

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13814

Docket No. 13696

04-2-03-2-16

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 the Burlington Northern Santa Fe Railway Company violated the current Agreement, effective September 1, 1974, as amended, in particular Rule No. 40 (a) and (i), when they capriciously, arbitrarily and unjustly dismissed Electrician Frank Rocha on May 22, 2002 after an investigation held May 10, 2002.
2. That the Burlington Northern Santa Fe Railway Company failed to provide Electrician F. Rocha with a fair and impartial investigation, as mandated by the controlling Agreement.
3. Accordingly, the Burlington Northern Santa Fe Railway should be ordered to promptly reinstate Electrician F. Rocha and make him whole for all wages and benefits lost; including but not limited to, vacation, insurance, hospitalization, railroad retirement rights and benefits lost, account of Carrier's arbitrary and unjust action.
4. That the Burlington Northern Santa Fe Railway Company promptly remove Letter of Dismissal dated May 22, 2002, and that any and/all reference thereto; including all relative correspondence in connection with the charges be removed from Mr. Rocha'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.

The Claimant, an Electrician for the Burlington Northern Santa Fe Railway Company, was charged on March 18, 2002 with violating company Rules S-28.13, S-28.6, and S-28.2.7. Additionally, the Claimant was charged with violating Rules 4.1 and 7.6 of the Carrier's Policy on the Use of Alcohol and Drugs. After a number of postponements, the investigative Hearing was held on May 10, 2002 and, as a result of that Hearing, he was dismissed from service by letter dated May 22, 2002.

The dismissal decision was properly appealed on the property, was denied, and is now appropriately before the Board for adjudication.

Both the Carrier and the Organization have presented strong and compelling arguments supported by a large volume of evidence and exhibits. However, the outcome of this case, which involves insubordination for refusing to participate in probable cause testing, does not solely turn on whether or not the Claimant was guilty of insubordination - admittedly, he refused to participate, knowing full well the possible consequences. Rather, the final judgment rests on whether the Claimant was denied a fair and impartial Hearing, and whether the penalty assessed was arbitrary.

The Carrier has an obligation to its employees to articulate the reason why an employee is being required to undergo probable cause testing. Without this requirement, probable cause testing becomes random testing without the randomness. The Carrier has argued that when violations such as those of Blue Flag Rules occur, it (Carrier) has compelled all employees working in the area of the

violation to be tested under the guidelines provided in the BNSF Policy on the Use of Alcohol and Drugs. This claim was unrefuted by the Organization. The Claimant also clearly understood why he was being ordered to undergo testing. All the other employees identified also understood and acquiesced to be tested. The Claimant felt that his absence of physical proximity to the location where the violation occurred made him ineligible for testing. The time a violation initially occurs and the time it is discovered may vary so the Claimant may have very well been closer to the location at the time the violation occurred. This, however, is not his call to make.

It must be noted that probable cause testing as stated in the Carrier's policy is broad, and is designed as such to allow the Carrier to exercise its managerial prerogatives fully. Hypothetically, one Foreman may choose to have all employees in the general area tested when a violation occurs, whereas another, under similar or identical circumstances, may be more discerning and selective, and require testing for only a few. The basic tenet of "obey now, grieve later" clearly applies here. The issue of whether or not the Carrier was correct in ordering testing for the Claimant is irrelevant. If employees are allowed to be tested on the basis of what they feel is appropriate, chaos would abound.

Let us now discuss the Hearing itself and the charge by the Organization that the BNSF conducted an oppressive, biased, and restrictive Investigation, and, in general, failed to provide the Claimant with a fair and impartial Hearing. The Organization contends that the Conducting Officer was restrictive in disallowing testimony of certain witnesses whose testimony would have showed that the Carrier's instructions to the Claimant were not in compliance with the probable cause conditions of the Carrier's policy. However, this was not a case of whether or not the Claimant was rightfully ordered to undergo testing (actually the Carrier advocate admitted in oral arguments that, in hindsight, the Claimant should probably not have been tested). It was whether or not he was insubordinate. So while it might appear, upon reading the transcript, that the Conducting Officer limited the more complete gathering of information, he actually maintained focus. Left unchecked, a lengthy, burdensome transcript would have evolved one holding largely irrelevant testimony. In any event, the Claimant was given ample opportunity to present his case.

Lastly, let us discuss the penalty. The Carrier's Policy on the Use of Alcohol and Drugs allows for the dismissal of an employee if he/she refuses to participate in any federal or BNSF drug test. Refusal to participate includes but is not limited to,

“outright rejection of participation in a drug or alcohol test.” Penalty for refusal shall be removal from service immediately and “disqualified from service for a period of at least nine (9) months, and subject to dismissal from BNSF.”

However, in the instant case, the Panel finds that the penalty was excessive and, therefore, arbitrary. The Organization stated that the Claimant was an exemplary employee with 32 years of service. He has, the Organization stated, an impeccable, discipline-free record. This was not refuted by the Carrier and must be given consideration in this particular case. In conjunction with this employee's length of service and impeccable record is some evidence that assurances given to him by certain supervision that he did nothing wrong may have reinforced his “principled” (albeit foolish) stance to refuse to test. An argument can also be made that he refused to test because he was “dirty” but the Panel is fairly certain that is not the case.

The Board changes the penalty originally assessed to a suspension without pay from the date of dismissal until the date he is returned to service. The Carrier is directed to return the Claimant to service as soon as practicable, given due course for administrative processes.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 3rd day of November 2004.