

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41395
Docket No. SG-41559
12-3-NRAB-00003-110154**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 C. D. Koonce, for reinstatement to his former position with compensation for all time lost, including skill pay, with all rights and benefits unimpaired, and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges in connection with an investigation held on September 18, 2009. Carrier’s File No. 35-10-0002. General Chairman’s File No. 09-031-BNSF-121-T. BRS File Case No. 14435-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 worked as a Signal Maintainer, which is a safety sensitive position. He was terminated for a second violation of MOW Operating Rule 1.5-Drugs and Alcohol, after he failed a scheduled drug and alcohol screen on August 31, 2009. He had previously tested positive for a controlled substance on March 3, 2009, and enrolled in the Carrier's EAP. Upon successful completion of the EAP, he was returned to work subject to certain conditions that, if violated, could subject him to termination. On August 31, 2009, the Claimant's breathalyzer results revealed the presence of alcohol. When the technician attempted to complete the test by obtaining a urine sample, the Claimant refused to provide one and left the property. Under the terms of the Claimant's return-to-work reinstatement Agreement, he could be terminated for "More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period." He was also subject to termination for "Failure to provide a urine specimen or alcohol sample without a valid, verified medical explanation."

On September 1, BNSF issued the Claimant a notice of an Investigation to be held on September 8, 2009. The Investigation was held, but the Claimant did not attend. On September 9, 2009, the Carrier notified the Organization that the recording equipment had malfunctioned during the Hearing and that it would be impossible to create a transcript. In order to obtain a transcript, the Investigation was scheduled to reconvene on September 18, 2009. The Claimant did not attend the reconvened Hearing. At the end of the second investigatory Hearing, the Carrier determined that the Claimant violated the conditions of his return-to-work reinstatement Agreement and terminated his employment. The Organization contends that the discharge should be overturned because the Carrier failed to submit substantial evidence that the Claimant violated the conditions and because of procedural violations: (1) the Carrier failed to establish that there was, in fact, a failure of the recording equipment at the first Hearing (2) the second investigatory Hearing was not timely held and (3) it was improperly conducted: there was a

different Hearing Officer, there were different witnesses, and the Carrier introduced new evidence.

The record developed on the property includes substantial evidence that on August 31, 2009, the Claimant tested positive for alcohol and that he refused to submit a urine sample when requested. The Claimant had specific notice that he could be terminated if he tested positive again for alcohol within a ten-year period or if he refused to provide a urine sample. Accordingly, the Carrier did not violate the Collective Bargaining Agreement when it terminated his employment.

However, the Organization raised serious procedural issues that the Board must address. It is a fact of modern life that technical failures happen. The Carrier's impulse to reconvene the Hearing was appropriate, but its conduct of the reconvened Hearing was problematic. First, the Carrier notified the Organization that the recording equipment had failed, but offered no proof or any way for the Organization to verify that its assertion of equipment failure was true. The Carrier submits that it would be impossible to prove nothing, which is what it had on the audio recorder. Its point is well taken, but there has to be some way for the Organization to ensure that the Carrier is not simply making an empty assertion because it did not like how the first Hearing turned out. Someone has to be in charge of the audio recording equipment – that person should be required to submit a written explanation of the problem. Alternatively, the Carrier could give the Organization the opportunity to listen to what was taped, to verify that the feed was defective and nothing was in fact recorded. Without any way to verify the truth of the Carrier's assertion, the reconvened proceedings will be tainted by suspicion, as they were in this case.

The Organization further contends that the second Hearing was not timely because it was not held within 15 days of the alleged misconduct. It is important to keep in mind that the Carrier complied with the contractual time limits for scheduling the original Hearing. The primary purpose of the time limits for holding Investigations is to conduct the Investigation while events are fresh in the memories of witnesses. The parties were prepared to – and did – present their evidence and arguments at the original Hearing on September 8, 2009, little more than one week after the alleged misconduct occurred. Witnesses had an opportunity to testify while events were fresh. At the end of the original Investigation, the matter would have been closed but for the equipment malfunction. Accordingly, the purpose of the second

proceeding was not to hold an entirely new Hearing, but to recreate the first one as closely as possible. The evidence and arguments were fixed during the first Hearing. The second Hearing was held ten days later- nine days after the malfunction was discovered. Witnesses' memories would still have been relatively fresh, especially since they had already testified once. Requiring the Carrier to reconvene the Investigation within the original 15-day time limit would not be realistic under the unique circumstances that pertain here. Ten days between the first Hearing and the second is not an unreasonably long delay. If the second Hearing had been postponed for, say, a month, the Board might feel differently, but the second Hearing was not untimely.

The Board's most serious concerns are with the actual conduct of the second Hearing. As noted above, the purpose of the second proceeding was to recreate the first one as closely as possible, not to give either side an opportunity for a second bite at the apple with a "new and improved" Hearing. To the extent possible, the Hearing Officer, the representatives, and the witnesses should all be the same people that participated in the original Hearing. "To the extent possible" is the operative phrase, however; it is not realistic to expect to replicate the original Investigation exactly. For instance, if the original Hearing Officer has gone on vacation, the parties may have to choose between having the same Hearing Officer and when the second Hearing is held. It should be possible to recall and reschedule witnesses who are under the parties' control, but it may not be possible for those who are not. Moreover, the parties need to be pragmatic. If a witness is testifying only to authenticate a document (such as the results of a drug test) someone else in the same Department may be equally capable of authenticating the document. Under those circumstances, substituting one witness for another should not be a problem: the same evidence – the document – gets into the record either way. Obviously, the situation is quite different for, say, individuals who observed events: only they can testify as to what they saw. Finally, it is absolutely improper under any circumstances for new documents and other exhibits to be introduced at the second proceeding. The Investigation, including the record evidence, was closed at the end of the first Hearing. The second Hearing was not a "do-over," but an effort to recreate the first Hearing in order to obtain a transcript. Permitting either side to introduce new evidence at the second Hearing is fundamentally inconsistent with that purpose and a violation of the concepts of Agreement due process that underlie the grievance procedures negotiated by the parties.

The Carrier successfully established that it had proper cause to terminate the Claimant. This case presents unusual circumstances that may be unlikely to reoccur. But if such circumstances confront the parties to this dispute in future cases, they need to be cognizant of how a second investigatory Hearing should be conducted.

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 25th day of July 2012.