

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44847
Docket No. MW-47162
23-3-NRAB-00003-210836**

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

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. M. Lawrence, by letter dated June 10, 2020, for violation of MWOR 1.5 Drugs and Alcohol was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-6423-J/11-20-0416 BNR).**
- (2) The appeal* as presented, by letter dated October 14, 2020, to General Director Labor Relations Joe Heenan shall be allowed as presented because said claim was not disallowed by Mr. Heenan in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant M. Lawrence shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.**

***The initial letter of appeal will be reproduced within our initial submission.”**

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.

Factual Background:

On February 6, 2020, the Carrier instructed the Claimant to submit a sample for a drug and alcohol test. The Claimant immediately complied with the directive and submitted a breathalyzer sample, which appeared to indicate that he was above the allowable amount of alcohol (.029). Subsequently, the Claimant submitted a follow-up sample, which also read above the allowable amount.

Following Investigation, the Carrier issued a letter dated June 10, 2020 informing the Claimant that he had been found in violation of Maintenance of Way Operating Rule (MWOR) 1.5 Drugs and Alcohol. He was immediately dismissed from service.

Position of Organization:

The focus of the Carrier's case is the egregious denial of a fair and impartial hearing by the Hearing Officer, Roadmaster J. Paquette. It points out that he took on multiple roles as charging officer, witness and judge; indeed, he personally removed the Claimant from service before signing the letter dismissing him. The Organization notes that a person who bears testimony cannot be considered neutral under any possible set of circumstances. Not only that, Paquette discussed the case with a witness prior to hearing. It notes that the taint of private discussions with witnesses is not curable based on topic of conversation, and cites a series of awards supporting this principle.

On the merits, the Organization notes that the test documentation of the gas tank of the breathalyzer had been manually altered; the breathalyzer was not properly calibrated; the Carrier alternated between saying the test was FRA (federally mandated precluding a blood test) and random; the Claimant was unfairly denied the opportunity to give a blood sample; and the Claimant's test the numbers should have dropped over time but they did not, supporting a finding that the machine's analysis cannot be trusted.

Position of Carrier:

The Carrier maintains the Claimant had no right to a blood test because the test was random FRA; the Claimant's breathalyzer test scored a positive result of 0.029 and was subsequently confirmed; the difference between the accuracy verification of .042 and the gas tank value of 0.40 was simply due to clerical error; the hearing officer only discussed the process of the investigation with the witness; and the other procedural allegations involved no prejudice to the Claimant.

Analysis:

It has been repeatedly and consistently determined that if a hearing officer discusses a case with a witness *ex parte* prior to hearing, this action precludes any finding of a fair and impartial hearing. This is well established in the precedent shared by the parties.

In this case the hearing officer did just that. Paquette asserted he was only discussing the process. Of course, the "process" is a concept that could be subject to variable interpretation. Even if the hearing officer discussed nothing more than the structure of a hearing, he gave a Carrier witness an advantage the Organization's witnesses did not have. There is no way such an exchange can occur without destroying any and all perception of a fair and impartial proceeding as required by Rule 40A.

Insofar as this finding dictates the resolution of the claim, it is not necessary for the Board to address other arguments made in the case.

Claim sustained in accordance with findings. The Claimant shall be offered reinstatement subject to the Carrier's return to service policies. Additionally, Claimant must meet with an Employee Assistance Counselor and complete prescribed treatments,

if any, as part of his return to work process. The Carrier shall remove the discipline from the Claimant's record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

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 10th day of March 2023.