

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40221
Docket No. SG-39884
09-3-NRAB-00003-070027
(07-3-27)**

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 T. A. Arthur, former Assistant Signalman on Crew 139, for a re-examination pursuant to Rule 30 of the current Signalmen’s Agreement, with a proper setting in which to take the examination and payment for all time lost if the Claimant passes the re-examination, account Carrier failed to give the Claimant a proper, fair and impartial re-examination on October 31, 2005 as required by Rule 30.”

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 was assigned to the position of Assistant Signalman. He had successfully completed three of the four training steps set forth in Rule 30 – Training. The Claimant failed his fourth training period examination and he was scheduled to take his re-examination on October 31, 2005 in a conference room at the Carrier’s General Office Building in Kansas City, Kansas. The Claimant failed his re-examination by scoring only 67 percent, instead of 70 percent which the Agreement sets as a passing grade.

The Organization filed the instant claim on his behalf, contending that the Claimant had been dismissed after failing his fourth training period examination. The Organization asserted that the Carrier failed to provide proper testing conditions for the Claimant on October 31, 2005, in violation of Rule 30 - TRAINING PROGRAM of the Agreement, which reads, in pertinent part, as follows:

“M. Examinations provided for in this rule shall be fair and impartial and employees taking these examinations will not be examined on matter with which they have not had the opportunity to become familiar with either through the study of training manuals applicable to their status of training or training which has been afforded them.”

The Organization argues that there were “numerous and continuing” distractions which prevented the Claimant from being able to devote his full attention to the test. According to the statement provided by the Claimant, Supervisor Graney was typing on his computer and received several phone calls while the test was underway. In addition, the Claimant stated that Supervisor Graney left the room several times, and at one point left the door open to the testing room where hallway conversations and noise distracted the Claimant. Moreover, the Organization asserts that the re-examination should have been given at the training school in Overland Park, Kansas, rather than at the Carrier’s headquarters.

The Carrier contends that the Claimant was not dismissed; he resigned by failing to pass his re-examination. In addition, the Carrier provided a statement from Supervisor Graney, which states in relevant part:

“All re-examinations required by Rule 30 of the BNSF-BRS Agreement are held at a field location by the employee’s supervisor. [Claimant] was required to take a re-examination to comply with Rule 30. I reserved a Conference Room in the Kansas City Office facility, which is where we hold all reexaminations. This room is provided to help the employee have the best environment to take a test. We follow the same procedures with all employees and I did not change any process for [Claimant].

During [Claimant’s] test I was using my computer as a laptop and had the sound turned off so as not to distract him while he took the test. I used only the mouse and keyboard. I did receive 2 phone calls with my cell phone on vibrate, so not to disturb [Claimant]. After receiving these calls I immediately exited the room, and closed the door so he was not disturbed.

I provided the opportunity for [Claimant] to come to me for pre-test assistance. He chose not to communicate with me on the subject. [Claimant] was afforded the same procedures for the test as any Employee and all procedures are in compliance with Rule 30 of the Brotherhood of Railroad Signalman Agreement.”

The Board carefully reviewed the record in this case. The burden was on the Organization to establish a violation of the Agreement. The record shows that the Claimant’s assertions regarding the testing process were directly refuted by Supervisor Graney, who described the testing environment and stated that the testing conditions were the same as those used for all other employees taking re-examinations. Given the conflict in the material facts, the Organization has not met its evidentiary burden of proving that the Claimant’s examination was conducted in less than a fair and impartial manner in accordance with Rule 30 M.

Once that finding is made, it must be concluded that the Claimant was neither disciplined nor dismissed. By failing his re-examination, he was considered as having resigned from the Carrier's service in accordance with Rule 301, which states:

"Failure of any employee to take and pass re-examination will result in such employee's forfeiture of all seniority and rights and such employee will be considered as having resigned from the Carrier's service."

Notwithstanding the Organization's efforts on the Claimant's behalf, this 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 Third Division**

Dated at Chicago, Illinois, this 21st day of December 2009.