

**PUBLIC LAW BOARD NO. 7564**

Case No.: 41/Award No.: 41  
Carrier File No.: 11-13-0232  
Organization File No.: B-M-2677-M  
Claimant: Brian J. Schaff

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

1. The discipline (Dismissal) imposed upon Mr. Brian J. Schaff by letter dated March 22, 2013, for alleged violation of BNSF Railway Policy on the use of Alcohol and Drugs April 15, 2009 and MOWOR 1.5 Drugs and Alcohol on Tuesday, February 12, 2013 at approximately 0756 hours in Dickinson, ND, for alleged positive follow-up breath test conducted, while working as a Welder on the Dickinson Subdivision.
2. As a consequences of the violation referred to in Part (1) above, Claimant Brian J. Schaff shall now receive the remedy prescribed by the parties in Rule (G).

**Facts:**

By letter dated February 15, 2013 the Claimant was directed to attend an investigation on February 22, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged positive follow-up breath test conducted at approximately 0756 hours on Tuesday, February 12, 2013 in Dickinson, ND while you were working as a Welder on the Dickinson Subdivision. The date BNSF received first knowledge of this alleged violation is February 13, 2013." The letter further informed the Claimant that he was being withheld from service pending results of the investigation.

**Carrier Position:**

The collective bargaining agreement does not require the Conducting Officer and the officer who issues the discipline to be the same individual. No error occurred. As Division Engineer Pickard reviewed the transcript and made a fair and impartial decision, the dismissal was in accordance with PEPA. There is no showing that the investigation prejudiced the Claimant. There is strong decisional support for the principle that substantive evidence is the proper standard of proof in this industry. Manager Medical Support Services Crespin's

telephonic testimony, which is not prohibited by the collective bargaining agreement, explained why the tester was qualified and why the Phoenix 6.0 EBT (breathalyzer) was properly calibrated. Manager Crespin also explained that the dissipation rate of alcohol in the body would account for the .000 finding approximately one hour later. Beyond that, the test results at the Sheriff's department were simply certified by a possible relative of the Claimant, but the results themselves have not been presented and nothing is known of the calibration of the device used or the qualifications of the tester. In essence, the Organization is asking for leniency, which is the Carrier's prerogative but not within the Board's discretion. Should the claim be sustained, the Claimant is due only the remedy called for in Rule 40.G, with back pay to be offset by outside earnings.

**Organization Position:**

The investigation outcome was prejudged when the Claimant was withheld from service. The investigation was not fair and impartial because the decision to dismiss the Claimant was not issued by the Conducting Officer. Division Engineer Pickard could not have read the transcript and still decided on dismissal. Adding to the unfairness of the process was Manager Crespin's telephonic testimony, as the Organization was unable to see his reactions to the questions posed. The testing did not meet rigorous standards because the tester was not qualified and the Phoenix 6.0 EBT was not properly calibrated. Manager Crespin gave his opinion about the alcohol dissipation rate, but that was only an opinion. The .000 results from the testing done at the Sheriff's department confirmed the Claimant's testimony that there were no drugs or alcohol in his system when tested. There is no way that the results would have gone from .022 to .000 in about an hour if there had been alcohol in the Claimant's system.

**Findings:**

The outcome of the investigation was not prejudiced as the parties have agreed in Rule 40.B that an employee may be held out of service under certain conditions. Not withholding an employee from service when the possibility that he or she would be working under the influence of alcohol would amount to gross managerial irresponsibility.

In an earlier decision, this Board has agreed with the Carrier that the best practice is to have the same individual serve as Conducting Officer and the officer who issues the discipline. In cases where there are serious credibility issues, the resolution of which could determine the outcome, the Board should be able to ascertain with confidence who made the credibility determination—something that is murky when the Conducting Officer and disciplining officer roles do not rest with one individual. In this case, the Board does not find serious credibility determinations critical to the outcome of the case. The Board does not applaud the decision to separate the roles of conducting Officer and disciplinarian, but we find no harmful error in this instance.

The Board does not view Manager Crespin's telephonic testimony as destructive of a fair and impartial investigation. Much of his testimony had to do with an explanation of the documents entered as exhibits. The Organization was not precluded from questioning Manager

Crespin. While some of his testimony has been characterized as opinion, the Organization has not questioned his credibility.

The Board accepts Manager Crespin's explanation that when read together, the two certificates contained in Exhibit 6 establish that the tester was trained and certified to use the Phoenix 6.0 EBT, commonly known as a breathalyzer. It is a matter of record that the tester neglected to check the box showing that there was a 15 minute interval between the first and second breathalyzer tests. It is also a matter of record that a Certificate of Correction was completed and signed for the tester in her absence, but the tapes of the tests themselves establish that the interval was observed as there was actually 16 minutes between tests.

The Board is well aware of Manager Crespin's testimony that the last calibration was dated December 6, 2012. However, the tapes that show the December 6, 2012 date are labeled "Calibration/Check Printout" (see Exhibits 7 and B). The tapes are consistent with Manager Crespin's explanation that the Phoenix 6.0 EBT was calibrated exactly one week before the Claimant was tested. There is no basis for a conclusion that the breathalyzer was not tested shortly before use or that the machine was faulty.

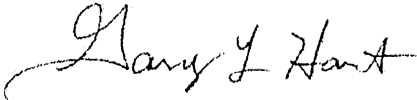
Finally, there is the question of the Sheriff's department reading of .000 compared to the earlier readings on .031 and .022 on which the dismissal is based. The fact that Daun Scharff's affidavit was notarized indicates only that Daun Scharff signed the document—no more, no less. The Notary Public is not certifying the accuracy of any of the information contained in the affidavit. The Board does not view the information in the affidavit of a possible relative of the Claimant as proof that he was alcohol free when tested by the Carrier. Missing are the readout tapes from the test, information about the qualifications of the tester and information about the calibration of the device used. All of this information would be necessary for a proper assessment of the results. But, even assuming that 1) the affidavit was signed by a person unrelated to the Claimant and 2) that the results are valid, the Organization has not mounted a plausible defense. Manager Crespin testified without contradiction that the alcohol dissipation rate is .020 per hour. When tested, the Claimant's rate went from .031 to .022 in the 16 minutes between tests—a reduction of .009. Multiplying by four produces a dissipation rate of .036 in roughly the hour between the retest and the Sheriff's department test. This differs from Crespin's estimate but clearly would account for the .000 reading from the Sheriff's department. The Board does not take issue with Manager Crespin's testimony that the initial two tests were valid. The Carrier has provided substantial evidence that the Claimant violated MOWOR 1.5. In an industry as inherently dangerous as the railroad industry, there can be no place for an employee working under the influence of either alcohol or drugs or even prescribed medication that can alter judgment and/or actions.

**Award:**

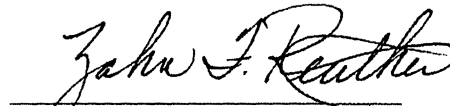
Claim denied.

**Order:**

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



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
April 23, 2015