

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41833
Docket No. SG-41789
14-3-NRAB-00003-130348 (New)
14-3-NRAB-00003-120003 (Old)

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
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(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 reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and his personal record 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 imposed the harsh and excessive discipline of dismissal against the Claimant 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. 35-10-0015. General Chairman's File No. 10-012-BNSF-188-SP. BRS File Case No. 14552-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 companion case to Third Division Award 41522. The facts involve the same Claimant and arise out of incidents which took place on the same day. In the companion case, the Board denied the Organization's claim relative to the Claimant's 30-day Level S record suspension, with a three-year probationary period, for his violation of Maintenance of Way Operating Rule 1.5 – Drugs and Alcohol while riding on Carrier-provided transportation (a contracted bus service). The instant claim involves the allegation that Claimant Hamilton, while involved in the afore-mentioned alcohol incident, lied to the bus driver about his identity when he signed-in as someone else on the passenger log and verbally identified himself as another employee.

On November 20, 2009, following completion of a Carrier training course at an away-from-home location, the Claimant boarded a Carrier-provided bus to travel from the hotel to the airport. As the Board found in the companion case, the Claimant was in possession of and had consumed alcohol prior to boarding the bus. When he boarded the bus, he failed to sign the log-in sheet. When the bus driver noticed that she had one more person than signatures, she asked the passengers repeatedly if they had signed in. Ultimately, the Claimant identified himself as another employee and signed in as that employee, beside that person's name on a pre-printed form. The driver reported that the Claimant and another passenger were "loud and obnoxious" during the trip to the airport. She also reported hearing cans being opened and found empty beer cans onboard after the passengers exited the bus at the airport. She notified the Carrier of the behavior and named the Claimant as one of the perpetrators, but identified him under the alias that he had used when signing in.

As a result, the Carrier issued a Notice of Investigation to the employee who was named on the sign-in sheet. Fortunately, that employee was able to prove that he had left earlier and that someone had falsely appropriated his name on the sign-in sheet. The bus driver subsequently identified the Claimant, through photographic evidence, as the person who gave the wrong name.

After a series of mutually-agreed upon postponements, the Investigation was held on February 1, 2010 to determine the Claimant's responsibility, if any, in connection with the record which had allegedly been falsified. As a result, the Claimant was dismissed on February 19, 2010 for violating Maintenance of Way Operating Rule 1.6 – Conduct. The Investigation and discipline letter for the companion offense had the same two dates as in this case.

Maintenance of Way Operating Rule 1.6 states:

“Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.” (Emphasis added)

The Organization asserts that the Claimant inadvertently signed the roster next to the wrong name. It contends that he was pressured into doing so when the driver stopped the bus in the middle of the road and demanded the roster be signed. It submits that the Claimant had no intent to deceive and that he was off duty at the time. The Organization further takes exception to the Carrier holding two separate Investigations and assessing two separate disciplinary findings for what, it asserts, was effectively the same incident. It contends that this is not in keeping with the principle of progressive discipline because the Claimant had no ability to learn from his past transgressions. It also submits that the Claimant was denied a fair and impartial Hearing because he was not provided with evidence in advance of the Hearing, as requested by the Organization. Lastly, it contends that the bifurcation of proceedings, with the attendant objections which were overruled during the Hearing, resulted in a lack of Agreement due process.

Conversely, the Carrier submits that the Investigation proved that whoever signed the roster did so in the name of the absent employee, which clearly demonstrated intent to deceive. It contends that it was under no obligation to provide discovery in advance of the Hearing, because there is no contractual obligation to do so. Finally, it asserts that the Claimant’s intentional falsification of Carrier records is a separate offense that, separately, is sufficient to warrant the Claimant’s dismissal.

The Board finds that the Claimant did, in fact, intentionally deceive the Carrier when he falsified the bus roster. It is clear that he not only signed beside someone else’s

name (which might have been inadvertent) he deliberately signed the other person's name. That clearly weighs against his version of the facts.

With respect to advance discovery, as this and other Section 3 tribunals have repeatedly held, such is not a requirement in this industry, absent specific Agreement language to the contrary.

As a result, the Board comes to the final issue – was this one event or two? This is not a case where discrete events happened over the course of months, but were discovered together. Everything happened on the same day. However, possessing and consuming alcohol is different than falsifying Carrier records. On the other hand, it is the view of the Board that the events are inextricably linked – it is more likely than not that the Claimant's falsification was an attempt on his part to avoid culpability for the potential discipline for violating the Carrier's Rule prohibiting the possession and consumption of alcohol. As a consequence of this linkage, we find that while the involved Rule violations may be matters for separate disciplinary actions, it is true that the Claimant had no ability to learn from his transgressions, both of which occurred on the same day. Therefore, the Board is exercising its authority to reduce the discipline in this case to time served. Accordingly, the Claimant shall be returned to service with seniority unimpaired, but without backpay. It is the Board's hope that the Claimant has learned from his mistakes and that during and beyond the probationary period outlined in the companion Award, he will comport himself well. To do otherwise would place his further employment in serious jeopardy.

With respect to the implementation of this Award, the Carrier argued that, in the event the Board ruled to return the Claimant to work, he should be subject to Section 4.7.1 of its Policy regarding the Use of Alcohol and Drugs, which states:

“4.7.1 Return-to-Service Testing (BNSF Authority).

Employees must pass a drug screen and/or a breath-alcohol test prior to returning to service after:

an absence greater than six months (drug screen only), a removal from service following verified/confirmed positive, adulterated, or substituted test results, admission of use, possession, refusal to test, or company authority violations of this policy.

The employee must successfully complete an EAP Manager's recommendations including prescribed education and/or treatment, when returning to serviced under company authority (BNSF)."

The Organization argues that this particular case centers on an issue of dishonesty and, therefore, Rule 4.7.1 cannot apply. It argues that, to so rule would be beyond the authority of this tribunal.

The Carrier argues, finally, that this clause is a normal return-to-work requirement. It contends that the employee must undergo an EAP assessment and must follow the instructions resulting from that assessment.

The Board finds that, while the Organization makes an interesting argument, this case is based upon a continuation of the facts contained in Award 41522. Indeed, the Claimant's reinstatement is predicated upon the fact that he was not given the opportunity to learn from his prior mistake. Therefore, this inextricable link to his violation of the Carrier's alcohol policy gives rise to the reasonable argument of the Carrier that the Claimant must comply with the EAP assessment portion of its policy, and any resultant instructions that would naturally flow therefrom. In order to return to work, the Claimant must undergo the normal process outlined in the Carrier's Policy.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of March 2014.