

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 473 – Award No. 473 – Tsosie  
Carrier File No. 14-14-0188  
Organization File No. 2400-SF13N1-1460

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing April 16, 2014, when Claimant, R. Tsosie (6545651), was dismissed when allegedly failed to comply with the terms of his January 16, 2014 contract with the Medical & Environmental Health Department and/ or Employee Assistance Program (EAP) regarding treatment, education, and follow-up testing while working as a Machine Operator on TRPX0014, BNSF;s (sic) first knowledge of this event was April 11, 2014. The Carrier alleged violation of the Maintenance of Way Operating Rules (MOWOR) 1.13 Reporting and Complying with Instructions.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing April 16, 2014, continuing forward and/ or otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, R. Tsosie, had been employed by the Carrier since 1991. On April 16, 2014, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to comply with the terms of his January 16, 2014 contract with the Medical & Environmental Health

Department and/or Employee Assistance Program (EAP) regarding treatment, education and follow-up testing while working as Machine Operator on TRPX0014. The Carrier claimed first knowledge of the event on April 11, 2014. Following the investigation, the Carrier found Claimant guilty of the allegations against him, in violation of MOWOR 1.13 Reporting and Complying with Instructions, and dismissed him from service.

Kevin Vaudt, Carrier Field Medical and Environmental Health Manager, testified at the investigation that he follows and monitors with the Carrier Employee Assistance Program (EAP) when an employee has violated an alcohol or drug related rule. He stated that Claimant, on January 16, 2014, had signed a contract with the Medical and Environmental and Health Department specifying the conditions for his return to work. The conditions were that Claimant was required to contact the Employee Manager, Eugenia Vasquez, between the 1<sup>st</sup> and 5<sup>th</sup> of each month, that he attend one Alcoholics Anonymous meeting per week, with Saturday as the designated day, and that he establish a relationship with a sponsor to support his sobriety.

Mr. Vaudt contended that Claimant had not contacted the Employee Assistance Manager as required, that he had only attended four AA meetings, and he was not aware of Claimant's sponsor's name.

Mr. Vaudt also testified that he spoke with the Employee Assistance Manager several times regarding Claimant's situation, and in April he had not followed up by the 5<sup>th</sup> of the month. They also, he explained, were not able to verify his sobriety and fitness for duty.

Claimant testified at the investigation that he understood the contract steps he was required to follow. He understood the seriousness of the situation. Claimant stated that although he had spoken with Ms. Vasquez, he had not done so as often as required by his contract, between the 1<sup>st</sup> and 5<sup>th</sup> of the month. He later testified that he had never spoken to Ms. Vasquez at all but had faxed her some documents.

He stated that he had attended AA meetings, and meeting attendance sheets were entered into the record. They showed that Claimant had attended four meetings in each of November and December 2013, meetings on January 4 and 11, 2014, and meetings on March 22, and April 12, 15, and 17, 2014. Claimant first stated that he had no information concerning the gap in his AA meeting attendance, but later testified that he lives on a dirt road and conditions were bad in February 2014. The record includes a letter from Billison James, an employee with the Navajo Division of Transportation for Pinon Region, Arizona, which monitors road conditions and responds to emergency situations. The letter states that the road to Claimant's residence was impassable at least three or four times in February 2014. Claimant acknowledged that he never notified EAP that the road conditions did not allow him to attend AA meetings.

Claimant testified that Thomas Davis was his sponsor, although it appears that he had an earlier sponsor as well. The record includes a Carrier EAP Release of Information form, dated March 22, 2014, naming Mr. Davis, identifying his AA organization, and authorizing him to report Claimant's progress and cooperation with the EAP, and assist in his recovery. The record also includes a note from Claimant, dated April 17, 2014, giving Ms. Vasquez permission to speak to Mr. Davis.

The Carrier contends this is Claimant's third Level S offense within his 36-month review period. In particular, on November 12, 2013 Claimant signed a waiver accepting a Level S 30-day record suspension with a 36-month review period for violation of the Carrier's policy on the Use of Alcohol and Drugs. Claimant, the Carrier states, has already been shown leniency under the terms of its Policy for Employee Performance Accountability (PEPA).

The Carrier states that this case is not complicated. Mr. Vaudt testified that Claimant did not meet three requirements of the contract he signed on January 16, 2014:

- He did not contact the EAP manager once per month between the 1<sup>st</sup> and 5<sup>th</sup> of each month
- He did not attend one AA meeting per week
- He did not establish a relationship with an AA sponsor

Further, the Carrier states, Claimant admitted he did not contact EAP as required. The Carrier notes that it has been held repeatedly that an admission of guilt is sufficient for the Carrier to meet its burden of proof and the only question is the quantum of discipline. The Carrier argues that dismissal was appropriate given the seriousness of Claimant's violation.

The Organization contends that dismissal is excessive, as Claimant complied with all instructions to the best of his ability and understanding of his obligations as explained to him. Carrier witness Mr. Vaudt declared that Claimant had violated a February 16, 2014 contract with the Carrier's Medical Environmental and Health Department; however, he never produced any documentation of such a contract.

The Organization states that Claimant believed his sponsor was in contact with the Carrier, as he gave him authorization to do so, and he did attend AA meetings as required after his extended period of rehabilitation. During the month of February, he explained that road conditions on the reservation where he lived did not permit him to travel to meetings, which is the reason he did not attend any. It is clear that Claimant followed all requirements except for contacting Ms. Vasquez, but he did have a sponsor as required and believed the sponsor was in contact with the EAP.


The Organization points out that Claimant is a 58 year old employee with only two years until retirement and requests that he be shown leniency so he may demonstrate that he is serious about maintaining his sobriety. The Organization urges that the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, although the Carrier did not produce Claimant's contract at the hearing, Claimant acknowledged that he was aware of its requirements and did not follow them. He had no explanation for failing to contact EAP as required. Even if the roads from his home were impassable three or four days during the month of February, there is nothing to support the conclusion that he was unable to attend meetings for an entire month. In that same vein, there is no explanation for his failure to contact Ms. Vasquez and inform her if he in fact had difficulty getting to his meetings. The Carrier has proven by substantial evidence that Claimant failed to comply with his contract's requirements.

It is well settled that employees who fail to comply with the requirements for maintaining their employment following a drug/alcohol violation are subject to dismissal. The Organization essentially requests leniency on Claimant's behalf, but it is well settled that leniency is the province of the Carrier, not this Board. We see no reason to overturn the Carrier's decision that dismissal was warranted.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
Neutral Member

  
**JOY MENDEZ**  
Carrier Member

  
**DAVID SCOVILLE**  
Organization Member

Dated this 12<sup>th</sup> day of Oct., 2016.