

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39919
Docket No. SG-40325
09-3-NRAB-00003-080126

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of S. R. Ames, for reinstatement to service with compensation for all lost time, including skill pay, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on June 22, 2006. Carrier’s File No. 35-06-0043. General Chairman’s File No. 06-030-BNSF-33-K. BRS File Case No. 13825-BNSF.”

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.

The Claimant in this case was assigned to the position of Signal Maintainer at Topeka, Kansas. At the time of the incident giving rise to this dispute, he had approximately 33 years of service with the Carrier.

On January 30, 2006, the Claimant was administered an FRA random drug and alcohol test. By letter dated January 30, 2006, M. Crespin, Manager Medical Support Services, advised the Carrier that the Claimant's random test was positive for alcohol. The Carrier thereafter scheduled an Investigation to determine if the Claimant was in violation of Rule 1.5, which prohibits use or possession of drugs or alcohol while on duty.

The Investigation was originally scheduled for February 7, but due to repeated postponements, was held on June 22, 2006. Following the Investigation, the Claimant was dismissed from service.

The record shows that the Claimant had previously tested positive for a controlled substance on March 21, 2002, and was returned to active service after signing a Return-to-Duty letter. Prior to this first positive test result, the Claimant was enrolled in the Employee Assistance Program in accordance with Carrier policy. The Claimant was diagnosed with and treated for Post Traumatic Stress Disorder after the death of his wife. These facts are not in dispute.

The Carrier contends that there was substantial evidence to establish the charges. It argues that the testimony and test results conclusively establish that this was the Claimant's second positive test for drugs or alcohol within a ten year period. Under the Carrier's Policy for Employee Performance and Accountability, as well as the terms of the Claimant's August 19, 2002 Conditional Reinstatement Agreement, the second violation of Rule 1.5 within ten years is a dismissible offense.

The Carrier rejects the assertion that the penalty was overly harsh or unwarranted. While expressing sympathy for the death of the Claimant's wife, it argues that the Claimant's personal circumstances cannot excuse a second incident of drug or alcohol use in violation of Carrier policy. Moreover, the Carrier contends that the Claimant was provided with assistance through the EAP beginning in 2001 when the death occurred. The Claimant was already afforded one previous reinstatement despite a Rule 1.5 violation. He knew or reasonably

should have known that he was subject to permanent dismissal if he tested positive a second time. Given the safety concerns associated with the use of alcohol by an employee responsible for the maintenance of crossing signals, the Carrier submits that it was justified in dismissing the Claimant and, therefore, the claim must be denied.

The Organization protests the Claimant's dismissal on several grounds. It maintains that the Carrier denied the Claimant the right to a fair and impartial Investigation. It further maintains that the Carrier provided inadequate treatment for the Claimant's medical condition, contributing to the likelihood of the Claimant's failure to pass a controlled substances test and making the punishment of dismissal unduly harsh.

We need not address the Organization's second argument because the first is dispositive. After careful review of the record in its entirety, it is readily apparent that the Carrier failed to present substantial evidence to establish the charges directed against the Claimant. The test of substantial evidence is not particularly onerous. It has been defined as such ". . . relevant evidence as reasonable minds might accept as adequate to support a conclusion. . . ." Consol. Ed. Co. vs. Labor Board, 305 U.S. 197, 229. In the instant case, the Carrier did not meet that evidentiary burden. Significantly, not only did the Carrier fail to introduce the alcohol and drug test results into the record during the Investigation, it failed to produce the terms of the Claimant's August 2002 Conditional Reinstatement Agreement. The Hearing Officer had no probative evidence from which to conclude that the Claimant was guilty of the charges.

The Carrier argues that the test of substantial evidence was met because the Claimant "never denied testing positive." The Board is unwilling to draw such an inference based on the testimony presented. While it is true that the Claimant spoke of his personal difficulties since the death of his wife, he did not admit that he was under the influence of alcohol on the testing date. Moreover, he questioned the validity of the test results, having been denied the opportunity to see and review the documents.

The Carrier also attempted to cure the evidentiary deficiencies in the record by adding the drug and alcohol test results to its initial claim denial. The date stamps on the documents reveal that they were in the Carrier's possession prior to

the Investigation. No explanation was forthcoming from the Carrier as to why the documents were not produced at the Investigation.

In deciding whether or not the Claimant committed the charged offense, the Board is restricted to evaluating the evidence submitted at the Investigation. The Board cannot consider the testing documents because they were untimely introduced subsequent to the Investigation. The Claimant had no opportunity to rebut the documents or to examine their accuracy or authenticity. While we are mindful of the importance of the Carrier's drug and alcohol policies, the absence of any probative evidence during the Investigation to substantiate the Claimant's guilt compels the finding that that the imposition of discipline was improper. To find otherwise would subvert the process and deny the Claimant the right to a fair and impartial Investigation as contemplated under Rule 54. Because the Carrier did not meet its burden of proof, the claim must be sustained.

AWARD

Claim sustained.

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 31st day of August 2009.