

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45158
Docket No. MW-47490
24-3-NRAB-00003-220551**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(BNSF Railway Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Breen, by letter dated December 14, 2020, for violation of MSR 28.5 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-21- D070-5/10-21-0097 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Breen shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated in accordance with Rule 40G of the Agreement.”**

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.

At the time of the testing which led to the Claimant's dismissal, the Claimant had approximately 15 years of seniority with the Carrier. He was assigned to a Bridge and Building carpenter position.

In March 2019, a year prior to the instant test, the Claimant tested positive on a Carrier-administered drug screening test. As a result, the Claimant was to receive random drug tests in accordance with both a signed waiver agreement and Department of Transportation requirements.

In August 2020, a follow-up drug screening was administered, and in early September, the Carrier notified the Claimant that he had tested positive for a controlled substance (marijuana) and was charged with an alleged violation of the Carrier's policy, rules and procedures on the use of alcohol and drugs.

An on-property investigation ensued on December 8, 2020. By letter dated December 14, 2020, the Carrier dismissed the Claimant for violation of "MSR 28.5 Drugs and Alcohol."

The Organization argues that the Carrier did not provide notice that the Claimant was being charged under MSR 28.5 Drugs and Alcohol. The Board finds no mention or discussion of this policy/rule in the record of the investigation. Rather, the Claimant was questioned about his compliance or non-compliance with Maintenance of Way Operating Rule 1.5 and the BNSF Policy, Rule and Procedure on the use of Alcohol and Drugs. The Organization argues that the failure to confront the Claimant with the rule(s) he is alleged to have violated at the investigation violates the fundamental due process rights of the Claimant to a fair and impartial hearing, required under Rule 40.

In order to provide the Claimant with a fair and impartial hearing, the Carrier had an obligation to enter a copy of MSR 28.5 into the record during the investigation. This Board has ruled on several occasions that the Carrier's failure to specify the rules allegedly violated by the Claimant is a violation of the Claimant's and the Organization's procedural rights under Rule 40.A. In on-property NRAB Third Division Award 42870, this Board concluded in relevant part,

"The Claimant did not receive the fair and impartial investigation required by Rule 40A. PLB No. 7564 Award No. 51, a 2015 on-property

award in which the claim was sustained, contains the following partial explanation for that Board's action:

‘The investigation was not fair and impartial regarding MWOR 8.3 Main Track Switches. The rule was not introduced as an exhibit during the investigation. As a result, the Claimant was not put on notice as to the standard against which his conduct was being measured and the Board cannot say whether the Claimant's behavior on April 8, 2014 met or fell short of the standard. Consequently, the Carrier has not proved with substantial evidence that Rule 8.3 Main Track Switches was violated.’

In the case now under consideration, the Carrier was not obligated to specify the rule(s) violated in the NOI so long as the NOI was clear about the behavior of concern to the Carrier. But during the investigation, the Carrier was obligated to enter a copy of the rule(s) violated into the record so as to allow the Claimant and the Organization a complete defense and, ultimately, to give the Board sufficient information to consider whether the rule had been violated. This was not done, as Rule 6.3.1 Main Track Authorization was first mentioned in the letter imposing discipline. The Board believes the words from the above-noted PLB award are as applicable to Claimant Scott's case as they were to the earlier case and that no more needs to be written.”

(NRAB Third Division, Award 42870).

The Carrier is not required to include specific rules in the Notice of Investigation, as long as it is clear what conduct of the Claimant is under investigation. However, the Carrier must specify during the investigation the rules allegedly violated and must enter copies of them into the record. When the Carrier fails to do so, the Claimant cannot be sure of the standards against which his conduct is being judged; the Organization is hampered in its defense; and the Board is prevented from concluding whether the conduct violated the specific terms of the rule.

However, the Board recognizes in this case that the Claimant tested positive for marijuana in August 2020. The Organization argues that his positive test in August 2020 was a “one-time” situation when old friends came into town, and he succumbed to the

pressure to use marijuana with them. The Claimant testified that he had passed numerous drug tests since his positive test in 2019. However, the Claimant did not dispute that the drug test in August 2020 was administered properly. He admitted during the investigation that he has a drug problem. His situation presents a serious safety concern.

Therefore, the Board concludes that, due to the procedural error on the part of the Carrier, the claim will be sustained in part, and the Claimant will be reinstated to his position. However, due to the serious safety violation committed by the Claimant, the Board concludes that the Claimant is not entitled to compensation for the period he was off work due to the dismissal. The Board further orders that the Claimant must report for an EAP evaluation and follow their recommendations. The Claimant is subject to a 36-month review period for his compliance with the EAP's recommendations following his return to service.

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 22nd day of February 2024.