

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 66**  
**Carrier File No.: 10-16-0254**  
**Organization File No.: C-16-D070-9**  
**NMB 119**  
**Claimant: R.S. Martens**

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**BNSF RAILWAY COMPANY**

**-and-**

**BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES DIVISION - IBT**

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**FACTS:**

On February 25, 2016 Claimant was administered a drug test. The results came back positive. The Carrier deemed this sufficient grounds for dismissal. The Organization disagreed and filed a claim protesting the discipline. The claim was duly processed to this Board for consideration.

**CARRIER POSITION:**

On February 8, 2010, Claimant signed a waiver and conditional suspension for violating BNSF's Policy on the Use of Alcohol and Drugs and MOWOR 1.5.1 The suspension was conditional upon:

- 1) Claimant's first-time violation of Rule 1.5 or BNSF Policy on the Use of Alcohol and Drugs.
- 2) Claimant's placement into the Employee Assistance Program.
- 3) Full compliance with the program and instructions issued by the Employee Assistance Manager.

On March 15, 2010, Claimant signed a document signifying his completion of the prescribed treatment program and compliance with the Employee Assistance Program. The document provided the following: "Violation of any one or more of the following conditions will subject you to dismissal: ... More than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during any 10-year period."

On February 25, 2016, Claimant was asked to submit to a drug and alcohol test. On March 2, 2016, BNSF's Medical Department notified Division Engineer John Bainter that the results of that test were that Claimant had tested positive for a controlled substance (amphetamine and methamphetamine). The test was verified by BNSF's Medical Review Officer, who determined there was no legitimate medical reason for the positive test. Bainter was also informed that Claimant had previously tested positive for alcohol on January 27, 2010. At the investigation, Claimant admitted he was out of compliance. The Carrier argues that the MRO corrected a typographical error in handwriting, but contends this modification in no way invalidated the test results.

Claimant had self-referred in 2015. As a result of the self-referral, EAP initiated a follow up program which began on September 25, 2015 continuing through September 24, 2017. The test here concerned was conducted on February 25, 2016, within the follow-up program window. The Carrier maintains that nothing in Claimant's 2010 letter negates a drug test based on an employee's self-referral. It argues Claimant was orally advised that he needed to request split testing in writing, yet he failed to do so. It concludes he cannot be heard to complain about a lack of split testing. In the Carrier's view both the test and the discipline were proper.

#### **ORGANIZATION POSITION:**

The Organization notes that this employee has long service; Claimant began working for the Carrier in 2005. His 2010 letter established the conditions for his continued employment in terms of drug testing. That letter states: "Violation of any one or more of the following conditions will subject you to dismissal: • More than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during any 10-year period." The February 25, 2016 test was only the first in the ten year period following the letter and fell outside the circumscribed five-year limit of his follow-up program. The Organization insists that since the specified five year period for follow-up testing had expired, Claimant should have fallen under the DOT random testing policy. In addition, the Organization contends the test report was invalid because it included handwritten remarks.

In the Organization's view, there should have been split testing, but instead the Carrier required a written request for split testing and failed to advise Claimant in writing of this requirement. It concludes the testing and discipline were improper.

#### **DECISION:**

The language of the 2010 letter is clear. It was signed by Martin M. Crespín, Manager of Medical Support Services. Claimant also signed the letter, acknowledging that he had read the letter and understood its conditions. Its terms were not modified after Claimant self-referred and the Carrier cannot be permitted to unilaterally amend the terms of a written document that has already been executed, issued to and signed by an employee. Nothing in the letter referenced or indicated a change in status in the event of self-referral and therefore none is recognized. The language of the letter stands as written, and new

conditions cannot be after added. The Board finds the terms of the letter to stand fully enforceable as written regardless of self-referral.

After he completed his 2010 treatment program, Claimant was advised as follows:

You have satisfactorily completed the prescribed treatment program and complied with requirements of BNSF Employee Assistance Program following your violation of the BNSF Policy on the Use of Alcohol and Drugs, dated April 15th, 2009. As a condition of employment, you are now subject to periodic drug and/or alcohol testing up to five years from the date you return to work. When a follow-up test is required, you will be notified by proper authority. All Federal (FRA or, FRA & FMCSA) Follow-Up tests will be conducted under observed conditions. Prior to returning to active service, you must contact your supervisor and comply with any other conditions required as a result of this violation. Violations of any one or more of the following conditions will subject you to dismissal: More than one confirmed positive test for any controlled substance or alcohol obtained under any circumstances during a 10-year period.

The terms of this letter began upon signature, and therefore any drug or alcohol test prior to signature on March 15, 2010 was excluded from the 10-year period referred to in the letter's terms. As a result, Claimant's prior positive test for alcohol use in January of 2010 cannot be used to aggregate positive test results within the letter's 10-year period.

The test of concern was administered in February of 2016. This was after the five year period of random testing had expired. There is no correspondence in the record placing Claimant on notice that the terms of his March 15, 2010 return to service had changed. He had been required to understand and acknowledge the terms of the March 15 letter; he was not similarly required to understand or acknowledge any change to those terms. The Carrier's decision to unilaterally extend the five year period based on Claimant's self-referral was not foreseen by or permitted in the March 15 letter. More importantly, there is no evidence that either Claimant or the Organization were put on notice of a change in the documented conditions applicable to Claimant's situation.

Even if the five year period for random testing were deemed appropriately extended, the March 15 letter nonetheless requires more than one positive test within any ten year period. The only positive test result in the ten years following March 15, 2010 was the single result in 2016. It follows that Claimant's 2016 drug test was singular in nature, and did not constitute grounds for dismissal.

**AWARD:**

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record and reinstate Claimant, subject to its policies on return to work, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as

a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier's employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.

**ORDER:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

January 25, 2018; Park City, Utah



Patricia T. Bittel, Neutral Member



Zachary Voegel, Organization Member



James Rhodes, BNSF Member