

**BEFORE  
PUBLIC LAW BOARD NO. 7499  
CASE NO. 4  
AWARD NO. 4  
NMB Subject Code: 16**

<b>BROTHERHOOD OF RAILROAD SIGNALMEN</b>	)	
<b>(Organization file: 10-040-BNSF-188-SP)</b>	)	<b>PARTIES TO THE</b>
<b>vs.</b>	)	<b>DISPUTE</b>
<b>BNSF RAILWAY COMPANY</b>	)	
<b>(Carrier file: 35-11-0003)</b>	)	

**STATEMENT OF CLAIM:**

The Organization requests that the dismissal assessed Mr. Michael E. Moulton on July 29, 2010 be removed from his record, that he be immediately returned to work, and that he be paid for all time lost and have all employment rights restored as if he were never dismissed.

**FINDINGS:**

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011 that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that Mr. Moulton was a BNSF Signalman on May 24, 2010 when he was the driver of a company boom truck, pulling a trailer with a backhoe on it. Mr. Moulton was involved in a motor vehicle accident, in which the trailer turned over. That same day, Mr. Moulton was tested for drugs and alcohol under the Post Accident Testing protocol pursuant to the Federal Motor Carrier Safety Administration regulations, in compliance with Part 382 of the Federal Register.

Mr. Moulton was questioned by the Medical Review Officer concerning any explanation he might have given for methamphetamine being present in his urine sample. After that conversation, the Medical Review Officer determined that there was no legitimate medical explanation for the positive test. The Medical Review Officer then reported to the Carrier that the test was positive for methamphetamine (a controlled substance) and negative for alcohol. As part of this protocol, Mr. Moulton had the split sample of urine re-tested at an alternate laboratory, as was his right.

As a result, Mr. Moulton was charged with a possible violation of BNSF Policy on the Use of Alcohol and Drugs, along with a potential violation of Maintenance of Way Operating Rules 1.5. An investigation was ultimately held on July 14, 2010, after a series of agreed-upon postponements. BNSF dismissed Mr. Moulton from employment on July 29, 2010.

Mr. Moulton was hired by BNSF on June 5, 1989, and was thus a 21-year employee at the time of his dismissal. His previous discipline record included a conditional suspension on June 24, 2002 for a first-time violation of Rule 1.5, where he was apparently held out of

service for just under 2 months for testing positive for a controlled substance. Mr. Moulton's investigation and appeal rights were waived in that instance. He also signed a letter, dated August 19, 2002, wherein he was notified that a second confirmed positive test for any controlled substance within a 10-year period would render him subject to dismissal.

**BNSF Maintenance of Way Rule 1.5 states:**

"The use or possession of alcoholic beverages while on duty or on Company property is prohibited. Employees must not have any measurable alcohol in their breath or in their body fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect the safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substance in their body fluids when reporting for duty, while on duty, or while on company property."

**The BNSF Policy on the Use of Drugs, Alcohol and Drugs, Section 3.1 states:**

"While on BNSF property, on-duty, or operating BNSF work equipment or vehicles, no employee may:

- Use or possess alcohol;
- use or possess controlled substances (except as described in FRA Regulation 219.103 and Sections 3.2, 3, and 3.3 below) or illegally obtained drugs. Prohibited for on or off-duty FRA covered employees;
- Possess drug paraphernalia;
- Possess drug test alterations or specimen substitutions;
- Report for duty or remain on 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 with a blood or breath alcohol concentration greater than or equal to 0.02%;
- Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs."

The record shows that Mr. Moulton was trained on these rules and policies. Mr. Moulton, in the investigation, denied violating either Rule 1.5 or the Policy and denied ingesting any illicit drug. He offered no explanation for the positive test, other than to say that it must have been wrong. He stated that he had been tested over 40 times since his past infraction and had always been negative.

There were no issues raised concerning the fairness of the investigation during the course of the investigation itself.

**Organization Argument:**

The Organization states that the Carrier violated Rule 54 of the Signalmen's Collective Bargaining Agreement by denying Mr. Moulton a fair and impartial investigation and failing to prove the charges against him. The Organization argues that the positive test was unproven and unreliable since the Carrier could not provide the specific level of methamphetamine in Mr. Moulton's urine sample. They state that the Carrier should have had this information, and/or told Mr. Moulton that he could get it, prior to the investigation. They also suggest that his past negative tests and Mr. Moulton's evidence that he had no knowledge of any reason for the illicit drug to be in his system, further indicate that the test results are unreliable.

**Carrier Argument:**

The Carrier's witness provided evidence that the Carrier is not allowed to know the exact level of substance in the urine absent the consent of the employee. They state that they merely know that the test was positive for a substance prohibited by their Policy and Rule. They also state that if Mr. Moulton had wanted to know the level of methamphetamine in his system, he could have asked for it. Alternatively, during the course of the hearing, the Organization could have requested a recess to obtain this information. Neither Mr. Moulton nor the Organization did so.

**Result:**

This Board finds that the Medical Review Officer determined that the test was positive for methamphetamine. There is no issue over the chain of custody. Mr. Moulton had a second test done which verified the first result. The Board finds that Carrier has met its burden of proof in that the evidence shows that Mr. Moulton did violate the Carrier Policy and Rule in question, as well as the letter of August 19, 2002, by testing positive for methamphetamine. The degree to which he failed this test is irrelevant. The only relevant part, in this case, is the confirmed positive, above the cutoff level established for the test protocol. The investigation was fair and impartial. Based on the facts in this case, this Board sees no rationale to overturn the dismissal.

**AWARD**

The Claim is denied.

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**Roger K. MacDougall**  
**Chair and Neutral Member**

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**John Bragg**  
**Vice-President**  
**Employee Member**

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**Michelle McBride**  
**Director Labor Relations**  
**Carrier Member**

Dated: \_\_\_\_\_

At: Chicago, IL