified the Claimant that he was found to be in violation of MWOR 1.6, Conduct, and MWOR 1.13, Reporting and Complying with Instructions, for failure to follow instructions on April 23, 2018:

“As a result of investigation held on Monday, May 21, 2018 ... you are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to comply with instructions when you failed to be present at the designated time and place for a drug and alcohol screening set for Monday, April 23, 2018, in relation to your reinstatement to service.”

On August 8, 2018, the Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

MWOR 1.6, Conduct, prohibits insubordination, specifically failing to follow instructions. MWOR 1.13, Reporting and Complying with Instructions, states,

“Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”

The Carrier contends that there is substantial evidence that the Claimant violated these Rules by his failure to comply with instructions to submit to a drug and alcohol screening as part of his return to work process. The Carrier contends that there is no question that the Claimant failed to appear as directed on three occasions, even though the Carrier went above and beyond what was required by giving the Claimant multiple opportunities to comply. The Carrier contends that it was the Claimant’s responsibility to ensure that he arrived at the testing site as directed and in a timely fashion.

The Carrier acknowledges that the Claimant was exonerated of his failure to appear for a drug and alcohol screening on April 24, 2018, but points out that he was found guilty of failing to appear as directed on Monday, April 23, 2018. The Carrier contends that Appendix B of the Carrier’s Policy on Employee Performance Accountability (“PEPA”) contains a non-exhaustive list of dismissible offenses, including,

“D. Stand-Alone Dismissible Violation

- 1. Stand-Alone Dismissible Violations include, but are not limited to:**

- (d) Refusal to submit at any time to required testing for drug or alcohol use, adulterations of sample, second violation of the Use of Alcohol and Drugs Policy within 10 years, or failure to comply with instructions of the Medical Director.”

Therefore, the Carrier contends that the assessed discipline was not excessive, arbitrary, or unwarranted requiring the Board to disturb the discipline imposed.

The Organization contends that the Carrier failed to meet its burden of proving that the Claimant refused to submit to a drug or alcohol screening as directed. The Organization points out that the parties mutually agreed to reschedule the April 16 test. It further asserts that the Claimant appeared for the April 23 test, but was late due to no fault of his own. Finally, the Organization contends that there is no evidence in the record that the Claimant was ever notified of the April 24 test and he was exonerated of this charge by the Hearing Officer. The Organization contends that the Claimant was only found in violation of the Carrier’s rules with respect to April 23, 2018.

The Organization contends that during the investigation, Division Engineer Russell Sweet, said that “three chances” was an adequate number of times for the Claimant to complete the test. But, the Organization points out, the Claimant was not given three chances.

The Organization further contends that the discipline was excessive as the Claimant was a long-term employee who was completing the return to work process after being reinstated. The Organization contends that the Claimant was not given three opportunities to complete the alcohol and drug screening so that he could return to work as ordered.

The Carrier has failed to show with substantial proof that the Claimant was guilty of insubordination or refusal to comply so as to justify his dismissal. The only charge before this Board concerns the Claimant’s conduct on April 23, 2018. But there is no dispute that when the Claimant was late for the scheduled screening on April 23, the parties *agreed* to reschedule the test to give him another chance on April 24, but inexplicably failed to notify the Claimant of the new opportunity.

The Claimant's drug and alcohol screening was necessary only because he was found to have been wrongfully removed from the Carrier's service. The screening was a necessary part of the return to work process. The Carrier's witness made clear that the Claimant should have been given three opportunities to comply with the return to work process, but he was not. On April 23, the Claimant did appear for the screening but was late and the Carrier was willing to reschedule the test. As a result, his failure to arrive timely during the reinstatement process cannot be seen as a failure to submit to testing that would justify his dismissal, especially in light of the Claimant's long tenure with the Carrier, which must be seen as a mitigating circumstance.

Because the Carrier has not proven its charges against the Claimant, we have no choice but to sustain his claim. But as the Claimant has not yet completed the return to work process, he is not entitled to back pay for the period since the reinstatement order was issued by Public Law Board 7585 Award 66, as he has not been cleared to return to work. This Award, however, is not intended to affect any rights the Claimant would have been entitled to pursuant to Award 66 and he must be given a fair opportunity to complete the return to work process which was begun.

AWARD

Claim sustained in accordance with the Findings.

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.