

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 43891
Docket No. SG-45386
20-3-NRAB-00003-190123

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 E.A. du'Monceaux, for reinstatement to service with compensation for all time lost, including overtime pay, 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 September 27, 2017. Carrier's File No. 35-17-0044. General Chairman's File No. 17-069-BNSF-154-TC. BRS File Case No. 15959-BNSF. NMB Code No. 173.”

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 Organization maintains the Carrier committed a grave procedural violation during the investigation phase of this case when the hearing officer conferred with the Carrier's key witness, Supervisor Signals Jonathan Warlof, before taking his testimony. (TR 17, 42) The transcript of investigation shows that the Organization objected and offered a photograph of the hearing officer speaking with Warlof prior to the start of the investigation. The Board agrees that this conduct was improper. The question therefore becomes whether it was prejudicial to the Claimant's case.

The Carrier provided a copy of the receipt for the lunch in question which clearly showed that a Sierra Nevada beer was ordered. The Organization provided statements from restaurant servers stating that it is very easy to make the mistake of putting a Sierra Nevada on the tab when a Sierra Mist was ordered. We are not persuaded by this argument; it would require pure supposition that the server made a mistake when there is nothing to support that conclusion.

The receipt is not the only evidence of the Claimant's drinking on duty. His statement is provided below:

Exhibit # 8

9-15-17

At 0730 John called and said he need to talk to me, I said I was already on my way to Big Stone to do some wiring I asked if he want we to turn around, he said no I'll meet you out there.

When John met me, he got in to my truck to talk, he first brought out his phone and pulled up concur. He told me that the two drinks at Twin Peaks costed too much and I would have to pay for one myself, more than \$50 is too much for a meal he said. I told him no problem, he told me to pay for it and then get the confirmation code and enter it in the comments on the expense report. Next, he asked if I had lunch at Q39, I answered yes and he ask if I had a drink at lunch which I answered yes. Next, he got quiet, I ask is there a problem with that, he said yes said he would have to talk with Steve what to do, I asked why. He responded that it was in violation of a company policy, I responded with a confused OK then he got out. I went back to work and 30 min. later John calls and said he is coming back it pull me out of service so I packed up and locked up the truck rode back to his office. When we got back he had the investigation notice ready for me to sign.

The Claimant's question "Is there a problem with that" belies any notion that by "drink" he was referring to a non-alcoholic drink. There would be no reason for him to suspect a problem had he been drinking Sprite. This admission, coupled with the receipt, is sufficient to constitute substantial, if not convincing, evidence of a violation of the Carrier's Policy regarding drugs and alcohol. The Carrier has met its burden of proof without the need for testimony from Warlof, hence the Claimant has not been prejudiced by any discussion between Warlof and the hearing officer before the investigation began.

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 28th day of January 2020.