

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No. : 23/Award No.: 23  
Carrier File No.: 11-12-0193  
Organization File No.: T-D-4074-G  
Claimant: Mark A. Sorenson

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION )  
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**Statement of Claim:**

The Carrier violated the Agreement when on February 17, 2012 Claimant Mark A. Sorenson was issued a dismissal for violation of the BNSF Railway Policy on the Use of Alcohol and Drugs and MOWOR 1.5 Drugs and Alcohol.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel file and make him whole for wages and benefits lost.

**Facts:**

By letter dated December 21, 2011 the Claimant was directed to attend an investigation on December 29, 2011 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged Positive results on follow up Drug Test held on December 13, 2011." After a mutually agreed to postponement, the investigation was conducted on January 25, 2012. Claimant Sorenson had been notified that he was being withheld from service pending results of the investigation.

**Carrier Position:**

The investigation was fair and impartial. The Claimant was not prejudiced as Rule 40B. allows the Carrier to withhold the Claimant from service. The positive finding for codeine provides substantial evidence that the Claimant violated the Policy on Drug Use and Alcohol and MOWOR 1.5 Drugs and Alcohol and reported to work under the influence of a controlled substance just two months after completion of a prescribed treatment program. The Claimant provided no explanation for the positive finding when

interviewed by the Medical Review Officer and did not ask for a split sample retest. His explanation at the investigation was therefore "too little, too late" and did not meet the burden placed on the Claimant by the positive finding. The Carrier was not required to specify the policy and the MOWOR allegedly violated in the Notice of Investigation and was not required to engage in discovery prior to the investigation. Should the Board find a lack of substantial proof, it must remove the dismissal and reinstate the Claimant with a make-whole remedy offset by other earnings.

**Organization Position:**

The investigation violated Rule 40 requiring fairness and impartiality because: 1) the Organization's request for relevant documents prior to the investigation was ignored; 2) the Claimant was prejudiced by being disciplined (withdrawn from service) before the investigation; 3) the Conducting Officer overruled the inclusion of Rule 40 as an Organization exhibit and 4) Manager of Medical Support Service Crespín was allowed to testify by telephone, depriving the Organization of the ability to judge his credibility by viewing him while he testified. The testing procedure was flawed and the Claimant's guilt based on questionable findings because the quantity of codeine in the Claimant's urine specimen was not established. When the Claimant was interviewed by the Medical Review Officer he was unaware that his over-the-counter cough medicine, Cheratussin, contained codeine. He subsequently learned that it did, and the Carrier has not provided valid rebuttal to the claimant's explanation given at the investigation. The Organization also has stated that the Claimant had no need to ask for a split sample retest because he knew that the cough medicine contained codeine. The Carrier has failed to consider that this case, which involves an exceptional seven-year employee, did not involve the usual, illegal controlled substances.

**Findings:**

The investigation was fair and impartial. This Board has written in our Award Nos. 1 and 4, for example, that the Agreement between the parties does not mandate discovery and therefore the Carrier has no obligation to provide documents prior to the investigation. The Conducting Officer has an obligation, complied with in this hearing, to allow the Organization adequate recess time to review documents tendered and accepted during the investigation.

The Claimant was not prejudiced by being withdrawn from service prior to the investigation. Rule 40B. sets forth the parties' agreement that employees may be placed out of service. The Organization, having agreed to the provision, is not in a position to argue persuasively that withdrawing an employee from service constitutes prejudgment.

The failure to accept Rule 40 as an exhibit when offered by the Organization, while arguably an inappropriate ruling, did not prejudice the Claimant or deprive him of due process. The presence or absence of a copy of Rule 40 as part of the investigation has no impact whatsoever on the Carrier's obligation to conduct a fair and impartial investigation. That obligation is a continuing contractual commitment.

Regarding Manager Crespin's telephonic testimony, this Board in our Award Nos. 3 and 14, the latter also involving Manager Crespin, found that telephonic testimony does not deprive the Organization of the ability to cross question the witness. The Board is of the opinion that credibility is better determined by a careful analysis of the consistency and inherent logic of a witness's testimony than by any body language exhibited by a witness.

There is no dispute that the Claimant tested positive for alcohol on July 22, 2011, was conditionally suspended as a result and satisfactorily completed the prescribed treatment program on or about October 17, 2011. Thereafter the Claimant was subject to random testing for up to five (5) years and to dismissal for "More than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during any 10-year period (Exhibit #9, Board emphasis). Manager Crespin's testimony and the associated documents provide substantial evidence that the Claimant tested positive for codeine—a controlled substance. No issue has been raised with the chain of custody of the urine specimen. Manager Crespin's testimony explains to the Board's satisfaction the lack of a specific number associated with the positive findings. The Claimant could have obtained that information but did not do so.

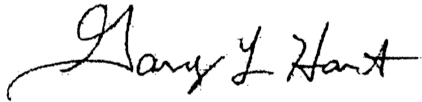
The Carrier has made a *prima facie* case for a violation of the Policy on the Use of Alcohol and Drugs and MOWOR 1.5. Because the *prima facie* case has been made, the burden shifts to the claimant to rebut that case. The Organization has made two contradictory arguments on the Claimant's behalf. On the one hand, the Organization contends that at the time of Claimant's interview with the Medical Review Officer, he was unaware that Cheratussin cough syrup accounted for the positive codeine finding. On the other hand, the Organization has also argued that the Claimant did not ask for a split sample retest because he knew that he had ingested codeine and that the retest was likely to show another positive finding. The Board believes that if the claimant truly did not know why he had tested positive for codeine, the logical decision would have been to ask for the retest. Furthermore, the Board does not dispute the Carrier's finding that there was no medical explanation for the positive test results. Finally, the Board cannot ignore the above-noted "obtained under any circumstances" language. Particularly in view of his past history, the Claimant was responsible for what he ingested and for insuring that he did not ingest controlled substances that had the potential to impact his performance on the job in what is an inherently dangerous industry. Under the circumstances, the Board has no basis for substituting its judgment for that of the Carrier.

**Award:**

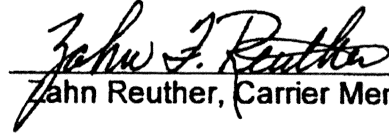
Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
February 12, 2014