Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13871
Docket No. 13751
05-2-04-2-29

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Metro North Commuter Railroad Company

STATEMENT OF CLAIM:

"1. That the Carrier acted improperly when it subjected Electrical Foreman Edmund Roberts, Jr. (appellant), to breath alcohol testing on December 22, 2003. Appellant was tested in connection the Carriers Follow-Up Program. Appellant was not subject to Follow-Up or any other testing on December 22, 2003. Therefore the improper test results should be discarded.

2. The Carrier failed to consider expert testimony as to why the Appellant may have produced a positive test result during the improper breath alcohol test on December 22, 2003. The Carrier acted arbitrary and capriciously when it dismissed Mr. Roberts in all capacity."

FINDINGS:

The Second 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 Claimant, E. Roberts, Jr., an electrical foreman in service with the Carrier, was dismissed as a result of a breath alcohol test on December 22, 2003.

The Organization argued that on January 17, 2001 the Claimant was subject to a DOT random alcohol testing at which time he tested positive for alcohol. The Claimant signed an SAVE substance abuse waiver letter. He complied with all requirements and was returned to duty subject to random testing for up to two years. The Claimant was not employed in the classification subjecting him to random testing. The Claimant asked for and received a blood test within one and one-half hours which was negative for alcohol.

Under the terms of the Collective Bargaining Agreement and the SAVE agreement the Claimant was not subject to either follow-up testing or random testing on December 22, 2003. The Carrier admitted the test was classified as a follow-up test and nearly one full year past the terms of the SAVE agreement. The Carrier took the position that the Claimant did not successfully complete the treatment program which is clearly not true. The time limits set forth in these agreements are binding on both Parties no matter how burdensome. Other boards have so found and were cited.

The SAVE and waiver agreement provide for two years of follow-up testing. The Carrier does not have unilateral authority to change these terms except at the bargaining table. The test was non-DOT hence not federally required. The testing was in violation of Rule 8-H-1(a) of the controlling agreement as well as the provisions for testing under the SAVE agreement. Therefore, the improper test must be disregarded.

The Claimant for his part stated that he had consumed up to 12 beers while watching TV during the evening of December 21st. He also stated he had not consumed any alcohol after that time before reporting to work on December 22, 2003. There was no violation of the Carrier's operating procedure. The policy states that alcohol cannot be consumed within four hours of duty time. The Carrier admitted that the Claimant did not appear that he was under the influence of alcohol. He did not have alcohol on his breath. The result of the blood alcohol test showed no trace alcohol.

The most likely scenario was that the Claimant consumed excessive amounts of alcohol on December 21, 2003 and still had low levels of alcohol on the morning of December 22. The Carrier completely disregarded all testimony and medical opinions. The Carrier acted arbitrarily in testing the Claimant without reason and in capriciously finding the Claimant guilty as charged, therefore, the claim should be sustained in its entirety.

The Carrier argued that the Organization must show that the Carrier acted unreasonably in finding the Claimant guilty. At the investigation the Carrier proved by substantial and credible evidence that the Claimant was guilty of the charges and that the correct discipline was applied. The evidence at trial showed that on January 17, 2001 the Claimant violated the Carrier's substance abuse policy in that a breath sample he provided was positive for alcohol. The Claimant was given notice of this on January 17, 2001 and was given two Breathalyzer tests which tested positive. The Claimant signed a waiver agreement under the substance abuse policy of the Carrier.

On December 22, 2003 the Claimant was in the EAP after care and follow-up program during the required five year period. The Claimant again was tested for alcohol twice with readings of .029 and .026.

The Carrier would note that the Claimant stated that he had consumed up to 20 12-ounce beers the night before. The Claimant was informed that he was to enroll in the Carrier's EAP program and was subject to unannounced drug and alcohol tests until such time that treatment was no longer necessary. The Claimant was given notice of possible random testing. The Claimant at the investigation that he was subject to random testing. The Carrier appropriately discounted the Claimant's condition of Candidiasis as a factor and a positive Breathalyzer reading. The record shows that the Carrier did appropriately discount this theory. Likewise, it was appropriate for the Carrier to discount the Claimants alleged condition of hyperthyroidism as a factor. The only factor is that the Claimant drank a large number of beers within the start of his shift.

The Organization argued that the breathalyzer test is inaccurate. This was refuted by testimony at the investigation. Likewise, the Carrier was correct in determining that the testimony of Stanley Broskey, Phd. does not exonerate the Claimant. Dr. Broskey's testimony was in the vein of raising reasonable doubt that would be appropriate at a criminal trial. In addition Dr. Broskey did not examine

the Claimant. The Claimant testified that he did not do any of the things that could skew the test.

Upon complete review of the evidence the Board finds that the facts here are not unusual. The Claimant is in a safety sensitive position and he did test positive for blood alcohol. The Claimant did sign a waiver and participated in the Carrier's EAP program in lieu of discharge. The alcohol test was appropriate under Carrier Policy. Even though the Claimant became a foreman, he is still subject to this testing.

By his own admission the Claimant admitted that he had consumed a large number of beers the night before the start of his shift. The Claimant should know that this is inappropriate behavior whether the alcohol would metabolize prior to the start of his shift or even if for whatever reason the alcohol did not completely metabolize, although it should have by the start of his shift. The Carrier has a strong case. The Claimant was given a second chance.

The Board, however, finds that the overall record of this case, particularly the clear blood test which took place within less than two hours of the positive breathalyzer test, has led the Board to conclude that the Claimant does deserve another chance and that he is ordered to be referred to the EAP program once again. The Claimant should not look at this award as in any way justifying the large consumption of beer the night before he returned to work. Given the Claimant's problem of record, the Claimant should not be drinking any beer at any time, whether before or after work. He has shown in the past that he is unable to control this situation. If the Claimant is cleared by the EAP, which would include a return to work physical, the Carrier will then be ordered to return the Claimant to the position which he held prior to his dismissal on a last chance basis. All other claims including back pay are specifically 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 Second Division

Dated at Chicago, Illinois, this 22nd day of December 2005.