

**PUBLIC LAW BOARD NO. 7564**

Case No. 84/Award No. 84  
Carrier File No. 10-17-0207  
Organization File No. C-17-D070-8  
Claimant: Mark L. Kaelin

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

By letter dated April 10, 2017, Mr. Mark L. Kaelin was issued a dismissal for alleged violations of BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs and MWOR 1.5 Drugs and Alcohol. The May 25, 2017 claim from the Organization, Jim L. Varner, Vice General Chairman, includes the following: "I request that the Dismissal issued to Mr. Kaelin be removed as it is excessive. I ask for leniency and that you reinstate Mr. Kaelin back to the BNSF Railway Company."

**Facts:**

By letter dated February 7, 2017, Claimant Mark Kaelin was informed that he should:

Arrange to attend investigation at 0900 hours, Thursday, February 16, 2017, at the Broken Bow Depot Conference Room, 1201 South A Street, Broken Bow, NE, 68822, to develop the facts and circumstances concerning your alleged failed positive drug test from reasonable cause test conducted on January 30, 2017, while employed as a Group 2 Machine Operator on TMOX0428 and alleged violated of Rule 1.5 of the Maintenance of Way Operating Rules, effective April 1, 2015, and BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs, effective September 1, 2-14. BNSF First Knowledge of test results is February 7, 2017.

The notice of investigation informed the Claimant that he was being "withheld from service pending the results of the investigation." After three postponements and a change of time, the investigation was conducted at 1000 hours on March 28, 2017.

**Carrier Position:**

The Carrier avers that the investigation was fair and impartial and that the Claimant's admission provides the necessary substantial evidence. The Claimant did not contest the positive finding for marijuana. The Carrier must maintain a drug-free workplace and the dismissal was in accordance with the Policy for Employee Performance Accountability (PEPA), Appendix B, Item 4. Leniency is up to the Carrier, not the Board, and leniency was granted in 2009. If the claim is sustained, the Claimant should be reinstated in accordance with Rule 40.G, with a deduction for outside earnings and without damages for health care expenses.

**Organization Position:**

The Organization asserts that the investigation was not fair and impartial because Roadmaster Abeyta attempted to enter documents into the record that were not pertinent. The Carrier has not met its burden to prove the charges as the Claimant's tenure, record, honesty and the fact that he was not impaired were not considered before excessive and arbitrary discipline was imposed.

**Findings:**

Parts of three documents are relevant to the Board's decision. MWOR 1.5 Drugs and Alcohol in pertinent part states that "Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property." Corporate Policy, Use of Alcohol and Drugs, IV Policy Requirements, Section E states:

Notwithstanding any statute, ordinance, regulation, or other law that legalizes or decriminalizes the use or possession of marijuana, whether for medical, recreational, or other use, BNSF Railway's Use of Alcohol and Drugs Policy prohibits an employee from reporting for duty or remaining on duty or on BNSF property with any detectable amount of marijuana in his or her body. . . .

PEPA, lists among Stand Alone Dismissible Violations the following: "4) Refusal to submit at any time to required testing for drug or alcohol use . . . second violation of Rule 1.5 (former Rule G) second positive test within 10 years . . ."

The Claimant's Employee Transcript shows a May 31, 2009 date of hire and an excellent, but not spotless, disciplinary record that includes an August 4, 2009 Level S Conditional Suspension for a "refusal to participate in required drug and alcohol testing." On Friday night, January 20, 2017, at a reunion of sorts with high school buddies, the Claimant admittedly indulged in the marijuana that was being passed around. On January 30, 2017, he was subjected to a reasonable cause drug and alcohol test and tested negative for alcohol and positive for marijuana. The Organization has not questioned the credentials of the test administrator, the chain of custody of the bodily fluids (urine) obtained or the results of the tests. The Claimant waived his right to

have the urine sample rested by a different lab. The ensuing on-property investigation was fair and impartial, the Organization's contention notwithstanding. The unquestioned test results and the Claimant's admission provide proof of the charges far beyond the required substantial level.


The Board is well aware of the Claimant's long history with the Carrier, his commendable honesty and the fact that the positive test results prove only that he had marijuana in his system and not that he was working under the influence. However, "under the influence" is not the relevant criterion when MWOR 1.5 and the Corporate Policy are considered. The Board is also acutely aware of the long-standing practice in this industry that leniency is the province of the Carrier, not the Board and that the Board should not substitute its judgment for that of the Carrier. The Claimant received leniency in 2009 when he was given a conditional suspension rather than a dismissal that would have been in accord with PEPA. The Board takes no pleasure whatsoever in denying the claim of an employee with the Claimant's long tenure and reasonable work history, but the record does not support a finding that the dismissal was arbitrary and excessive under the circumstances, as it is consistent with PEPA and with the Carrier's responsibility to maintain a drug-free workplace.


**Award:**

Claim denied.

**Order:**

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.

  
Zachary Voegel, Organization Member

  
Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
January 21, 2019