

Case No. 404
Award No. 404
BNSF File No. 14-22-0157
BMWED File No. 2404-BN40I2-2207

Public Law Board No. 7048

PARTIES) **Brotherhood of Maintenance of Way Employees Division**
) **ATSFF System Federation**
TO)
) **and**
DISPUTE:)
)
) **BNSF Railway Company**

Members of Board:

Jeanne M. Vonhof, Chairman and Neutral Member
Michelle McBride, Carrier Member
Jeffery Fry, Employee Member

Statement of Claim:

We present the following claim on behalf of Weldon Johnson (3096054) for the removal of the Claimant's Dismissal. In addition, we request all record of discipline removed from the Claimant's record. The claimant shall be made whole as a result of being withheld from service starting May 24, 2022. The Carrier's violation, including the following compensation(s):

1. Straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);
2. Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service, including any and all 401k contributions including any market adjustments.
3. Overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid

to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;

4. Health, dental and vision care insurance premiums, deductibles, and co-pays that he would not have paid had he not been unjustly Disciplined commencing May 24, 2022, continuing forward and/or otherwise made whole. All notations of the disciplined should be removed from all Carrier records.

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 Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or working conditions, nor have authority to change existing agreements or to establish new rules. The Board shall have jurisdiction over the disputes assigned to this Board and such other disputes as may be added during the life of the Board by mutual assent of the parties.

The Claimant, Weldon Johnson, was notified on May 26, 2022 of an investigation into Claimant allegedly testing positive for an FMCSA pre-employment test conducted on May 16, 2022, while the Claimant was employed as a Machine Operator in the Powder River Division, in violation of the Company's Rules and Procedures on drugs and alcohol. Via letter dated June 30, 2022 the Claimant was informed that he was being dismissed because it had been determined, through testimony and exhibits brought forth during the investigation, that he was in violation of the BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, effective September 1, 2014 and MWOR 1.5 Drugs and Alcohol.

There is substantial evidence in the record that the Claimant tested positive for marijuana on May 16, 2022, during a physical for a CDL. He had similarly tested positive in March 2022 and was placed on a Conditional Suspension at that time. At that time he was ordered to contact the EAP, obtain an assessment from them, and follow their instructions. If he did not comply fully, he was informed that he could be terminated.

The Claimant said that he had not used marijuana since he first tested positive in March, 2022. According to the Claimant, after this positive test he spoke to the doctor who certified the most recent test results. Claimant said that the doctor told him that the test came back showing only a trace of marijuana, and that this positive test could be the result of drugs remaining in the Claimant's body for up to 90 days. The Claimant also testified that he may have had marijuana in his system because of inhaling second-hand smoke around family members. The Claimant did not have any documentation to substantiate his conversation with the doctor. The Claimant testified

that he had taken a drug test in order to return to work in late March 2022 and also took another drug test in April of 2022, both of which were negative.

The Company's policy states that employees may not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on Company property, unless the substances are medically prescribed. The Claimant had just recently been suspended for drug use, was placed in the care of the EAP, and only permitted to return to work if he tested negative. He tested negative twice in March and April but then tested positive in May. It is not at all likely that the Claimant would test negative twice and then, all of sudden test positive, if the cause of the positive test were residual traces of marijuana remaining in the Claimant's system after he says he quit using several months earlier, or second-hand smoke from family members. It is much more likely that the positive test resulted from the Claimant using marijuana again.

Under these circumstances, the Carrier has shown that the Claimant violated its drug and alcohol policies twice within only two months. He was notified after the first positive test that a second positive test within 36 months could lead to dismissal. He was given assistance and a second chance after the first positive test. The record demonstrates that there is substantial evidence that he violated the Carrier's drug and alcohol policy and MWOR 1.5 again and that the penalty of dismissal is not excessive, especially for an employee with only three years' tenure with the Company.

AWARD

Claim denied.



Jeanne M. Vonhof
Neutral Member and Chairperson



Michelle McBride
Carrier Member



Jeffery Fry
Employee Member

Award Date: **January 8, 2025**