

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42409
Docket No. SG-42911
16-3-NRAB-00003-150084**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 D. Scales, for reinstatement to service with compensation for all time lost, including skill pay and overtime, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued 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 June 11, 2013. Carrier’s File No. 35 13 0033. General Chairman’s File No. 13-024 BNSF-20-C. BRS File Case No. 15070-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.

On May 13, 2013, Signal Supervisor Patrick Fike noticed that the track authorization time Claimant had used for his signal inspections was insufficient for performance of the inspections he was responsible for. The Carrier held a formal investigation for the purpose of gathering evidence. Based on the evidence provided, the Carrier determined that Claimant had violated conduct rules prohibiting dishonesty. As a result, he was terminated. The Organization protested the dismissal, which the Carrier rejected on appeal. The claim was duly processed without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Organization raises a strong objection to the fairness of the investigation which must be addressed before approaching the merits of the case. It alleges impropriety in that Keith Fezekas, Manager of Signals in Chicago, Illinois, testified at the investigation hearing then issued discipline to Claimant. Fezekas stated as follows at the Investigation in pertinent part:

“I did tell him that that was a violation of reporting, and the date of inspection is the record date. Such backdating can change the next scheduled test and may open BNSF to liability should an event such as derailment, side swipe, collision occur between the time he allegedly did the test and the recorded date. And also by changing the record, he is attempting to perform fewer tests throughout the year. One other part to that is in, uh, I, I did tell Mr. Scales also that there is a requirement to upload the test within 24 hours of the date of inspection. (TR 90-91)”

Subsequent to the investigation hearing, Faeeekas issued the termination letter on July 3, 2013 stating as follows in part:

“It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.6 Conduct.

In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).”

The Organization insists no fair and impartial investigation can possibly have taken place when one of the witnesses testifying against Claimant is the individual making the disciplinary decision.

The Carrier counters that there was no prejudice to Claimant's case here. It explains that the termination decision was reviewed at multiple levels within its hierarchy, and upheld at each level. It insists that because all dismissals get reviewed by several levels before proceeding to arbitration, Claimant was not prejudiced by the fact that the termination letter was issued under Fezekas' name.

The Board finds the Organization's argument in this regard to be entirely persuasive. A witness who testifies for the Carrier is not in a reasonable position to make an unbiased evaluation of the evidence submitted in the case. To do so, he would have to be able to analyze the credibility and reliability of his own testimony, including his ability to dependably perceive events, the accuracy of his own memory, his relative truthfulness and the precision of his articulation. It defies credulity to imagine that a witness could perform an objective and fair analysis of his or her own testimony.

No reasonable person could find that the Claimant in this case has had a fair and impartial investigation when one of the key witnesses against him evaluated the sufficiency of the evidence, including his own testimony. The Carrier's argument that others participated in the dismissal decision is far from persuasive when the dismissal letter itself went out under Fezeka's signature. Because of the egregious procedural error in this case, the Board does not reach the merits.

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 31st day of October 2016.