SBA No 1112
BNSF/BMWE
Case No. 3
Award No. 4

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112

BURLINGTON NORTHERN/SANTA FE

and **CASE NO. 3**
AWARD NO. 4

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

On July 29, 1998 the Brotherhood of Maintenance of Way Employes ("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 Railway 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, on 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 Railway 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 claim 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.

The Agreement further establishes 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 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 proceedings and are to be reviewed by the Referee. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data, including argument, evidence,

and awards.

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 the applicable provisions of 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

The Claimant, James Delaney, established seniority, originally as a bus driver in a steel gang, with the Carrier for approximately five years prior to this dismissal. At the time he was dismissed he was assigned as a welder in the frog shop. His service record contains no discipline or other entries relevant to disposition of the claim.

The Claimant was dismissed on December 18, 1998 as a result of an investigation which was held on November 30, 1998 after it was originally scheduled for November 23, 1998 pursuant to notice by letter of November 16, 1998. Claimant was charged with violating with Sections 2.1.3 , 6.2, and 12.0 of the Carrier's Policy on Use of Alcohol and Drugs. Those Sections read, in relevant part, as follows:

> 2.1.3 Prohibitions Under BNSF Policy
>
> FRA and FHWA regulations set forth minimum prohibitions on the use of alcohol and drugs. However, BNSF's General Rules for All Employees set forth even more strict prohibitions on such use, and provide, in part, as follows:
>
> Drugs and Alcohol
>
> ...Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on BNSF property...
>
> * * *

6.2 Follow-Up Testing

> An employee who provides a negative urine specimen and/or breath sample and has been permitted to return to service is subject, for a period of five (5) years, to urine and breath alcohol testing...If such further testing for said substances is positive, the employee will be subject to dismissal...

* * *

12.0 DISMISSAL

> Any one or more of the following conditions will subject employees to dismissal:
>
> (a) A repeat positive test either for controlled substances or alcohol obtained under any circumstances. Those employees who have tested positive in the past ten (10) years will be subject to dismissal whenever they test positive a second time and shall not be eligible for reinstatement...

FINDINGS AND OPINION

On June 1, 1998 the Claimant was the subject of a Return to Duty drug screen which subsequently tested positive for marijuana metabolites. On June 11, 1998 he was so advised and directed that he would not be permitted to perform any services for the Carrier unless and until he fulfilled certain conditions. Those conditions included that he obtain an assessment of his condition, abide by treatment recommendations, be subsequently cleared for return to service by the Employee Assistance Manager, and provide a supervised negative urine sample. The Claimant fulfilled each of these conditions and, on September 28, 1998 returned to service with the understanding that he would be subject to periodic testing for five years and that if he failed any such test he would be subject to dismissal.

On October 30, 1998 one such test was administered under circumstances which included the Claimant's written acknowledgment, *inter alia*, that his specimen bottle "...was sealed with a tamper-evident seal in (his) presence and that information (set forth on the intake form) and on the label attached to (the) specimen bottle is correct." Finally, the Claimant was accompanied to the collective room only by the lab technician.

On November 12, 1998 the Claimant's Welding Supervisor was notified that the Claimant's sample tested positive for cocaine metabolite and the notice of investigation, described above, issued to the Claimant.

The Organization attacks the Claimant's dismissal on essentially procedural grounds. The first relates to the timeliness of the investigation and the second, a series of assertions, relates to the process used in administering the Claimant's drug screen. We reject the Organization's claims on both points.

Schedule Rule 40 requires that in cases involving "serious infraction of rules" the investigation shall be held within ten days after the date the claimant is withheld from service. The record shows that the Claimant received notice of his failure to pass the drug screen and the fact that he would be withheld from service on November 16, 1998 and that the investigation was scheduled to commence on November 23, 1998, seven calendar days later. Thus, at that point the investigation complied with the provisions of Schedule Rule 40. On or about November 18, 1998 the Carrier asked the Organization's agreement to postpone the hearing to November 30, 1998 because one of its witnesses was not available on the original hearing date. The Organization, by letter of November 18, 1998, agreed to the request noting that in doing so it did not waive its position that the Carrier violated Schedule Rule 40. It is apparent from this time frame that the only possible rule violation would be that the November 30, 1998 hearing was more than ten days after the Claimant was withheld from service. However, the Organization could have prevented this harm to the Claimant by withholding its concurrence to postpone the hearing to that time. This it did not do. Moreover, it's express reservation to raise the timeliness argument was limited to the originally scheduled date which was, as described above, within the time limits of Schedule Rule 40. Accordingly, we find that the Carrier complied with all applicable provisions of the rule and the investigation was timely.

The Organization's remaining contentions go to the manner in which the Claimant's sample was collected leading to the positive drug screen. Here, the Organization asserts that the collection facility was not secure, nor was it posted as such, that the collector dealt with more than one employee at a time, that the collector had the Claimant sign the acknowledgment of procedure before the procedure was undertaken, and that the sample was not properly handled. In support of its argument it offered the testimony of the Claimant, in describing the manner in which his sample was collected, and other employees who testified about the collection process and area in general. We find that the Claimant's testimony is not credible and that the testimony of the other employees was less than adequate to meet the Organization's burden of proof.

More specifically, we find it incredulous that the Claimant, who admittedly knew the consequences of his first positive test and, more importantly, the serious consequences of another positive test, would casually submit to, without any objection, a process that he knew was improper.

Moreover, it strains the bounds of credulity even further that he, armed with this knowledge, would sign an acknowledgement that the process was appropriate and that he would do so even before the process was carried out. Rather, we conclude that he signed the acknowledgment simply because it was true and accurate.

With regard to the testimony of the other employees, the record is clear that they are either clearly wrong (e.g. the collection *room* was secure and posted), that they were unable to clearly describe or set forth their knowledge of the collection process used for the Claimant, or that their testimony was insufficient to invalidate the collection process (e.g.s that the collector worked with more than one employee at a time *only* with respect to paperwork, their admission that collections were witnessed *only* by the collector). In fact, the only portion of their testimony that conclusively demonstrates some error on the part of the collector, the misidentified social security number in one instance, did not implicate the collection taken from the Claimant.

In light of this record, we are unable or unwilling to find that the collection process followed with respect to the Claimant's drug screen that led to his dismissal was faulty.

AWARD: The claim is denied.

Robert Perkovich

DATED: March 10, 1999

Robert Perkovich, Chairman and
Neutral Member, SBA No. 1112