

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42370  
Docket No. MW-42521  
16-3-NRAB-00003-140159**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (dismissal) imposed upon Track Inspector R. Sandness by letter dated January 4, 2013 for his alleged violation of Section 3 Policy on the use of Alcohol and Drugs and MOWOR 1.5 Drugs and Alcohol in connection with his alleged failure of reasonable cause test administered on October 5, 2012 while working as Track Inspector on gang TINS 1487 headquartered in Newcastle, Wyoming was arbitrary, excessive, without merit and in violation of the Agreement (System File C-13-D070-4/10-13-0213 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Sandness’ record shall be cleared of the charge leveled against him and he shall be returned to service in accordance with Rule 40.”**

**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.

On October 5, 2012, the Claimant was working as a track inspector when he ran into the back of a train. After the incident, he was asked to submit to a reasonable suspicion drug and alcohol test. The results of the test showed that he tested positive for amphetamines and methamphetamines. He was found to be in violation of BNSF's Policy on the Use of Alcohol and Drugs as well as MOWOR 1.5 and subsequently dismissed.

The Carrier points out that during the investigation hearing the Claimant admitted his violation of the Drug and Alcohol Policy as well as his violation of MOWOR 1.5. As a Track Inspector, the Claimant was in a safety sensitive position. The Claimant had two serious rule violations, and the second one exposed him to dismissal. The Carrier contends that leniency is not appropriate here, despite the long service of the Claimant. Leniency is the prerogative of the Carrier, and it is not the province of the Board to grant leniency. The Carrier rejects the Organization's protests about due process in that it complains that a testifying witness also issued the disciplinary letter. The Carrier avers the Claimant was not unjustly disciplined, he was breaking the rules.

It is the Organization's position that it was grossly improper for Division Engineer Turnbull to conduct the on-scene investigation of the accident, serve as a witness at the investigation then subsequently be the officer of BNSF Railway who issued the dismissal. Turnbull testified to the Claimant's guilt and dismissed him based on his own testimony. The fact that he failed a drug test is irrelevant; the fair and impartial hearing has to occur before the disciplinary action. The Board is not at liberty to disregard Rule 40 of the Agreement.

The Organization emphasizes the Claimant has 35 years of service and his only discipline was 30 years ago. He has been open and honest at every turn, he entered into a treatment program and successfully completed it. It was completely unreasonable not to allow him a customary first time waiver.

Rule 40 states: "An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held."

The Organization asserts allowing a witness against the Claimant to issue discipline constitutes a clear violation of this rule.

The Carrier points out that there was no credibility decision to be made, hence the witness was not put into a position of deciding his own credibility. This argument, however, does not address the full panoply of problems with allowing a witness to issue a penalty. In this instance, the decision to issue discipline constituted a parallel decision to deny the Claimant eligibility for a waiver. Given the Claimant's 35 years of service, the issue is raised as to whether this service should be considered a mitigating circumstance. The decisions to deny the Claimant eligibility for a waiver and reject the Claimant's service as a mitigating circumstance fell within Turnbull's authority as the issuer of the dismissal involved here.

As the Organization has pointed out, the question of relative guilt or innocence cannot be reached until after a full and impartial hearing has been held. As a witness, Turnbull clearly had an interest in the outcome of the case. A person who bears testimony, by definition, has taken sides and cannot render an objective view of the matter about which he has testified. The procedural flaw of having a witness at the hearing decide and issue the discipline to be imposed is flagrant. The Board would effectively negate the import of Rule 40 were it to allow Turnbull to issue discipline in this case. It follows that the procedural error in this matter must be deemed fatal to the Carrier's case.

The claim is sustained in full. The Claimant shall be offered reinstatement, subject to the Carrier's return to work policies. The Carrier shall immediately remove the discipline from the Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier's employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.

**AWARD**

Claim sustained.

**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 30th day of August 2016.