Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39363
Docket No. MW-39542
08-3-NRAB-00003-060327
(06-3-327)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. J. T. Marshall on February 8, 2005 for alleged violation of Burlington Northern Santa Fe Railway Drug and Alcohol Policy and the Policy for Employee Performance and Accountability as outlined in Montana Division General Manager's Notice No. 6, while working as a grinder operator at Forsyth, Montana on December 16, 2004 was arbitrary, capricious, without just cause, on the basis of unproven charges and in violation of the Agreement (System File B-M-1277-H/11-05-0080 BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now '*** immediately restore Claimant Marshall to the service of the Carrier, remove any and all mention of the discipline from Mr. Marshall's record and make Mr. Marshall whole for any and all losses.'"

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 originally hired by the Carrier in 1974. Prior to his dismissal, he held seniority as Grinder Operator in the Maintenance of Way and Structures Department dating from June 28, 1977. On the morning of December 16, 2004, he was given a random DOT/CDL drug and alcohol test. The first breathalyzer result was 0.027% and a second confirmation test administered 17 minutes later had results of 0.020%, the threshold minimum "positive." This was the Claimant's second positive test for drugs or alcohol in less than six years, as he had tested positive on January 18, 1999. A subsequent urinalysis was administered which was "negative."

Based on the breathalyzer results, the Carrier withheld the Claimant from service and charged him with violating BNSF Policy on the Use of Alcohol and Drugs, dated September 1, 2003. After an Investigation held on January 11, 2005, the Carrier found the Claimant guilty of violating the BNSF Policy on the Use of Alcohol and Drugs, as well as the Policy for Employee Performance Accountability as outlined in Montana Division General Manager's Notice No. 6, and dismissed him from service on February 8, 2005.

The Policy on the Use of Alcohol and Drugs prohibits an employee from reporting to work with a blood or breath-alcohol concentration greater than or equal to 0.02%. Under the Carrier's Policy for Employee Performance and Accountability, Appendix C(4) a second violation of Rule 1.5 or a second positive test within ten years is a "dismissible rule violation." Maintenance of Way Rule 1.5 prohibits an employee from having "any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property."

The Carrier contends that the Claimant was given a fair and impartial Investigation and that there is substantial evidence to support the dismissal of the Claimant for his second violation of the Carrier's Policy on the Use of Alcohol and Drugs within six years. The Organization contends that the Investigation was not fair or

impartial and asserts that the test results were invalid because the tester made numerous errors and repeatedly failed to follow required procedures. The Organization also contends that in light of the Claimant's long service and record with the Carrier, the evidence offered by the Carrier was flawed and insufficient to charge or dismiss him and, in any event, the discipline imposed was excessive.

After careful review of the record, the Board finds that the Hearing afforded the Claimant was fair and impartial. The Organization contends that the Hearing Officer had prejudged the Claimant, because his position had been bulletined as a vacancy even before the Investigation had been held. However, there is no evidence that the Hearing Officer was responsible for the posting, and the transcript itself demonstrates that the Hearing Officer conducted a full and complete inquiry into the incident and afforded the Claimant and his representative ample opportunity to present evidence, question witnesses and make argument and objections. The Organization also objects that the Hearing Officer impermissibly coached the Roadmaster, because the Roadmaster failed to mention until late in the Hearing, after several breaks, that he had smelled alcohol on the Claimant as he drove him back to his hotel and that the Claimant admitted at that point that he had been drinking the previous evening. However, the transcript does not indicate that this testimony was coached. More important, the Organization never recalled the Claimant to rebut this testimony. Thus, the Claimant was not deprived of a fair and impartial Hearing.

The Organization's objections to the conduct of the testing are of greater concern. The record indicates that the tester, a contract Breath Alcohol Technician, failed to request any form of photo ID from the Claimant prior to testing (§40.241(c)) failed to clear the testing area of other employees so as to conduct the test in private (§40.223(b)) failed to instruct the Claimant not to eat, drink, put anything into his mouth or belch between the first and second tests (§40.251(a)(2)) failed to keep the Claimant under observation between the first and second tests (§40.251(a)(1)) and failed to show the Claimant on the machine's display the results of the air blank test that preceded the second test. This litany indicates that this Breath Alcohol Technician was somewhat cavalier in his testing procedures.

In appropriate circumstances, failure to follow prescribed procedures should invalidate drug or alcohol test results, either because they prejudice the employee or render the results unreliable. See, e.g., Public Law Board No. 5850, Award 199 (breathalyzer machine malfunction) Third Division Award 33858 (failure to protect chain

of custody of sample) First Division Award 25971 (failure to protect chain of custody of sample). However, it does not appear that the lax test procedures here affected the Claimant's test results to his detriment. Though no ID was requested, the Claimant was the individual selected for testing, and the individual who took the test. Though the Claimant was not shown the second air blank test results on the machine display itself, there is no danger that the blank test had not been repeated, because the Claimant was given a printout showing the time and 0.00% result of the second air blank test together with the time and results of his confirmation test.

During the on-property processing of the claim after the Investigation, the Organization submitted the written opinion from an expert (Robert Howard, Ph.D.) that the Claimant's test results may have been skewed by the presence of other employees while the first test was conducted, and by the Claimant's chewing tobacco before each test. However, Dr. Howard's opinion was strongly refuted by an official of the Office of Drug and Alcohol Policy and Compliance (ODAPC) of the federal Department of Transportation. Not only did that Senior Policy Advisor observe that there was no basis under federal regulation to cancel the Claimant's test or to "suggest a fatal challenge to the credibility of the 0.02 confirmation test," and conclude that "the documentation of a confirmed 0.02 test result is most acceptable under part 40 [DOT alcohol test regulations]," he also rejected Dr. Howard's claims on passive exposure to alcohol and tobacco-alcohol retention issues, noting that the ODAPC and the National Highway Transportation Safety Agency (NHTSA) were unaware of any basis for those claims. We find that the Carrier presented substantial evidence to refute Dr. Howard's opinion.

We find the rest of the Organization's objections similarly unpersuasive. The Organization contends that the results were suspect because the drop from 0.027% to 0.020% in 17 minutes is a faster rate of dissipation than the expected rate of 0.015% per hour, citing only the report of the testimony of a witness in Third Division Award 26920. However, even the Organization notes that this reported standard rate is subject to variation due to individuals' differing metabolic rates. Without more evidence, we cannot say on this record that the deviation from the "standard" 0.015% per hour dissipation rate is so great as to render the test results invalid.

Thus the Board finds substantial evidence supports the Carrier's determination that the Claimant violated the Drug and Alcohol Policy and the Policy for Employee Performance and Accountability as outlined in Montana Division General Manager's Notice No. 6. The question remains whether the penalty of dismissal was excessive. The

Board will not set aside a Carrier's imposition of discipline unless its determination was unreasonable, arbitrary, or capricious. While we recognize that the Claimant was a very long-service employee, this was not the Claimant's first positive test. He admitted drinking after work the day before the random test, even though he was subject to random testing and even though a second positive test within ten years is a "dismissible rule violation" under the Carrier's Policy on Employee Performance and Accountability. Employee drug and alcohol use presents serious safety hazards to the employee, co-workers, and the public at large, particular in a safety-sensitive position like the Claimant's. Under these circumstances, the Board will not substitute its judgment for that of the Carrier. The penalty assessed, while severe, is not unreasonable, arbitrary, or capricious. To the extent that the claim presents a request for leniency, that plea must be directed to management, rather than the Board. See Third Division Awards 36003, 37582, and 37810.

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 October 2008.