

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41522
Docket No. SG-41790
13-3-NRAB-00003-120004

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

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

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J. W. Hamilton, for his record to be cleared of any mention of the discipline issued in a letter dated February 19, 2010, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the excessive discipline of a 30-day Level S record suspension with a three-year probation period without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on February 1, 2010. Carrier's File No. 35-10-0025. General Chairman's File No. 10-011-BNSF-188-SP. BRS File Case No. 14551-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.

This is a case in which the Claimant was charged with a violation of Maintenance of Way Operating Rule 1.5 – Drugs and Alcohol as a result of an incident on November 20, 2009. The Claimant was finished with a training class at an away-from-home location. It is not disputed that he was still under pay, but had been released to go home. At a company-provided hotel, he boarded company-provided transportation (a contracted bus service) to go to the airport, while allegedly under the influence of alcohol. After a series of agreed-upon postponements, an Investigation was held on February 1, 2010 and the Claimant was assessed a 30-day Level S record suspension, with a three-year probationary period, on February 19, 2010.

The Organization raises a series of issues in defense of the Claimant. It contends, firstly, that the Carrier failed to conduct a fair and impartial Investigation because it did not produce requested evidence prior to the Hearing. Secondly, there was no reliable evidence that the Claimant was in possession of or under the influence of alcohol. It asserts that the Carrier witness was not credible and pointed to a number of alleged inconsistencies in her testimony. Thirdly, it argues that even if he was in possession of or under the influence of alcohol, he was not on duty or subject to duty, nor was he on company property. Therefore, it contends that he was under no obligation to comply with Rule 1.5.

The Carrier responds by saying that it is under no obligation to provide evidence or witnesses in advance of the Hearing. With respect to the witness, it asserts that the bus driver, who was formerly a bar bouncer and on a police force, observed the Claimant in possession of and consuming alcohol. It contends that regardless of any inconsistencies in the bus driver's testimony, the Claimant admitted to drinking before boarding the bus and to being in possession of alcohol. With respect to Rule 1.5, it asserts that the Claimant was being compensated at the time of the incident and, therefore, was subject to Rule 1.5. Further, it argues that the bus was, in effect, company property, because the Carrier had contracted for this service. Therefore, Rule 1.5 applied on a separate ground.

MOWOR 1.5 states:

“1.5 Drugs and Alcohol

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty or while on company property.”

With respect to the preliminary objection about a lack of discovery in advance of the Hearing, the Board has held on numerous occasions that, absent agreement language to the contrary, there is no advance discovery in this industry. This objection is therefore dismissed.

With respect to the evidence of possession or consumption of alcohol, a careful review of the record reveals that the Claimant did, in fact, admit to both. He stated that he had consumed a “couple of beers” before boarding the bus and that he was in possession of beer on the bus. Therefore, regardless of any testimony by the Carrier witness, the Carrier met its burden with respect to the onus of proof.

The issue of the interpretation of Rule 1.5 is less clear. The Carrier asserts that the Claimant was under pay and, therefore, still subject to the Rule. However, the Rule says nothing about pay status. It is conceivable that an employee can be under pay for many reasons. He or she might be released from work early, with no prospect of being called back to work. The employee might then be at home and enjoy an alcoholic beverage with impunity. Therefore, the Board finds the Carrier’s pay status argument to be without merit. However, there is a second ground to the Carrier’s Rule 1.5 interpretation. It contends that being on a company-provided bus is, in effect,

akin to being on company property. The Board finds this argument compelling. It is without doubt that being in a crew-hauling van that is in an accident might subject a Carrier to legal liability related to its employee. Similarly, if an assault takes place between employees or between an employee and an employee of a contractor while in the bus or van, the Carrier might also be held liable. It is for these reasons that the Board finds that the Claimant remained subject to Rule 1.5 while on the company-provided bus.

Having proven its case, the Carrier was within its rights under its discipline policy to assess the instant discipline. Accordingly, the 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 19th day of February 2013.