

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13560

Docket No. 13461

00-2-99-2-60

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(International Brotherhood of Electrical Workers
(System Council No. 16)

PARTIES TO DISPUTE: (

(Burlington Northern Santa Fe Railway Company
(former Burlington Northern Railroad)

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 30 in particular, Douglass, Wyoming Towerman A. B. Burnham was unjustly dismissed from the service of the Burlington Northern/Santa Fe Railroad Company following an investigation held on November 6, 1997;
2. That the investigation held on November 6, 1997 was not a fair and impartial investigation under the terms required by the rules of the current controlling Agreement;
3. That the supreme penalty of dismissal was clearly unjust, excessive and a gross abuse of managerial discretion; and
4. That, accordingly, the Burlington Northern/Santa Fe Railroad Company should be directed to make Towerman A. B. Burnham whole by restoring him to its service with seniority rights unimpaired, restore all rights, benefits and privileges due him under the Agreement which were adversely affected by his dismissal and compensate him eight (8) hours pro-rata for each work day beginning October 30, 1997 and continuing until he is restored to service. Claim also includes removal of all reference to the subject disciplinary hearing from Mr. Burnham’s personal record.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant Burnham had been employed by the Carrier for approximately 20 years when, on October 15, 1997, a drug screen revealed the presence of marijuana in his system while on duty as a Towerman at Douglass, Wyoming. On October 31, 1997, the Carrier sent him a directive to attend an Investigation on November 6, 1997 in this connection. Following the close of that Hearing, the Carrier advised the Claimant by letter dated November 18, 1997 that he was being dismissed "for violation of Rule 1.5 of the Maintenance Way Operating Rules and Rule S-28.5 of the Safety Rules and General Responsibilities for All Employees." The Claim was timely filed thereafter, handled in routine fashion on the property without satisfactory adjustment and is now properly before the Board for resolution.

As an initial matter, the Organization asserts that the Carrier's Notice of Investigation did not disclose sufficient information to allow for preparation of a proper defense and thus failed to satisfy the requirements of the Agreement providing for a complete and precise advance notice of the charges for which the Investigation was being held. In that connection, neither the Claimant nor his representatives received copies of the test results upon which the Carrier relied prior to the Investigation proceedings. The Organization further maintains that the Claimant was never notified that he had failed a drug screen until the date of his Investigation, and that the conflicting evidence with respect to whether the Carrier's Medical Review Officer (MRO) had informed him earlier could have been avoided by recording the pertinent telephone conversation. Additionally, the Carrier failed to promptly provide the Organization with a copy of the exhibits to the Investigation transcript, frustrating his ability to progress his claim.

Lastly, with respect to the merits, the Organization contends that as an employee who is not required to operate equipment, the Claimant should not have been subjected to random testing. The results of the failed drug screen were accordingly improperly obtained and should be disregarded.

A review of the Carrier's October 31, 1997 Notice of Investigation fails to disclose the defects alleged. The Board finds the Carrier's charges to have been sufficiently clear and precise to put a reasonable recipient on notice of the substance of the alleged offense. The prevailing authority for many years has held that the Carrier is under no obligation to identify specific Rules in its Notice of Investigation. Examination of the transcript confirms that the defense mounted by the Organization was professional, competent and in no way compromised by any perceived ambiguity in the Carrier's Notice. Similarly, although the Carrier neglected to include the exhibits with the transcript of the Investigation sent to the Organization on November 18, 1997, it did so within two days of being notified of its error. Absent a showing of prejudice to the Claimant in progressing his claim - which was done so in a timely manner and reflected a fully informed appellant - the Board views this irregularity as harmless error.

The Board cannot credit the Claimant's allegation that he was unaware of his failed drug test prior to attending his Investigation. The Claimant himself testified that he had learned he had failed his urinalysis in a prior telephone conversation with a nurse and the Carrier's MRO, Dr. Khuri. In that discussion, Dr. Khuri indicated both that the test results were positive and that he would be withheld from service pending Investigation. And while it is perhaps accurate to suggest that any disagreement over the accuracy of other aspects of that discussion would have been obviated had it been taped, there was no contractual requirement to do so, and arguably valid privacy concerns against such recording. Lastly, the Claimant's delay in picking up the Carrier's letter of October 30 confirming the test results until November 8 cannot be ascribed to the Carrier as failure to convey official notification.

With respect to the propriety of the drug screen, record evidence establishes that this is the Claimant's second dismissal for substance abuse. Second Division Award 13016 reflects an earlier termination for a Rule G. violation following the Claimant's arrest for driving a company vehicle while intoxicated. That Board converted the Carrier's dismissal action to a disciplinary suspension with several conditions, including that he "place himself in the hands of the Employee's Assistance Program, and . . . cooperate in any recommended treatment if necessary." The Carrier's representation

that its EAP required the Claimant to submit to periodic drug screens was not contested. The Board accordingly rejects the argument that the test results were improperly obtained.

Under the circumstances described above, the Board is of the opinion that while dismissal of a 20-year employee is a most serious matter, so too are the charges. On this record, the Carrier has substantiated them in all respects. The Claim must be respectfully denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 27th day of October, 2000.