

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39489
Docket No. MS-39965
08-3-NRAB-00003-070305
(07-3-305)

The Third Division consisted of the regular members and in addition Referee Danielle Hargrove when award was rendered.

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

PARTIES TO DISPUTE: (

(Northern Indiana Commuter Transportation District

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 29 in particular, the Northern Indiana Commuter Transportation District, as a result of an unfair and unwarranted investigation held on April 19, 2005 at Michigan City, Indiana, unjustly and arbitrarily removed from service, Signelman Rick Vogel, pending said investigation, and then following said investigation, dismissed Mr. Vogel from service.**
- 2. That, accordingly the Northern Indiana Commuter Transportation District be ordered to promptly return Signelman Rick Vogel to Carrier service and to make him whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of the investigation and unjust assessment of discipline, and further that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 29 of the controlling Agreement.”**

FINDINGS:

The Third 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.

At the time of the incident which gives rise to this case, the Claimant had been employed by the Carrier for approximately 22 years and was working as a Lineman/Signalman at the Carrier's Michigan City, Indiana, facility. A summary of the facts is as follows:

On or about Friday, March 25, 2005, the Claimant met the Carrier's Substance Abuse Professional (SAP) as part of a scheduled assessment pursuant to a Waiver of Investigation/Last Chance Agreement with the Carrier.¹ Upon the Claimant's arrival at the meeting, the receptionist observed the odor of alcohol on the Claimant's breath. He was subsequently asked to take a breath alcohol test that he failed. Before he failed the breath test, it was the Carrier's and the Claimant's understanding that he would be concluding his program for alcohol abuse and that the SAP would make the determination that the Claimant had met the treatment goals and requirements of the Waiver of Investigation/Last Chance Agreement. Because the Claimant arrived for his assessment under the influence of alcohol and failed the breath test, the SAP recommended that the Claimant continue in the program. She specifically recommended that the Claimant attend a relapse prevention group, abstain from alcohol and other mood-altering drugs while participating in the relapse prevention group, and attend "continuing care" at the conclusion of four weeks with the group.²

¹ The record evidence reveals that the Claimant has a history of alcohol abuse and was working under a Waiver of Investigation/Last Chance Agreement signed by the Claimant on July 7, 2004. It required the Claimant to undergo assessment by the Carrier's SAP and to adhere to all conditions of follow-up recommended by the SAP.

² The Board notes that significant statements contained in the Carrier's Submission regarding the Claimant's blood alcohol level and degree of intoxication were not supported by any record evidence.

On Monday, March 28, 2005, the Claimant reported that he failed the breath alcohol test to his supervisor who, in turn, reported the information to the Chief Operating Officer (COO) for the Carrier.³ The COO participated as a witness at the Claimant's Investigation and also served as the decision-maker at the first level of appeal.⁴ After the Investigation, the Carrier concluded that the Claimant had violated Safety Rule F and General Notices 3 and 4, as well as the terms of his Waiver of Investigation/Last Chance Agreement. The deciding official ultimately opined in his April 22, 2005 decision letter that the Claimant's historic pattern of behavior and the official's "deep concern" about public safety and the safety of the Claimant's coworkers compelled his decision to immediately terminate the Claimant's employment.

The Organization's appeal is based upon alleged violations of the Claimant's Agreement due process rights under Rule 29 for a fair and impartial Hearing. Specifically, it alleges that (1) it was improper for the Hearing Officer to also have been the Charging Officer⁵; and (2) it was improper for the COO to serve as a witness in the Investigation and as the decision-maker at the first level of appeal. The Carrier's reliance on Third Division Award 24547 in support of its position regarding the multiple role objections raised by the Organization is not persuasive given the very unique facts of this case. Accordingly, while we reject the Organization's initial objection, we are inclined to agree with its second contention.

The Organization references the COO's testimony wherein it was revealed that he spoke with the SAP on or about March 29, 2005, and learned that before the Claimant failed the breath alcohol test, the SAP was prepared to recommend that the Claimant conclude the program. It was at this time that the COO articulated his opinion to the SAP that as far as he was concerned, the Claimant had violated the Waiver of Investigation/Last Chance Agreement and that "... this was now a disciplinary issue." Such clear prejudgment (even if ultimately accurate) does not

³ In this case, the primary contact was unavailable to receive the information. The COO's position is such that he was able to receive and act in the primary contact's stead on Employee Assistance Program (EAP) confidential matters.

⁴ The Organization took issue with the COO serving in both capacities and requested the COO to recuse himself from the first level of appeal. The COO denied the request on the basis he acted neither as the charging, presiding or disciplinary officer in the matter.

⁵ The Organization presumably relies on the Investigation transcript wherein the COO identified the Hearing Officer as the Charging Officer. We find no merit to the Organization's objection to the Hearing Officer's designation.

bode well for the appearance of Agreement due process, particularly given the fact that the COO ultimately served as the decision maker at the Claimant's first level of appeal. Given his role as witness in shaping the facts of this case, the COO was too closely connected to legitimately provide the Claimant an unbiased review of the Investigation and facts at the first appellate level. We agree with Third Division Award 24547 wherein the Board recognized this very action "... pointedly destroys the credibility of the due process system."

We would otherwise agree with the Carrier that the COO's role as a witness in and of itself would not prohibit him from being an appellate officer at the first level. However, in this unique case, the first level of appeals decision-maker, the COO, is on record clearly stating that he believed the Claimant to have been guilty and subject to discipline prior to the Investigation even taking place. As the Board stated in Award 24547, the independent review and decision at each successive appellate level, whether it is a two or three step appeals process, is plainly lacking when the same person puts himself in position to judge his own testimony. It is a contradiction in terms, which nullifies the hierarchal review process. In the instant case, we cannot agree that the Claimant's appeal was handled in accordance with the manifest standard of fairness and Agreement due process contemplated by Rule 29. As the Board stated in Award 24547, "... the grievance appeal should have been reviewed by another person." We do not believe that it can be reasonably argued that despite these facts, the Claimant received a fair and impartial Investigation and appeals process. The failure to have an unbiased eye review the Investigation transcript and conduct of those involved in the matter is critical to the assurance of Agreement due process. Therefore, without reaching the merits, we find the process sufficiently defective so as to warrant the Claimant's conditional reinstatement.

The Claimant shall be returned to service with seniority unimpaired provided (1) he successfully completes a substance abuse program similar to the one he was engaged in at the time of his dismissal and (2) he passes a breath or blood alcohol test administered by the Carrier. If and when he is reinstated, he shall be subject to a Waiver of Investigation/Last Chance Agreement whereby any incident(s) or event(s) whatsoever related to the use or abuse of alcohol or controlled substances, whether on or off duty, will subject the Claimant to immediate termination without an Investigation. The Claimant is not entitled to backpay given the very unique facts of this case. The Claimant is put on notice that his appeal would likely have been denied

absent the Carrier's procedural error. We interpret the language of the July 7, 2004 Waiver of Investigation/Last Chance Agreement to be just that – a last chance to protect his position for poor behavior related to his use and/or abuse of alcohol or controlled substances. We will not reward him for his failure to abide by his commitment as memorialized in his Waiver of Investigation/Last Chance Agreement.

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 Third Division

Dated at Chicago, Illinois, this 29th day of December 2008.