SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.,

CASE #66 – James F. Matthews (Termination of Employment)
AWARD NO. 67

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement ("MOA") between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal contain only the Referee's signature is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

James F. Matthews, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on June 2, 1976. At all relevant times, the Appellant was assigned as a Gang Trackman the area of Flagstaff, Arizona. Prior to the instant investigation, the Appellant had been disciplined on two separate occasions – In 2001 for an Altercation and Assault, where he received a five day record suspension, and a second

time in 2001, for refusal to participate in a Reasonable Suspicion Drug test on June 7, 2001, for which he received a conditional suspension,

C. The Charge at Issue

On or about July 1, 2003, following a formal investigation conducted on June 3, 2003, The Appellant was served with following charge:,

> This letter will confirm that as a result of investigation held in the Division Engineer's Conference Room at 101 East Route 66, Flagstaff, Arizona on Tuesday, June 3, 2003 at 9:00 AM, MDST (Railroad time), concerning you testing positive for a controlled substance during a follow up test on May 12, 2003, while working as a Trackman on P811 Gang at Flagstaff, Arizona, your second positive test or refusal to test within a ten year period, you are hereby dismissed from employment with the BNSF Railway for violation of Section 3, Policy of Use of Drugs and Alcohol, 3.1; Section 7, Discipline for Drug and Alcohol Violations, 7.4 and 7.9, Dismissal.

D. The Rules at Issue

BNSF Policy on the Use of Alcohol and Drugs, effective January 31, 1999, provides:

> **Section 3 – Policy on Use of Drugs and Alcohol,** provides, in relevant part:
>
> 3.1 While on BNSF property, on duty, or operating BNSF work equipment or vehicles, no employee may:
>
> - Use or possess controlled substances or illegally obtained drugs;
> - Report for duty or remain on duty or on property when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
> - Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs.

Section 7 – Discipline for Drug and Alcohol Violations, provides, in relevant part:

7.4 Employees who test positive for drugs or alcohol more than once in any ten (10) year period will be removed from service and subject to dismissal from employment with BNSF.

7.9 **Dismissal**. Any one or more of the following conditions will subject employees to dismissal:

- More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period.
- Any single confirmed positive test either for any circumstances within three years of any "serious offense" as defined by the Burlington Northern Sante Fe "Policy for Employee Performance Accountability."
- Failure to provide a urine or breath alcohol specimen without a valid, verified medical explanation.
- Adulteration, substitution or dilution of urine samples.

E. Facts Gathered from the July 1, 2003 Investigation

On July 1, 2003, a formal investigation was conducted by Ralph Chilelli, Planned Maintenance Coordinator and Conducting Officer, in Flagstaff, Arizona. The Appellant was represented by Robert Nickens, BMWE Vice General Chairman. At said Investigation, it was established that:

- The Appellant understands the Policy for which he was being charged. (TR 6, 12, 13)

- Darrell Ries, telecommunications Manager at Flagstaff, presented two exhibits relevant to the allegations at issue: EXHIBIT 5 – Test Results Report showing a "Positive" test result for Cannabinoids. The specimen, collected on May 12, 2003, reported a positive screening test result on May 14, 2003, with a 50 ng/ml

cut off, and a confirmed GC/MS positive test result, with a 15 ng/ml cut off. These results were confirmed on May 15, 2003 by Karl Saffo, MD, who served as the Medical Review Officer. The Appellant opted for a split sample test of his urine specimen. EXHIBIT 6 "Urine GC/MS Retest Confirmation Results", reconfirmed a the positive test results found in the May 14, 2003 test. The split-sample test results were confirmed by Dr. Saffo on May 30, 2003.

- During the cross examination of Mr. Ries by Mr. Nickens, it was determined that Mr. Ries had not personally observed any of the relevant factors noted in Section 3.1 above. (TR 9) In addition, Mr. Ries confirmed that while the Appellant may have tested positive on two occasions, each such occasion represented a positive test result of the same urine sample. (Noted in Exhibits 5 and 6 above)

- During examination of the Appellant by Mr. Nickens, the Appellant maintained that the GC/MS test result of 25 ng/ml was below the 50 ng/ml threshold, and should therefore have been reported as a negative test result. (TR 13) The Appellant also noted that while he opted for split-sample testing, and paid a $150.00 fee for such, he had no choice as to the testing laboratory used. Split sample test results were reported as LOD = 4.5 ng/ml, well below either the 50 ng/ml or 15 ng/ml thresholds. Accordingly, the Appellant maintains that the split sample result should have been reported as a negative. (TR 14-15)

- The Appellant maintained that as a family man, and as one interested in physical fitness, he would not smoke marijuana. (TR 15)

- The Appellant discussed the test results with Dr. Saffo, the MRO, who agreed that test results under the 15 ng/ml threshold are declared negative.

- The Appellant maintains that he is not in violation of Section 7.4, in that he has not tested positive more than once in a 10-year period. In this regard, the Appellant notes that he has been subjected to "several" random drug and alcohol

tests over the last two year period, and each test result came back "negative". (TR 17) Moreover, the Appellant noted that in his 27 years of employment with the Carrier, he has never previously tested positive for drugs or alcohol. (Id.) The Appellant noted that he was subjected to random testing due to an altercation incident that happened two years prior. As a condition for his continued employment, the Appellant was required to take an anger management class, which he maintains helped him, and to undergo a drug test. Appellant refused to undergo drug testing, but did so, allegedly upon advice from the Union. (TR 19-20)

Based upon the foregoing, the Appellant raise a "serious question" about the validity of the test results, and seek dismissal of all charges.

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;
2. To determine whether substantial evidence was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

(MOA, Paragraph 8)

B. The Issue Regarding Compliance with Rule 40

During the Investigation conducted on July 1, 2003, neither the Appellant nor the Union raised or alleged a Rule 40 violation. Accordingly, the provisions of Rule 40 have been met.

C. The Criteria for Establishing Positive (Drug) Test Results

In defense of the Appellant's position, the Organization has raised questions as to the testing laboratory, the MRO, and the validity of the positive test result from both the initial as well as the split-sample tests.

As an initial matter, it should be noted that the Carrier is governed by Regulations promulgated by the Federal Railroad Administration (FRA), who establishes minimum Federal Safety requirements for the control of alcohol and drug use in railroad operations. To properly comply with its intricacies, Carriers are expected to devote quality personnel and apply sufficient operational resources to make this essential safety program successful. FRA holds carriers fully accountable and responsible for the proper performance of its program, its program personnel, and its program service providers.

The Department of Transportation (DOT) regulations and FRA Regulations describe requirements for laboratories conducting urine drug testing for all but FRA mandatory post-accident testing. While the Carrier is permitted to employ one or more laboratories to conduct its urine testing, the FRA considers the carrier wholly responsible for the performance of its contract laboratory. In addition, all laboratories conducting Federal Testing under FRA Rule must hold a special qualification (DHHS/SAMSHA certification). Accordingly, the Appellant's suggestion that he should have been at liberty to select the laboratory used for split sample testing would not comply with FRA requirements.

The DOT and FRA regulations also govern the requirements for Medical Review Officers (MRO) under the urine testing portions of the FRA rule. FRA considers the carrier responsible for the performance of its MRO.

The role of the MRO is to receive all urine drug test results from the Carrier's laboratory. In the case of negative results, the MRO's role is purely administrative, reporting the findings to the employer. With laboratory positive and other non-negative results, the MRO is responsible for determining if the doner has a verifiable, legitimate medical explanation for the test findings. If not, the result must be reported to the Carrier as a verified positive, adulterated, substituted, or invalid result. Finally, the MRO is also responsible for the coordination of all requests for split specimen testing.

D. There is Substantial Evidence in the Record to Support the Carrier's Allegation

As an initial matter, the Appellant has not shown that the laboratory selected by the Carrier, identified as the Physicians Reference Laboratory (TR 14), to conduct its urine tests had not met DOT and FRA standards. Accordingly, absent such a showing, it must be assumed that such strict standards/requirements have been met.

Next, while the Laboratory reported the Appellant's test results as positive for the presence of Cannabinoids (marijuana), that is not the end of the story. These findings were reviewed by the Karl Saffo, a medical doctor, and MRO, who:

- Met with the Appellant in order to ascertain whether or not there were other reasons of a medical nature which would explain the positive test result. It was at this meeting that the Appellant was presented with an opportunity to persuade the MRO that the positive test report was, in fact, flawed. It is apparent that the MRO was not persuaded by the Appellant's attempt. Accordingly,

- The MRO reported the test result as Positive to the Carrier, as he is obligated to do under the Regulations.

The different threshold levels raised by the Appellant, are detailed in the Test Results (Exhibits 5 and 6), and set by DOT and FRA Regulations. These Regulations set the screening cut off at 50 ng/ml, while establishing the GC/MS cut off at 15 ng/ml. The record evidence establishes that the initial test results exceeded these cut off levels, and were therefore reported by the MRO as positive. Finally, the fact that the MRO reported the split specimen testing results as positive is proof that the results of this split test also exceeded the cut off thresholds noted above.

Given the foregoing, it is the conclusion of this Referee that there is substantial evidence in the record to support the Carrier's conclusion that the Appellant tested positive for a controlled substance.

E. The Appropriate Penalty

While Rule 40 provides that it is within the Referee's prerogative to determine "whether the discipline assessed is excessive", numerous decisions issued by Referees under this Board's authority have established that the Referee should not disturb disciplinary actions of the Carrier that are made in good faith, that are free from discrimination, and that bear a rational relation to the misconduct in question. In the instant matter, there has been no showing to the contrary.

In assessing the appropriateness of the penalty, the Carrier relied upon its Policy of Use of Drugs and Alcohol, at Sections 3.1, Section 7.4 (Discipline for Drug and Alcohol Violations), and Section 7.9, (Dismissal).

As an initial matter, the Carrier cannot rest upon the fact that the Appellant tested positive on more than one occasion in any ten (10) year period. Clearly, the record does not support such a conclusion. In this regard, the only way the Carrier could reach such a

conclusion would be to rely upon both positive urine results – the split specimen sample result that confirmed the initial positive test result of the same urine sample. Clearly, these two positive results would not satisfy the requirement of Section 7.4.

However, the record evidence does establish that the Appellant used an illegally obtained drug (Section 3.1). In addition, the Carrier has established, and the record evidence reflects, that in addition to the positive test result discussed above, the Appellant, within a three year period preceding such positive test result, was conditionally suspended for his refusal to participate in a reasonable suspicion drug test on June 7, 2001, and was also given a five day record suspension resulting from an altercation with a fellow employee on that same date. In assessing the penalty of termination, it is clear that the Carrier determined that either or both offenses occurring on June 7, 2001 constituted a "serious offense" as defined by BNSF Policy. Accordingly, the Carrier's reliance on Section 7.9 is supported by the record.

CONCLUSION AND AWARD

For the reasons noted and discussed above, there is substantial evidence in the record to support the Carrier's allegation, as well as the Carrier's determination that the Appellant's termination is an appropriate penalty. Accordingly, the Appellant's claim herein is denied.

20 October '03
Dated

Dennis J. Campagna, Referee
SBA No. 1112