

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 382, (Case No. 382)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing June 18, 2021, when Claimant E. Kee (6542583) was held out of service and subsequently on July 21, 2021, was dismissed for a positive test for alcohol and refusal to participate in a required urine drug testing after being properly notified of a FRA follow up test conducted on June 16, 2021, at approximately 0855 in Gallup, NM, in violation of MWOR 1.5.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this dismissal with all rights unimpaired and pay for all wage loss including overtime commencing June 18, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0239) (Organization File No. 2417-SL1312-2107)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate Claimant was assigned as a Machine Operator on June 16, 2021. On that date Claimant had a scheduled drug test at 0600 hours. Claimant did not show up until after 0830 hours. Upon reporting, Claimant was required to give a breath and urine sample for testing. Claimant complied with the breath analysis only and tested positive for alcohol and because Claimant tested positive for alcohol Claimant refused to provide a urine sample and because of

that Claimant was directed to attend a formal Investigation June 25, 2021, that was mutually postponed until July 21, 2021, concerning in pertinent part the following:

“...to develop the facts and circumstances concerning your alleged positive test for alcohol and your alleged refusal to participate in a required urine drug testing after being properly notified during a FRA follow up test conducted on June 16, 2021, at approximately 0855 in Gallup, NM while working as a Machine Operator on TTPX0001 and alleged violation of MWOR 1.5 Drugs and Alcohol; and BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs.”

On July 21, 2021, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization's position there is no proof Claimant received notice to attend the FRA test as an outside contractor administered the tests and no one from the Carrier was present at the test site to verify that Claimant appeared or did not appear. It further argued there was no proof that Claimant was notified of the Investigation inferring that the Investigation should not have been held in “absentia”. It concluded that the Carrier had not met its burden of proof and it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was aware of when the FRA test was to be administered and showed up two hours late for the test and failed the breathalyzer portion of the test and then refused to give a urine sample. It further asserted the record shows that the Carrier sent the Investigation Notice and Postponement to Claimant's address which was verified by the tracking records of the mail. It reasoned Claimant elected to not attend his own Investigation and there were no procedural violations in the handling of Claimant's case. It requested the claim be resolved on its merits.

Turning to the merits, the Carrier argued that Claimant failed the breath portion of the FRA test and there was no proof that the testing equipment was faulty. Additionally, it argued that after Claimant failed the first portion of the test Claimant decided not to provide a urine sample and instead left the testing site. It further stated that because Claimant tested positive for alcohol and refused to provide a urine sample, the Medical Collector, Kimberly Farris, contacted the Claimant's supervisor, Assistant Roadmaster J. Brittenum. Mr. Brittenum then tried to contact the Claimant multiple times in an attempt to have him return to the site to complete the urinalysis, even driving to the Claimant's hotel since Claimant was mobilized away from his home location. The Claimant did not respond to any of Brittenum's calls and the hotel where Claimant was staying advised Mr. Brittenum that Claimant had already checked out.

The Carrier suggested that Claimant was indifferent to Carrier Policy and Rules and it had proven that Claimant was in violation of MWOR 1.5 – Drugs and Alcohol where it states employees must not have any measurable alcohol on their breath or in their bodily fluids when reporting for duty, while on duty or on Company property. It concluded that after proving that Claimant was guilty as charged it appropriately disciplined Claimant because Claimant's violation was a Stand-Alone Dismissible Offense. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's argument that Claimant might not have been aware of the FRA test or the formal Investigation. Examination of the evidence indicates that Claimant signed the Department of Transportation (DOT) Alcohol Testing Form at Step 2 and 4 and dated it as 6/16/21 (See Transcript Exhibit No. 4). There is no doubt that Claimant appeared for the test.

The next question was whether or not the Claimant was aware of the formal Investigation. The Carrier is correct the tracking record substantiated that the Notice of Investigation and its subsequent postponement was sent to the Claimant's correct mailing address. Additionally, the record shows that when the Organization made its appeal in behalf of the Claimant on August 18, 2021, the Claimant had still failed to offer any reason why he did not appear at the Investigation and he offered no proof that he was either ill or unable to attend the Hearing for other reasons. The Carrier did not violate the Claimant's right to a "fair and impartial" Hearing when it was held in "absentia". In Award Nos. 145 and 354 of this Board it was stated:

"...It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at this own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924, 13957 and Public Law Board No. 6402, Award No. 202...."

Turning to the merits, the transcript and evidence substantiated that on June 16, 2021, Claimant failed a required FRA breathalyzer test and refused to offer a required urine test. Substantial evidence, that was not refuted, was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had 28 years of service with one Conditional Suspension about two and half years earlier for a like offense, a positive random breathalyzer test. The Carrier's Policy for Employee Performance Accountability (PEPA) states it is a Stand-Alone Dismissible Violation pursuant to Paragraph D to refuse to submit at any time to required testing for drugs or alcohol use or a second violation of the use of alcohol or drugs within ten years of a similar offense. The

Board is always sympathetic to long-term employees, but in this instance the Claimant has not offered any rationale for his behavior or shown any remorse, therefore, the Board finds and holds that the discipline will not be set aside because it was in accordance with PEPA and it was not arbitrary, excessive or capricious.

AWARD

Claim denied.

A handwritten signature in blue ink, reading "William R. Miller", written over a horizontal line.

William R. Miller, Chairman & Neutral Member

A handwritten signature in blue ink, reading "Michelle D. McBride", written over a horizontal line.

Michelle McBride, Carrier Member

A handwritten signature in blue ink, reading "Jeffery L. Fry" followed by the date "4/10/23", written over a horizontal line.

Jeffery L. Fry, Employee Member

Award Date: **April 10, 2023**