

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112**

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CASE NO. 105
AWARD NO. 106
CLAIMANT: M. L. JOHNSON**

On July 29, 1998, 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 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, 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 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 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.

The Carrier hired Claimant Matt L. Johnson on or about July 14, 1997 as a Gang Trackman in Sioux Falls, South Dakota. At the time of the incidents leading to the instant Discipline, Claimant was working as a Gang Trackman on a Mobile Gang. Prior to the incident leading to his Dismissal, Claimant had received the following disciplines:

DATE	OFFENSE	DISCIPLINE ASSESSED
8/28/98	AWOL	Censure
10/27/98	AWOL	5-day Record Suspension
11/1/98	AWOL	10-day Record Suspension
10/3/06	Positive Drug Test	Conditional Suspension

On August 6, 2007, Claimant underwent a return-to-service drug screen after an absence of greater than 6 months, the result of which was positive. The result of a retest was also positive, as confirmed by the Carrier's Medical Review Officer. An investigation was initiated regarding the incident. I note that Claimant retested at a private lab within 52 hours of receiving the result of his initial positive test. According to Claimant, the result from the private laboratory was negative.

By letter dated April 17, 2007, the Carrier notified Claimant that he was to attend a formal Investigation "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your positive drug screen, as a result of the Return To Service test conducted on August 6, 2007; and your alleged violation of the BNSF Policy on the Use of Alcohol and Drugs, dated September 1, 2003." After a number of postponements, the Hearing took place on October 18, 2007. Pursuant to that Investigation, Claimant was notified that he was being dismissed for violation of the BNSF Policy on the Use of Alcohol and Drugs. By notice dated December 21, 2007, Claimant exercised his right to appeal the decision to Special Board of Adjustment 1112.

According to the Organization, the discipline imposed upon Claimant was unwarranted and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization contends that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence. The Organization claims that Claimant has not received a fair and impartial Investigation. The Organization further claims that the original test was suspect and that Claimant retested at an independent laboratory, the result of which was negative, thus exonerating Claimant. The Organization asserts that the Carrier should now be required to overturn Claimant's Discipline and make Claimant whole for all losses. Conversely, the Carrier takes the position that it has met its burden of proof. Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement.

According to the Carrier, a review of the transcript makes it clear that Claimant was guilty as charged of violating the Carrier's Drug and Alcohol Policy. While it may be true that Claimant did retest at an independent laboratory, the test administered by the Carrier was nonetheless proper. Based on Claimant's offense, as well as his past disciplinary history, Dismissal is the appropriate penalty.

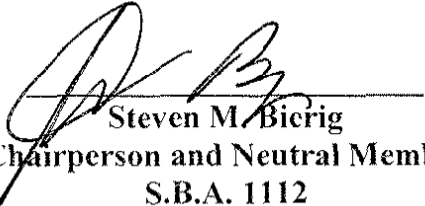
In discipline cases before this Special Board of Adjustment, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is limited to the question of whether the discipline assessed should be upheld, modified, or set aside. This Board must determine whether there 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.

This Board has found substantial evidence in the record to sustain the Carrier's position in whole. The Carrier has proven that Claimant did violate the BNSF Policy on the Use of Alcohol and Drugs when he tested positive for marijuana on August 6, 2007. Based on the offense, we cannot find the penalty to be unreasonable and will not overturn said Discipline.

Claim denied.

AWARD

Claim denied.


Steven M. Biebig
Chairperson and Neutral Member
S.B.A. 1112

Dated 6/10/08