

PUBLIC LAW BOARD NO. 4901

AWARD NO. 165

CASE NO. 165

**PARTIES TO
THE DISPUTE:**

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(ATSF Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied

DATE: January 5, 2002

STATEMENT OF CLAIM:

“Request in behalf of Fresno of Old Arizona Division Conductor D. L. Smeltzer for the removal of alleged violations of Rules 1.5 of the General Code of Operating Rules, BNSF Version with Revisions No. 1, in effect April 1, 1998, and Sections 1.0, 2.0, 2.1.3, 2.2, 2.2.1, 7.0 and 12.0 of the BNSF Policy for use of Alcohol and Drugs effective October 15, 1996, from his personal record and for his reinstatement to the service of the Burlington Northern and Santa Fe Railway Company, Coast Lines with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits beginning on February 10, 1999, and continuing until returned to service as a result of the Formal Investigation conducted on February 26, 1999.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Preliminary screening of a urine sample Claimant provided on January 30, 1999 for random drug testing revealed evidence of sample adulteration. A nitrite level of 4,108 µg/ml was detected, which was well in excess of the 500 µg/ml upper limit of the normal physiological range. Such tampering is, by Carrier’s policy, deemed to be a refusal to test and constitutes grounds for dismissal.

Both parties have raised procedural objections in this matter. Regarding those advanced by the Organization, our review of the record fails to disclose any shortcomings of significance. The filling of multiple roles by the hearing officer is not, *per se*, objectionable. As long as the various actions satisfy the requirements of fairness and impartiality, they are permissible in that they reflect

the staffing realities of the disciplinary process the parties have chosen to use.

In this case, the Organization takes exception to the fact that the hearing officer also made the disciplinary decision and then denied the Organization's initial appeal. But the Organization misdirected its appeal to him instead of the Division Superintendent as the Agreement required. In essence, the Organization invited the Terminal Superintendent, who had served as hearing officer, to reply to the appeal. For this, the Carrier cannot be faulted.

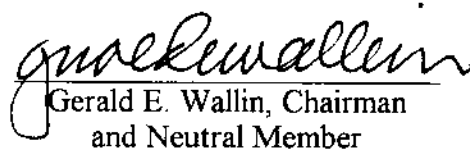
The bulk of the Organization's procedural objections were not raised until after the investigation. For example, no material exceptions to the testing protocol were taken at the hearing. It is well settled that such procedural objections must be raised at the first opportunity to do so or they are deemed waived. Such is the case here.


Turning to the Carrier's objection, it contends the Organization breached the time limit requirement for appealing to the Division Superintendent by misdirecting its appeal to the Terminal Superintendent. Once again, as with most of the Organization's objections, Carrier did not raise the error at the first opportunity to do so. Consequently, the objection was waived.

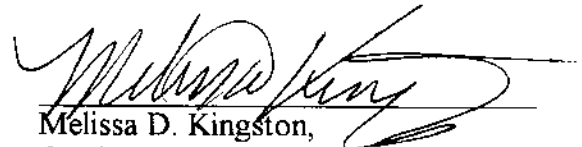
On the merits, the record is found to contain substantial evidence in support of the charge that Claimant adulterated his urine sample. No evidence in the record properly establishes an alternative explanation for the extraordinarily high nitrite level detected. Accordingly, we must deny the Claim.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


P. L. Patsouras,
Organization Member


Melissa D. Kingston,
Carrier Member