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MENT BOARD

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Award No. 13636

Docket No. 13492

01-2-99-2-94

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

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

**PARTIES TO DISPUTE:** (

(Burlington Northern Santa Fe Railway Company

**STATEMENT OF CLAIM:**

- “1. That in violation of the current Agreement, Rule 30 in particular, System Electrician Larry R. Lund was unjustly suspended for a period of nine (9) months and placed on probation for a period of three (3) years by the Burlington Northern/Santa Fe Railroad Company following an investigation held on May 29, 1998.
2. That the issuance of a nine (9) month suspension and the three (3) year probationary period was unjust, excessive and unwarranted.
3. That the investigation held on May 29, 1998 was not a fair and impartial investigation under the terms required by the rules of the current agreement.
4. That accordingly the Burlington Northern/Santa Fe Railroad Company should be directed to make System Electrician Larry R. Lund whole for all lost wages, rights and benefits which were adversely affected by the suspension, a rescinding of the three (3) years probationary period and that all record of this matter be set aside.”

**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 Claimant was suspended for nine months and placed on probation for three years as a result of an Investigation held on June 8, 1998. The discipline was imposed following the Carrier's determination that the Claimant failed to provide an adequate urine specimen as required for a mandatory random Federal Highway Administration Driver test on May 18, 1998.

The evidence presented at the Investigation shows that the Claimant, a 20-year Carrier employee, was working as a System Electrician headquartered at Minneapolis, Minnesota. As a System Electrician, the Claimant traveled via truck over his assigned territory, and therefore, he was required by federal statute to have a commercial driver's license (CDL). Drivers with CDL's are subject to random drug and alcohol testing under federal law.

The Claimant was randomly selected for testing on May 18, 1998. The collector administered a breathalyzer test after which the Claimant advised the collector that he was unable to urinate for the drug test.

Federal law allows the individual up to three hours to provide a urine specimen. The Claimant did not provide a specimen. There is a dispute of fact in this case as to whether the collector terminated the collection process upon expiration of the three-hour time limit. The collector testified that the time was up; the Claimant testified that he still had several more minutes to provide a urine specimen within the three-hour time frame. The collector subsequently notified the Carrier that the Claimant had failed to give a specimen.

In accordance with federal law, the Carrier arranged for the Claimant to see a doctor to determine whether there was a physical or medical reason for the Claimant's failure to provide a specimen. After an examination, the doctor concluded that there

were no physical or medical reasons for the Claimant's failure to provide a specimen and he so advised the Carrier.

The crux of this case turns on a credibility determination between the collector and the Claimant. According to the Claimant's testimony, he offered to give a specimen near the end of the three-hour window provided by statute. The collector testified that the Claimant did not make such an offer, and that the three-hour time limit expired with no urine specimen having been provided.

The Carrier observes that there was conflicting testimony concerning what occurred on the date in question and what was said. It argues that the Board should defer to the credibility determinations made on the property. The Organization contends that the collector harbored ill feelings toward the Claimant and therefore the Carrier cannot meet its evidentiary burden based on the testimony of this one witness. Lacking evidence of a credible nature to support the charges, the Organization submits that the claim must be sustained.

The Board has carefully reviewed the record that was developed on the property. It is apparent that this case presents the classic instance of a one-on-one Investigation in which the testimony of one witness must be credited over the testimony of the other. The Board's role in such cases is well-established. Our function is essentially that of an appellate body. We do not make factual findings de novo. Where credibility of witnesses is at issue, we are bound by the findings made by the Hearing Officer so long as they are not arbitrary or capricious.

Applying that standard to the record in the instant case, we find that there is substantial evidence to support the conclusion that the collector's testimony was more credible than the Claimant's. The collector and the Claimant had a heated exchange in an earlier testing situation. Neither one liked the other. However, the Hearing Officer could properly conclude that, on the narrow question of whether the full three hours was allotted to the Claimant to provide a urine sample, the collector's account was more accurate. There is no dispute that the start of the three hour period was given by the collector based on the time shown on his pager. The Claimant's assertion that he was not given the full three hour period was based on the time on a wall clock, which differed from that of the pager.

Given this factual predicate, it is clear that the Claimant did not cooperate with the collection process and that there is no merit to the argument that the test was terminated prior to the expiration of the three hour period. Absent any probative evidence that the Hearing Officer was prejudiced against the Claimant so as to deny him a fair and impartial Hearing, we find reasonable grounds exist to sustain the determination of guilt made by the Carrier. The discipline assessed the Claimant was not excessive or unreasonable and therefore the claim must be 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 6th day of August, 2001.**