

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

**Award No. 30031  
Docket No. 49912  
20-1- NRAB-00001-190042**

The First Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Locomotive Engineers and Trainmen  
PARTIES TO DISPUTE: (  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“It is hereby requested that Engineer S. C. Jackson’s discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of Dismissal be removed from his personal record, resulting from the investigation held on January 9, 2018.”**

**FINDINGS:**

The First 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 September 3, 2017, Claimant S. C. Jackson was working as a Conductor and was at the away from home terminal at Belen, New Mexico. Around midnight, the Claimant’s Engineer approached the Trainmaster and asked for the Claimant’s phone

number, noting that it was past their duty time and he did not know the Claimant's whereabouts.

The Trainmaster called the Claimant and informed him he was late. The Claimant said he had been tending to some sutures and he was on his way. During the conversation, the Trainmaster noted that the Claimant's speech was slurred. When the Claimant arrived at the depot, the Supervisor again noted slurred speech as well as bloodshot eyes and unusual behavior. Another Carrier Officer was brought in to observe the Claimant, and he also noted unusual behavior. Based on their observations, the officers informed the Claimant he would be tested for drugs and alcohol.

The Claimant tested negative for alcohol. However, he did not provide a urine sample to be tested despite drinking 40 ounces of water over a three-hour period. Consequently, by letter dated September 28, 2017, the Claimant was notified to attend an Investigation regarding his alleged refusal to test as a result of his inability to provide a sufficient urine specimen as required for the reasonable suspicion drug and alcohol test and his alleged violation of GCOR 1.5 - Drugs and Alcohol and BNSF Policy, Rules and Procedures on the use of Alcohol and Drugs. Following multiple postponements, the Investigation was held January 9, 2018. By letter dated January 30, 2018, the Claimant was notified that he had been found to be in violation of the cited Rule and policy based on his refusal to test, and he was dismissed from service.

The Organization appealed the Claimant's discipline assessment pursuant to the applicable collective bargaining Agreement, but the parties were unable to resolve the matter on the property. The case now comes before us for resolution.

The Organization challenges the discipline assessment on both procedural and substantive grounds. With respect to the procedures employed, the Organization takes exception to Carrier officers taking multiple roles in issuing discipline in that the Hearing Officer also issued the discipline assessment. It further alleges that the Hearing Officer was biased against the Claimant as demonstrated by his asking leading questions of the Carrier witnesses and his failure to call the sample Collector as a witness at the Investigation. The Organization contends that the absence of that witness deprived the Claimant of a fair and impartial Investigation.

With respect to the merits of the case, the Organization asserts that the Carrier did not prove the Rule violations with which he was charged. It maintains that the

evidence supports the conclusion that the Claimant suffered from a medical condition, constrictor of the urethra or tight meatal stenosis, which prevented him from being able to urinate normally. It further states that the Claimant was taking medications for anxiety and chronic pain, including morphine and Oxycodone, which caused him to suffer from urinary retention.

The Organization also points to a report from the Claimant's doctor which opined that the Claimant's inability to urinate was exacerbated by the conduct of the tester who was counting the time the Claimant had to produce the sample. The Organization states that the collector's conduct was intimidating and unprofessional and that it impacted the Claimant's ability to provide a sample. It concludes that the Claimant was not attempting to avoid the test but that his medical condition prevented him from completing it.

Lastly, the Organization takes the position that the test was not based on reasonable suspicion and that the Carrier Officers did not have the right to initiate it. It states that being tardy is not sufficient cause to conduct such testing and that the Carrier Officers' description of the Claimant's conduct in showing them his stitches as "flashing" was inflammatory and prejudicial. The Organization maintains that the Claimant was simply showing the officers his stitches to corroborate his earlier statement and that his behavior did not give rise to cause for testing.

The Organization concludes that under the circumstances of the case and considering the Claimant's years of service, the Carrier's decision to dismiss him was arbitrary and unreasonable. It asserts that even if the Carrier had proven the Claimant was guilty of violating the cited Rule and policy, the matter did not rise to the level of immediate discharge, and it requests that the Claimant be reinstated to service.

The Carrier, on the other hand, maintains that the evidence and testimony developed at the investigation unequivocally prove that the Claimant refused to participate in the drug screen. It also asserts that there were no procedural flaws in the case, and it states that the Claimant was properly directed to test based on the observations of the managers. The Carrier urges that the discipline assessment was warranted in light of the seriousness of the offense.

The Carrier first states that there is no procedural violation when a Hearing Officer issues discipline. It notes that the Hearing Officer has heard the live testimony

and is able to make credibility determinations based on direct observation. The Carrier points to prior awards which have upheld that practice. It also denies that the transcript reflects bias on the part of the Hearing Officer.

With respect to the merits of the case, the Carrier observes that there is no question that, despite drinking 40 ounces of water and being given three hours to complete the test, the Claimant did not provide the necessary sample. As for the reason he did not do so, the Carrier points out that the Medical Review Officer (MRO) who reviewed the test and medical documentation found no medical evidence to explain the Claimant's failure to provide a urine sample. It notes that the Claimant was properly examined and that the findings did not support a medical condition which would prevent him from voiding, but rather the reports indicated that the Claimant could in fact void. The Carrier also asserts that a Collector must be mindful of employees delaying the process, and it contends that neither the Claimant nor his representative indicated prior to the Investigation that they desired the Collector to be present as a witness.

The Carrier also refutes the Organization's argument that testing should not have been ordered in the first place because being tardy does not establish probable cause. The Carrier maintains that this was not an instance of an employee reporting for work a few minutes late and then being unjustly subjected to a drug screen. Rather, it points out that two Carrier Officers observed signs and symptoms including slurred speech and strange behavior, and that they justifiably determined a test was warranted based on their observations.

Finally, the Carrier urges that the discipline assessed is appropriate. It points out that refusal to submit to required testing for drugs or alcohol is defined as a stand-alone dismissible violation under its Policy for Employee Performance Accountability (PEPA), and that refusing to provide a urine sample has been found to be grounds for dismissal in prior awards. It maintains that the Claimant has broken the bonds of trust necessary for the employment relationship and that it should not be expected to continue Claimant's employment in such circumstances. The Carrier requests that Claimant's dismissal be upheld.

Our review of the record reveals no procedural bar to our consideration of the merits. We agree that there is no inherent prejudice when the Carrier Officer who conducts the Investigation and observes the witnesses testify issues the discipline based

on that observation. And with respect to the conduct of the instant Investigation, we find no indication that the Hearing Officer was biased or prejudiced against the Claimant. Furthermore, in light of the medical evidence submitted and the undisputed fact that the Claimant did not provide a sample, we find the absence of the Collector as a witness did not prejudice the Claimant such that the discipline assessment should be disturbed.

We likewise find no basis to conclude that the Claimant was improperly tested. The testimony of both Managers was consistent regarding the Claimant's slurred speech, both on the telephone and in person. The also observed bloodshot eyes and unusual behavior, such as the Claimant appearing to nod off during part of their discussion. The Managers also believed his behavior was unusual in the manner he exposed his chest to them to prove he had stitches. Although the Claimant's description of how he showed the Managers his stitches conflicted in some ways with the Managers' description, such variances are not sufficient for us as an appellate body to find that the Managers did not have reason to test the Claimant.

While there also appears to be some conflict in medical opinion regarding whether there was a legitimate medical reason for the Claimant's inability to provide a sample, we find no reason to discount the MRO's conclusion, which was based on reports of medical examinations, that the Claimant's inability to provide a sample in the circumstances was without medical cause. The Carrier is required to produce substantial evidence to support charges in a discipline case such as this, and we find that it has met that standard here.

Having found that the Rule and policy violation was established, the Board turns to the level of discipline imposed. As mentioned above, the Organization urges the Board to reduce the discipline assessed as being harsh and excessive. To overturn the Carrier's assessment, however, would require the Board to find that the Carrier acted arbitrarily or capriciously. We note that under PEPA, a refusal to test is considered a stand-alone dismissal offense. Prior awards have also found that such conduct is a very serious matter and that dismissal is warranted in such circumstances, and we find the same considerations applicable here. In light of all the circumstances, we cannot find that the Carrier's judgment was arbitrary or capricious, and we will not substitute our judgment for the Carrier's.

**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 First Division

Dated at Chicago, Illinois, this 29th day of January 2020.