

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14132
Docket No. 14033
16-2-NRAB-00002-140053**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

**(Freddie Ware
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“File No. 13-107 Appeal of Level S 30 Day Suspension dated April 16, 2013 for violation of Rule 28.11 Sleeping

File No. 13-160 Appeal of Dismissal dated June 24, 2013 for violation of BNSF Policy on the Use of Drugs and Alcohol

File No. 13-161 Appeal of Dismissal dated June 24, 2013 for violation of MSR S-28.6 Conduct”

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.

The dispute in this case involves three disciplinary actions involving the Petitioner who was employed as a Carman at Memphis, Tennessee. In the first case (File No. 13-107), the Petitioner was assessed a Level S (Serious) 30-day record suspension with a one year review period in connection with the following:

“. . .your alleged conduct while sleeping on duty on February 25, 2013, while working as Relief Supervisor in the Memphis, TN Train Yard lunch room.”

At the formal Investigation, Assistant General Foreman Antczak testified that he was sent copies of emails and photos that another Carman had sent to the General Foreman indicating that he had seen the Petitioner sleeping on the subject date. Mr. Antczak stated that when the Petitioner was questioned regarding the photographs, he stated that he was not sleeping when the pictures were taken but that at “some point during the evening he had nodded off.” Mechanical Foreman Bussey was present during Mr. Antczak’s conversation with the Petitioner, and he confirmed that the Petitioner stated that he had nodded off at some point during his shift. Mechanical Safety Rule 28.11 was entered into the record and this Rule prohibits sleeping while on duty and further states that being in a reclined position with eyes closed is considered a violation of the Rule.

The Petitioner testified that he was aware and awake at the time the other Carman took photographs of him and denied that he was sleeping and contended that the reason his eyes appeared closed was that the photographs were taken while he blinked. In addition, the Petitioner denied that he had ever indicated to Assistant General Foreman Antczak that he had been sleeping during the night in question.

The Board has carefully reviewed the record in this case and an examination of the photographs shows the Petitioner with his eyes closed and leaning back in his chair as opposed to an awake individual blinking. While it certainly would have been preferable to have the other Carman present to testify to the exact circumstances surrounding the taking of the photographs, the Board finds that the photographs depict the Petitioner in violation of Safety Rule 28.11. Of equal importance is that fact that the Petitioner, while denying that he was asleep when the photographs were taken, did tell Mr. Antczak, in the presence of Mr. Bussey, that he had “nodded off” during his tour of duty. While there was an attempt to make a distinction between

nodding off and sleeping, the Board finds no such distinction based on the generally accepted definition of nodding off. Accordingly, the Board finds that the Carrier sustained its burden of proving the Petitioner's guilt and finds that the discipline assessed was not arbitrary or capricious but commensurate with the offense.

In the second case (File No. 13-160), the Petitioner was dismissed from service following a formal investigation in connection with the following:

“. . .your alleged refusal to participate in a BNSF drug test as outlined in the BNSF Policy on the Use of Alcohol and Drugs, dated April 15th, 2009 while working as a Carman in the Memphis, TN Terminal on April 23rd, 2013 at approximately 0150 hours.”

As a threshold issue, the Board will address the contention that the Carrier had no basis for having the Petitioner submit to a drug test and that the Petitioner's actions relative to taking this test are not relevant based on the alleged improper testing decision. The Carrier notes that the Petitioner displayed quarrelsome and insubordinate behavior and that such misconduct subjected the Petitioner to reasonable cause drug and alcohol testing. While the issue of the Petitioner's alleged misconduct will hereinafter be discussed (File No 13-161), the Board finds that the Carrier's decision to have the Petitioner tested was proper and consistent with its Drug and Alcohol Policy.

The evidence adduced at the formal investigation establishes that on the subject date Tester French entered the Carrier's property to conduct a drug test on the Petitioner. The Petitioner asked Ms. French who she was and she offered to retrieve her credentials from her automobile. However, there is substantial evidence in the record supporting the fact that the Petitioner refused to take the urinalysis and left the property. While the Petitioner indicated that he was concerned due to the manner in which Ms. French was dressed, the Board finds that there was no valid basis for the Petitioner's refusal especially in light of the fact that Ms. French was prepared to show him her proper credentials. The Board also notes that the Petitioner's refusal to take the drug test constituted a violation of the Carrier's Policy and that the Carrier's decision to dismiss the Petitioner was in accordance with the terms of such Policy and was not an abuse of its managerial discretion.

In regard to the third case (File No. 13-161), the Petitioner was dismissed from service following a formal Investigation in connection with the following:

“your alleged, misconduct, insubordination and creating a hostile work environment by destroying a company document while having a discussion with CMT James Bowers and while working as a Carman in the Memphis, TN, Terminal on April 22nd, 2013 at approximately 2320 hours.”

At the formal Investigation, Management Trainee Bowers entered a statement and testified that on the subject date he was having a briefing with a number of employees, including the Petitioner, regarding the Carrier’s policy on calling off duty. Mr. Bowers stated that several employees took issue with some of the aspects of the policy and that when the Petitioner asked to see the sheet that he had signed acknowledging receipt of the policy, the Petitioner “folded it, and tore it up.” When the Petitioner testified at the Investigation, he stated that he did not have any problems with the calling off policy and he denied that he ripped up the company document.

There is obviously a conflict in testimony. The Board has held in a plethora of Awards that when there is a conflict in testimony that the Carrier, as the trier of facts is in the best position to resolve such conflict, and that the Board, in its appellate capacity, should not upset such finding absent a clear showing of prejudicial conduct by the Carrier. There is no such showing in this case. The Board finds that the Carrier sustained its burden of proving the Petitioner’s guilt of the charged offense and that in light of the Petitioner’s egregious misconduct, the decision to dismiss the Petitioner was not arbitrary or excessive.

In summary, the Board finds that in all three cases the Carrier sustained its burden of proof and that the discipline assessed in each case was not harsh or excessive, but fully warranted.

AWARD

Claim denied.

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ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 5th day of October 2016.