

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39470
Docket No. TD-38585
08-3-NRAB-00003-040563
(04-3-563)

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

PARTIES TO DISPUTE: (American Train Dispatchers Association
(BNSF Railway Company)

STATEMENT OF CLAIM:

“The Burlington Northern Santa Fe Railroad Company (hereinafter referred to as ‘the Carrier’) violated the current effective agreement between the Carrier and the American Train Dispatchers Association (hereinafter referred to as ‘the Organization’), including but not limited to the Drug & Alcohol Abuse Prevention Program dated December 21, 1984 in particular, when between January 20 and February 25, 2003, the Carrier required train dispatcher R. R. Erny to contact the Employee Assistance Program (EAP) and comply with the instructions from the EAP, placing the claimant on a medical leave of absence and providing the claimant sick leave benefits, despite the fact the claimant was found to be in compliance with the Carrier’s Drug & Alcohol Policy.”

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 regularly assigned as a Train Dispatcher in the Centralized Dispatching Center in Fort Worth, Texas. On or about January 14, 2003, before the Claimant reported to work, the Carrier received an anonymous telephone report that the Claimant was "abusing drugs." Upon the Claimant's arrival at work, the Carrier advised the Claimant of the anonymous telephone call and interviewed him. When asked if he would provide a urine sample, the Claimant consented. The Claimant was not removed from service awaiting the test results. The test results for the Claimant's sample were positive for the presence of opiates. The Carrier advised the Claimant on January 19, 2003 that he would be held out of service.

After interviewing the Claimant on January 21, 2003 and considering the circumstances of the positive results of the urine test, the Carrier's Medical Review Officer (MRO) reported to the Carrier that the Claimant posed a "significant safety risk." Therefore, on that same day, the Carrier placed the Claimant on a medical leave of absence as a precautionary matter pending further evaluation. The Carrier conferred with the Claimant again on or about January 23, 2003 to discuss a course of action acceptable to all parties, including the Claimant.¹ The Carrier subsequently advised the Claimant of its understanding of the consensus reached with the Claimant by letter dated January 23, 2003. The Claimant disputes he made any agreement with the Carrier.

The Claimant responded to the Carrier in a letter dated February 6, 2003 stating that he could not sign the Letter of Understanding sent by the Carrier. Notably, the focus of the Claimant's objections stemmed from the incorrect date of the referenced test result. He questioned why he was being placed on a medical leave of

¹The Claimant does not rebut that the Carrier discussed this matter (including being advised that the MRO found that the Claimant posed a significant safety risk) with the Claimant twice on January 21 and on January 23, 2003, despite no requirement to do so.

absence for a positive drug test from 2001.² He further questioned why he needed to contact the Carrier's Employee Assistance Manager, if he was not being charged with violation of the company's Drug and Alcohol policy. The Carrier's response dated February 11, 2003 explained that the Claimant's use of opiates and their possible side effects at work were deemed a 'significant safety risk' requiring evaluation.³ The letter further explained that, upon his return to work, the Claimant would need to provide a letter on his prescribing physician's letterhead stating that the physician was fully aware of the scope of the Claimant's duties and verifying that he was safe to work taking the prescribed medication in the manner prescribed and at the recommended dosage.

The Organization asserts that the Claimant's test results were negative. It further claims the Carrier unnecessarily required the Claimant to undergo evaluation and treatment through the Employee Assistance Program (EAP) and submit to another drug screening to be returned to service. The Organization further claims that the Claimant was involuntarily placed on a medical leave of absence which necessitated the use of his "sick leave" which resulted in his compensation being reduced to 80 percent of his normal rate of pay. It finally claims that the Carrier's handling of the Claimant's case was in violation of the Joint Drug and Alcohol Abuse Prevention Program dated December 21, 1984 and the Code of Federal Regulation (49 CFR Part 40).

² In response, the Carrier asserted it made a typographical error in its notice letter concerning the date of the Claimant's positive drug test results. Most notably, however, the Claimant's letter is silent regarding any objections to the other requirements asserted which were purportedly agreed upon, e.g., to participate in a treatment program, if prescribed, and to comply with any follow up testing. Therefore, it would appear that the Claimant had no objection and agreed with those provisions as stated in the Letter of Understanding.

³ It is clear the Carrier questioned whether to charge the Claimant with a violation of its Drug and Alcohol Policy. However, the Claimant's use of opiates, while not illicit as alleged by the Carrier in its Submission, caused some concern to the Carrier, given the instructions by the physician to not take the medication "while driving or working." [Emphasis added]. While the Claimant may not have taken the medication while at work, he most assuredly had the medication in his system while he was at work, which explains the positive test result. It is for this reason that an evaluation would be reasonably necessary to determine to what degree the Claimant's use of the medication would affect the Claimant's job performance, if at all.

The Carrier asserts that it was jointly decided or understood in the meeting on January 23, 2003 with the Claimant that the Claimant would participate in an evaluation, follow any treatment program recommended, and return to service upon approval of the Medical Department. In return, the Carrier would downgrade the positive test result to negative, not charge the Claimant with a violation of the BNSF Policy on the Use of Alcohol and Drugs, and place the Claimant on a medical leave of absence for time necessary to successfully complete any required treatment program and provide the requested letter from the Claimant's physician. Given the Organization's denial that such an agreement existed, the Board finds the fact of whether an agreement existed or not to not be essential to the resolution of this claim. The pertinent issue for consideration is whether the Carrier had the discretion to implement the alternative handling it took in this case. That is, did the Carrier violate the Agreement with the Organization by placing the Claimant on medical leave and requiring him to take sick leave while it evaluated his prescription use of opiates?

The Board finds the Claimant's claim wholly without merit. The Organization first takes issue with the Carrier's inconsistent designation of the Claimant's drug screen test on January 15, 2003 as warranted due to "reasonable suspicion" and for "probable cause." Although the Board notes the apparent carelessness of the documentation concerning this matter, it is undisputed and the record clearly reveals that the Claimant voluntarily consented to undergo drug screening in this case. Therefore, having consented to the test, the Claimant cannot complain when the Carrier takes action after receiving the results. The Claimant next operates from the legal fiction that his test result was negative. This is not true and there is no evidence in the record to support such an assertion. In the Board's opinion, the Organization uses circular reasoning and ignores the fact that the original test result was positive.⁴ The test result was positive and was verified as such. There is no credible evidence provided, as the Organization suggests, that the MRO was required to verify the test as negative or that the verification process was flawed in any way.

The Organization ultimately takes umbrage at the Carrier's alternative handling of this matter. Its claim that the Carrier does not have the ability to excuse the positive result for its purposes is not supported in the record. Further, it misstates the evidence of the Carrier's consultation with a representative of the Federal

⁴ There is no evidence that the test was ever negative before the Carrier's alternative handling.

Railroad Administration (FRA). The record evidence does not reveal that the FRA representative did not agree that a policy violation had not taken place as the Organization asserts. The record does reveal, however, that alternative handling was suggested, because of a question of whether the Carrier could successfully charge the Claimant with a violation of policy. The FRA representative's opinion regarding success at arbitration is not dispositive of whether the Claimant violated the Carrier's policy or not. The Carrier provided an opportunity for the Claimant to avoid discipline for testing positive for the presence of opiates in his system while at work. From the record, this appears to have been a gift to the Claimant. We are as puzzled as the Board was in Third Division Award 35746 with the Organization's complete ignoring of the Carrier's providing such an opportunity for the Claimant to avoid discipline in this case. The Claimant's prescription, valid or not, did not excuse his being under its influence while at work. It merely explains it.

When the Claimant submitted to a second test, the results were negative resulting in his return to service on or about February 20, 2003. We do not find that the alternative handling implemented by the Carrier was unreasonable nor in violation of the Agreement. For this reason, the Board finds that the Carrier did not abuse its discretion nor violate the Agreement. There is no reason to modify the Carrier's alternative handling of this matter.

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 29th day of December 2008.