

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13809
Docket No. 13700
04-2-03-2-41**

The Second Division consisted of the regular members and in addition Referee Carmelo R. Gianino when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(The Burlington Northern and Santa Fe Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the current agreement, in particular Santa Fe Rule 40, but not limited thereto, Commerce, California Mechanical Department Electrician Robert J. Sajda, Employee number 1449875, was unjustly dismissed from the service of the Burlington Northern Santa Fe Railroad following an investigation held July 24, 2002.
2. That the investigation held on July 24, 2002 was not fair and impartial under the terms of the current agreement.
3. That accordingly the Burlington Northern Santa Fe Railroad be directed to return Robert J. Sajda to its service with the restoration of seniority and made whole for all lost wages, benefits, rights and privileges which were adversely affected by the unjust dismissal. In addition, that all the record of this matter be removed from his 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.

The Claimant was working as an electrician at Diesel Service for the railroad on June 26, 2002 where, at approximately 2:35 P.M. on that date, he was required to participate in an FRA-mandated urine test. He was unable to void and, during the ensuing three-hour period, he was given over 40 ounces of water. At the end of three hours, the Claimant provided a partial urine sample but not enough to properly allow for testing. On June 27, 2002, the Claimant was notified to attend a formal Investigation to respond to charges that he violated BNSF's Policy on the Use of Alcohol and Drugs. Following a postponement, the investigative Hearing took place on July 24, 2002 at Commerce, California.

It must be noted that, after the Claimant's failure to produce an adequate urine sample on June 26 he was instructed to contact his personal physician to ascertain if any medical reason existed that could have caused the inability to void. The Claimant was examined by his personal physician who, on July 8, 2002, diagnosed the Claimant's inability to void on dehydration, and so noted. The Carrier's Medical Review Officer (MRO) disagreed with the Claimant's doctor and, since no mitigating condition existed, the Hearing took place.

The Claimant, by letter of August 8, 2002, was dismissed as a result of evidence presented at the Hearing. This decision was properly appealed on the property and is now before the Board for adjudication.

The Organization, in support of its position, argues that the charges proffered against the Claimant lacked specificity in that no specific Rule was cited in the charging letter of June 27, 2002. The letter states, in part, "You are hereby notified to attend . . . to develop all the facts and circumstances concerning your alleged violation of the BNSF Policy on the Use of Alcohol and Drugs, dated September 1,

1999, when working as an Electrician, position #7534, on June 26, 2002 as a result of the FRA Random Test conducted on test date June 26, 2002.” While more specificity might have been better, it is difficult to believe that the Claimant did not know the substance of the Investigation or could confuse the reason for holding the Hearing with any other. The Claimant was fully aware of his alleged violation and what was required to prepare an able defense. He was not disadvantaged by any lack of specificity and the Board cannot subscribe to the notion that the Claimant was denied a fair and impartial Hearing.

Prior to discussing the merits of the case, let us respond to the Organization’s statement that “Claimant did take the breathalyzer test and the result of that was negative.” Breath tests are not indicators of the presence of drugs and the Claimant was not absolved from full participation in the random testing protocol.

There is no argument that the BNSF had the right to test the Claimant and there is no argument made that the testing process was flawed in any way. The Organization acknowledges that, after being given over 40 ounces of water within a three-hour period after initially failing to void, the Claimant still could not provide an adequate urine sample. BNSF’s Policy on the Use of Alcohol and Drugs, Section 7.6 states, in relevant part:

“Employees refusing to participate in any federal or BNSF drug test will be removed from service immediately and disqualified from service for a period of at least nine (9) months, and subject to dismissal from with BNSF. Refusal includes:

- Failure to provide a urine or breath specimen without a valid medical reason;”

Thus, a Rule exists to govern this type of violation. In addition to oral arguments, the Organization, in its Memorandum presented before the Board on May 4, 2004 puts forth three arguments. First, the Organization contends the Carrier should have ordered the Claimant to submit to a blood test. This test is invasive and usually limited to the FRA’s Post-Accident Testing mechanism. In any event, the Carrier is not compelled to request or order a blood test from an employee.

Second, it argues that the note provided by the Claimant's doctor should have been accepted as a legitimate excuse as to why the Claimant could not void, especially since the Carrier doctor did not personally examine him. The Claimant's personal physician provided the Carrier's MRO with a note dated July 8, 2002, stating that the Claimant was unable to provide an adequate urine sample due to dehydration. This note was written 11 days after the Claimant was charged and removed from service, and cannot be truly representative of the Claimant's condition at the time the test was administered. Regardless, the Carrier MRO rejected the Claimant's doctor's rationale, and that must be assigned significant weight.

Third, the Organization argues that the BNSF, upon receipt of the note from the Claimant's doctor, should have contacted the Claimant and instructed him to provide another sample. Any future test, especially one so far removed from the original test date, as the Organization suggested be done, would not be a true indicator and compromise the Carrier's ability to ensure a drug-free workplace.

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 16th day of September 2004.