

SBA No. 1112  
BNSF/BMWE  
Case No. 35  
Award No. 36

**NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT**

<b>BURLINGTON/NORTHERN/SANTA FE</b>	}	<b>Claimant:</b>
	}	<b>Jeff C. Stephens</b>
<b>AND</b>	}	
	}	<b>CASE NO. 35</b>
<b>BROTHERHOOD OF MAINTENANCE</b>	}	<b>AWARD NO. 36</b>
<b>OF WAY EMPLOYEES</b>	}	

On February 2, 2001 the Brotherhood of Maintenance of Way Employees (“Organization”) and the Burlington Northern/Santa Fe (“Carrier”) entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 (“Board”).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railroad Labor Act. The Board’s jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of **three** members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railroad Labor Act.

Employees in the Maintenance of Way **craft** or class who have been dismissed or suspended from the Carrier’s service or who have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle **his/her** appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee’s service record to the Referee. These

documents constitute the record of the proceedings and are to be reviewed by the Referee.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

## **BACKGROUND FACTS**

Claimant, Jeff C. Stephens, Grinder Operator, was dismissed for his failure to provide an on duty urine drug specimen and breath sample as required by FMCSA Random Test #2554797 on Monday, August 20, 2001. Section 4 and Section 7.6, BNSF Policies on Use of Alcohol and Drugs, effective September 1, 1999, is as follows:

### **Section 4. Forms of Drug and Alcohol Testing**

- 4.1 BNSF employees are required to cooperatively participate in all aspects of the program. Failure to do so constitutes refusal and can result in discipline, including immediate dismissal for failure to follow instructions.**
- 4.2 *Random Testing.* All employees covered by the Hours of Service Act are subject to random testing at any time while on duty. Employees in positions requiring an active commercial driver's license are also subject to random testing at any time while on duty. Random selections are generated and issued by the Medical & Environmental Health Department. The tests require urine drug screens and breath alcohol testing. This testing is required by federal statute.**

### **Section 7. Discipline for Drug & Alcohol Violations**

**Employees refusing to participate in any federal on BNSF drug test will be removed from service immediately and disqualified from service for a period of at least nine (9) months, and subject to dismissal from service with BNSF. Refusal includes:**

- Outright rejections of participation in a drug or alcohol test;
- Failure to provide an acceptable identification number for federal testing (i.e., social security number, employee ID, driver's license number or engineer certification number);
- Failure to provide a urine or breath specimen without a valid medical reason;
- Tampering with urine sample by substitution, dilution or adulteration;
- Failure to report for a test without a valid reason; or,
- Harassment of, or refusal to follow the instructions of authorized collectors.

This incident occurred in the Clermont Section headquartered in Clermont, Wyoming when the Claimant refused to be tested. Instead, the investigation reflects that the Claimant went home sick and requested to be listed as on vacation leave. A formal investigation was held on Thursday, August 30, 2001 in the Roadmaster's Office located at 2300 Kittering Road, Sheridan, Wyoming. The record of the hearing reveals that the claimant received a fair and impartial investigation of events.

#### **FINDINGS AND DISCUSSION**

It is the Organization's position that the Claimant was ill from a viral infection and inattentive the morning of August 20, 2001, the date of the random drug and alcohol tests. Thus, the Organization reasons that the Claimant was unable to hear his supervisor's instruction to take the test at that juncture. However, upon later learning of the testing, the Claimant attempted to be tested but was refused. Subsequently, he went to his doctor, both Monday, August 20, and Tuesday, August 21, 2001 and obtained valid excuses for his legitimate illness. In sum, this was a problem of miscommunication between the Claimant and his Supervisor.

It is the Carrier's position that the Claimant knew of the random drug and alcohol testing policy as he has been with the railroad for eleven (11) years. Therefore, the Carrier reasons that the Claimant knows full well the consequences of his failure to provide urine/breath samples as required. Moreover, the Carrier strongly disagrees with the Organization that the problem is miscommunication. Instead, the Carrier asserts that the Claimant was instructed by his Supervisor to appear for testing and made a choice to leave the premises for home under the pretext of a pre-existing illness.

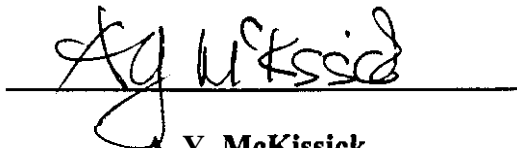
Based on the evidence adduced at this investigation, the Board finds that the Claimant should be dismissed for the following reasons. First, the Board is persuaded that the Supervisor's written contemporaneous statement best reflects the truth of events. That is, the Supervisor informed the Claimant of the testing and the Claimant responded that he was going home sick and to tell this reason to the person at the testing facility.

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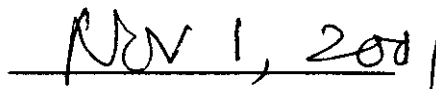
Second, the Board finds that the timing of the testing is significant. It occurred on Monday, August 20, 2001 at 7:30 a.m., nonetheless, the Claimant appeared for testing 1:00 p.m. that day. Thus, it would appear that the Claimant might have knowingly waited until the effects of the weekend subsided before agreeing to be tested. Third, the Claimant's disciplinary record reflects a censure and two suspensions prior to this current infraction. In light of the foregoing, the Board finds that a dismissal is warranted.

#### AWARD

The Claimant is dismissed for the aforementioned reasons.



A. Y. McKissick  
Neutral Chair  
SBA No. 1112



Dated