

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42699
Docket No. MW-43138
17-3-NRAB-00003-150356**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Inspector W. Haga by letter dated February 14, 2014 for alleged violation of ‘... MWOR 14.0 Rules Applicable Only Within Track Warrant Control (TWC) Limits, MWOR 14.3 Operating With Track Warrants and MWOR 1.13 Reporting and Complying with Instructions.’ in connection with his alleged ‘... violation of your track warrant 584-123 while operating BNSF vehicle 24404 track inspecting near Bowman, ND on the Hettinger Subdivision, and alleged failure to comply with instructions by not inspecting your complete territory and alleged failure to make yourself available for a Drug & Alcohol test at 0245 hours, Monday, December 23, 2013.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2739-E/11-14-0175 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Haga shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered including loss of wages to attend the investigation.”**

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 Carrier asserts that substantial evidence was obtained that Claimant Haga, operating unsafely, violated the above-noted Rules. The Claimant was inconsistent when conversing with the Dispatcher and Claimant's supervisors. Moreover, Claimant admitted his guilt. Dismissal was appropriate as Claimant's disregard for safety constituted a stand-alone dismissible offense. Should the claim be sustained, the Claimant should recover lost seniority and lost wages, minus outside earning, but no other benefits. Delivery of an incorrect transcript constituted harmless error because upon notification of the error, the Carrier extended the time limits and provided the correct transcript.

The Organization asserts that the absence of a transcript was harmful error because it prevented the filing of a claim. Also, harmful error stemmed from the pre-Investigation meeting between the Conducting Officer and Carrier witnesses. The Carrier did not prove dishonesty and thus abandoned the Rule 1.6 Conduct charge, nor did the Carrier prove violations of MOWORs 14.0 and 14.3 because of reliance on HLCS data that the dispatcher and Roadmaster testified were inaccurate. The Carrier never asserted during the investigation that the Claimant violated MOWOR 1.13 and has not proven that allegation. The Claimant could not have refused to take a drug test that he was not instructed to take. He missed alleged calls about the test, having fallen asleep after a long work day. Excessive discipline for this twenty year employee followed the Carrier's failure to prove violations of each noted rule. At a minimum, the dismissal should be reduced and the Claimant should receive lost seniority, wages and other benefits with no consideration given to outside earnings.

The decision to withhold the Claimant from service did not impede a fair and impartial Investigation. The three allegations set forth in the notice of Investigation involved safety and provided good reason to withhold the Claimant. That did not amount to pre-judgment. However, there are two major procedural flaws, either of which provides serious enough taint to the Investigation so that it cannot be considered fair and impartial, requiring the Board to sustain the claim without considering the appeal on the merits.

The first flaw involved an ex-parte conversation between Conducting Officer Shepard and Roadmaster Koeplin, a Carrier witness, during a recess but after the Roadmaster had begun his testimony. The Board notes Conducting Officer Shepard's explanation that the conversation did not involve the Investigation, but that is beside the point. A fair and impartial Investigation requires not only that it not be tainted by harmful procedural error but also that the Investigation be perceived as fair and impartial. Ex-parte conversations between Conducting Officers and Carrier witnesses just before or during investigations shatter the perception of impartiality regardless of the content of those conversations. In Third Division Award No. 41224, a 2012 on-property award,

Referee Andria S. Knapp wrote:

The concept of just cause includes not only substantive principles of fairness, but procedural one's as well. Rule 54.A of the parties' Agreement states, "An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. . . ." Because the Hearing Officer is a Carrier official, it is especially important for the investigative Hearing to be conducted as fairly as possible. For the Hearing Officer, this includes avoiding not just the reality of partiality, but also the appearance of bias, either for or against any party or witness. The job of the Hearing Officer at the Investigation is to develop facts and give both the accused employee and charging officials a fair opportunity to give their version of events, in an effort to further all sides' understanding of what happened, so that the Carrier can make an informed and reasoned decision whether the accused employee is guilty of misconduct and subject to discipline. Given that the Hearing Officer is a carrier official, it is critical to the dispute

resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process. The Hearing Officer must have – and be seen as having -- an open mind, one that is not made up in advance of the Investigation. Anything less would render the idea of a “fair and impartial” investigation a sham. In this case, the Hearing Officer conducted an extended private meeting with the Carrier’s witnesses immediately before the Hearing. The meeting led to concerns on the part of the Organization and the Claimant that the witnesses were being coached or, alternatively, they were explaining what they would testify to without the knowledge of the opposing side or an opportunity for cross examination. In either case, it appeared that “the fix was in,” so to speak. Even before the investigative Hearing started, if the witnesses were being coached by the Hearing Officer or in his presence, his ability to conduct a “fair and impartial” Hearing would be seriously open to question. The witnesses’ privately explaining their testimony could also compromise his ability to conduct a fair and impartial Hearing, as his perceptions of events and of the Claimant’s guilt or innocence would be compromised before the Hearing began. Even if such influence did not actually occur, the opposing side was reasonably left with the impression that it did, and the damage to the Hearing process is the same.

While the fact situation to which Referee Knapp responded differs from that in the case under consideration, the ex-parte contact remains, as does, at a minimum, the unfortunate perception that may flow from such contact. The Board finds the words in Award 41224 no less true and no less instructive in this case.

The second fatal procedural flaw concerns the bases for the Claimant’s dismissal. Rule 40.C requires that the written notice of investigation “must specify the charges for which the investigation is being held.” The Notice of Investigation provided to the Claimant met the above-noted requirement by charging him with 1) violating track warrant limits, 2) dishonest reporting of allegedly inspected territory and 3) failing to submit to drug and alcohol testing. The notice did not specify the rules allegedly violated, nor was it necessary to do so. There is abundant precedent for finding a notice of Investigation compliant so long as it contains enough detail of the allegedly inappropriate behavior and/or actions to allow the Claimant and his Organization to prepare an adequate defense. But with rare exceptions, specific

rules violated must be introduced during the Investigation so that the Claimant's representative may question witnesses to ascertain exactly why the Carrier believes such rules were violated. Certainly, the ability to address the relevant rules could be central to a Claimant's defense. In the Claimant's Investigation, the only rule mentioned or entered as an exhibit was MOWOR 1.6 Conduct. No other rules were mentioned, let alone read into the record or entered as exhibits. Yet, the letter dismissing the Claimant found him "in violation of MWOR 14.0 Rules Applicable Only Within Track Warrant Control (TWC) Limits, MWOR 14.3 Operating With Track Warrants and MWOR 1.13 Reporting and Complying with Instructions." Rule 1.6 Conduct is not mentioned.

The Investigation cannot be considered "fair and impartial" when the Claimant and his Organization have not had an opportunity to address the rules that might thereafter form the bases for discipline or dismissal. The Organization and the Claimant should not have to speculate or guess about which rules subsequent discipline might be based. In 2009 Third Division Award No. 39919 Referee Ann S. Kenis confronted a situation where the results of the Claimant's drug and alcohol test were not entered into evidence. In sustaining the claim, Referee Kenis wrote: "In deciding whether or not Claimant committed the charged offense, the Board is restricted to evaluating the evidence submitted at the Investigation. The Board cannot consider the testing documents because they were untimely introduced subsequent to the Investigation." Here the rules allegedly violated "were untimely introduced subsequent to the investigation" and cannot be considered by this Board. Not only has the Claimant been deprived of a fair and impartial Investigation, but he must be considered to have violated nothing in the record of the Investigation.

Because the claim is sustained, the remedy is intended to be consistent with that provided in recent on-property cases. The Claimant's dismissal is hereby rescinded and must be expunged from his records. He shall be returned to service without loss of seniority or benefits. In addition, the Claimant is entitled to compensation for all lost wages including overtime he would have been offered and likely would have worked from the date of his being withheld from service to the actual date he is returned to service. Any monies earned or paid to the Claimant, except all monies that he was receiving before being dismissed and that continued after dismissal, are to be deducted from lost wages owed to him. The Claimant is further entitled to be reimbursed for any and all out-of-pocket healthcare expenses that he incurred as a consequence of his dismissal which would have been covered

by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal.

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 12th day of July 2017.