Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38999
Docket No. SG-39619
08-3-NRAB-00003-60447
(06-3-447)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Massachusetts Bay Commuter Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Massachusetts Bay Commuter Railroad:

Claim on behalf of R. D. Morris, for him to be restored to his previous position with compensation for all time and benefits lost and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 57, when it issued the harsh and excessive discipline 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 July 14, 2005 and concluded on September 17, 2005. Carrier's File No. MBCR-BRS-10d/0905. General Chairman's File No. JY321010130-120059. BRS File Case No. 13633-MBCR."

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 Claimant began his railroad employment with Amtrak in its Signal Department in 1980. Massachusetts Bay Commuter Railroad Company succeeded Amtrak as operator of the commuter railroad system for the Massachusetts Bay Transit Authority, at which time the Claimant became a new employee of the Carrier effective July 1, 2003.

The Carrier's Code of Conduct contains a Drug and Alcohol Policy. The Policy expresses "zero (or no) tolerance for drug use" and prohibits employees "from possessing or being under the influence of alcohol beverages, intoxicants, narcotics or mood changing substances, including medication which may cause impairment, while on either MBCR or MBTA property, and/or while subject to duty or reporting for work." In addition, the Carrier has a separate Drug and Alcohol Policy, also called Rule G, that provides in pertinent part as follows:

> "1. No employee (covered and non-covered service) shall use, possess or be impaired by alcohol or any controlled substance while subject to, reporting for, or on duty; while in the workplace; while in recognizable MBCR uniform; while operating any MBCR vehicle at anytime; or while conducting business for or representing MBCR.
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> 2. No employee may use alcohol for whichever is the lesser of the following periods:
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> *Within four (4) hours of reporting for duty
> *After receiving notice to report for duty
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> * * *

7. Any employee tested for alcohol whose test result indicates an alcohol concentration of .02 or above may not perform or continue to perform service. The employee will be medically disqualified from performing further service and the employee will be charged with violating MBCR company policy. If eligible, the employee may sign a waiver and enter the Employee Assistance Program (EAP); if the employee elects not to enter a mandatory EAP, or produces a second result of .02 or above on a company or Federal test will result in a disciplinary hearing in accordance with applicable collective bargaining agreements and disciplinary action up to and including termination."

The Carrier introduced into evidence an Employee Policy Acknowledgement Form signed by the Claimant on May 15, 2003, which acknowledged receipt of a number of policies including the Code of Conduct and the Drug and Alcohol Policy and which included the statement, "I understand that these policies are stated as MBCR's policies and practices in effect on my first day of employment, July 1, 2003."

On March 14, 2005, the Claimant was given a return to service drug and alcohol test and tested positive for alcohol. In lieu of an Investigation for alleged violation of the Drug and Alcohol Policy and the Code of Conduct, the Claimant entered into an MBCR "Rule G" Waiver Agreement, which he and a Management Supervisor signed on April 1, 2005. An EAP counselor signed the document on April 5, 2005, indicating the counselor's first contact with the employee. Following are some of the provisions of the Agreement:

"I freely admit that I violated Company alcohol and/or drug use prohibitions as charged.

I understand I am being withheld from service without pay . . . pending my successful completion of treatment as recommended by the Employee Assistance Program Counselor (EAP) or his/her designated representative (a qualified Substance

Abuse Professional's (SAP) evaluation is required for an employee who has violated DOT drug and alcohol regulations). I agree to contact EAP/SAP Counselor within 10 days from the date I sign this waiver for a face-to-face assessment and clinical evaluation and to follow his/her recommended course of education and/or treatment. Should I fail to do so, I will accept discipline of dismissal for the above violation of Rule G.

I understand that after successfully completing the initial treatment plan, as determined by the EAP/SAP Counselor, I will be dismissed from service unless I comply with the following requirements:

1. I must have a negative drug test and/or alcohol test result with an alcohol concentration of less than .02 before resuming my railroad duties (DOT test if violated DOT prohibitions for drug/alcohol use).

2. I must adhere to the written follow-up drug and/or alcohol testing plan and continuing care plan prescribed by the EAP/SAP Counselor.

3. I must provide a negative drug and/or alcohol test specimen (DOT test if violated DOT prohibitions for drug/alcohol use) for at least six (6) unannounced follow-up tests during the first 12-month period of active service following my return to duty. A locomotive engineer must undergo six (6) unannounced drug and six (6) alcohol tests for the 12 months following the employee's return to service.

4. I further understand that if I test positive in any future drug/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all MBCR service.

5. I must maintain periodic contact with the EAP/SAP Counselor and participate in follow-up testing for a period of up to 48 months after the first 12 month period after successfully completing the initial treatment program as prescribed by the EAP/SAP Counselor."

Shortly after the Claimant clocked in for work on June 13, 2005, he was sent for a follow-up test pursuant to the Rule G Waiver Agreement. The test had originally been scheduled for June 9, 2005, but was not given on that date. A breath alcohol test using an Alco-Sensor IV breath analysis instrument manufactured by Intoximeters, Inc. was administered to the Claimant on June 13 by a certified Breath Alcohol Technician employed by Compliance Network of New England. The test result showed an alcohol concentration of .068 as of 8:06 A.M. A confirmation test by the same Technician on the same instrument resulted in a reading of .069 alcohol concentration as of 8:22 A.M.

As a result of the positive alcohol test, a notice dated June 16, 2005, was served upon the Claimant directing him to appear for a formal Investigation on June 23, 2005, of the following charge:

"Charge

It is alleged that you violated the Rule G Waiver Agreement you signed on April 1, 2005, the Obeying Instructions and the Drug and Alcohol Policy sections of the MBCR Code of Conduct and the MBCR Drug and Alcohol Policy when, on June 13, 2005, you provided a positive (above .02) breath sample during an unannounced follow-up drug and alcohol test conducted during your working hours in connection with the Rule G Waiver that you signed on April 1, 2005. The confirmation test, which was conducted only a short time thereafter, produced an even higher positive result."

After one postponement at the request of the Organization, the Investigation commenced on July 14, 2005, at the Carrier's Cobble Hill facility in Somerville, Massachusetts. Because of the Organization's objection to telephonic testimony by the certified Professional Collector Breath Alcohol Technician who tested the Claimant, the Hearing Officer agreed to recess the Investigation, after some testimony had been taken, until the Technician would be available to testify in person. The Investigation reconvened on September 17, 2005, on which date it was concluded.

The Technician testified that when the Claimant came into the mobile test vehicle where the test was performed, she could smell alcohol on him immediately as he was standing next to her. When the Claimant saw the result of the first test, the Technician testified, he was very upset. He said that he was going to lose his job and began to use profanity. When the result of the confirmation test is higher than the first, or screening test, the Technician stated, it usually indicates recent drinking.

The Signal Roadmaster who supervised the Claimant testified that he was notified on the morning of June 13 to arrange the follow-up drug and alcohol screening for the Claimant. After the Technician notified him that the Claimant had tested positive, he removed the Claimant from service as medically disqualified. The Roadmaster testified that he observed the Claimant, that he did not see anything wrong with him, that he did not smell alcohol, that the Claimant's eyes were not glassy or glazed, and that the Claimant seemed fine to him.

Approximately 36 minutes after the Claimant's confirmation test on June 13, the Technician performed an accuracy check on the same instrument she used to test the Claimant, and the result of the test showed that the machine was working accurately. When the testing instrument prints out the result of a breath test for alcohol, it automatically includes the date and the time of the test, the serial number of the machine, and the test number. The printouts of the two breath-alcohol tests of the Claimant and of the accuracy check were introduced into evidence. They showed that the serial number of the instrument used for the accuracy test was identical to the serial number of the instrument used for the screening and the confirmation tests of the Claimant. They also showed that the test numbers of the

three tests were in sequence: 557, 558, 559. All three printouts bore the date 6/13/2005, and, in the order of the tests, the times shown were 8:06, 8:22, and 8:58.

The Claimant testified that he has worked for the railroad for 25 years and that when he came over to the Carrier in spring of 2003 he received a copy of the Code of Conduct. He stated that he understood the Carrier's Rules regarding drugs and alcohol as detailed in the Code of Conduct and the Drug and Alcohol Policy. He acknowledged that he signed the Rule G Waiver Agreement on April 1, 2005, and that he read the Agreement before he signed it. In addition, he stated, at the time of signing the provisions of the Agreement were explained to him, including the consequences of failing to comply with the policy. He was aware that a further positive test would result in his dismissal or removal from service.

The Claimant testified that he reported for work on June 13, 2005, and submitted to a breath test. He was advised immediately of the results, he acknowledged, and did not dispute them. Asked if he had any explanation for the positive test result, the Claimant testified that he had a couple of drinks the night before and went to bed at 9:30. He did not think that there would be a problem with the test, he stated.

The Hearing Officer issued his decision by Decision Letter dated September 22, 2005, addressed to the Claimant. The Letter stated that the Hearing Officer "did not find any reason to question the testing process, the collector qualifications or her observations, or the test results." He stated that the level of alcohol found "clearly appears to contradict [the Claimant's] suggestion of having only had a couple of drinks the night before and observing a 9:30 p.m. bedtime." The levels of alcohol of .068 and .069 found in the tests, the Hearing Officer stated, "were well above the maximum tolerance level of .02 defined in the MBCR Drug and Alcohol Policy" and constituted a positive test.

The Hearing Officer addressed the question of the testing not occurring on the target date of June 9, 2005, or the Claimant's subsequent shift. The Hearing Officer stated that the testing actually occurred on the shift after the Claimant's subsequent shift and that "due to the lateness of the notification to the Department, this slight lapse appears reasonable, especially given that the Department had

responsibility for making all arrangements and there was a weekend involved" during which the Claimant did not work. The Hearing Officer found it especially important that even with the delay the testing was "in full compliance with all FRA [Federal Railroad Administration] policies and procedures for testing."

The Hearing Officer concluded his Decision Letter with the following Findings:

> "Findings:
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> Based on all of the above, I find that the Company proved you were in violation of the Rule G waiver that you signed on April 1, 2005 and, as such, the Obeying Instructions section of the MBCR Code of Conduct. I also find that you violated the MBCR Drug and Alcohol Policy, specifically paragraphs 1 and 7 under MBCR Prohibitions, and the corresponding section of the Code of Conduct as specified in the Notice of Formal Investigation dated June 16, 2005.
>
> I found nothing in the record that would serve to mitigate your responsibility for the positive result of the Breath-Alcohol Test conducted on June 13, 2005."

As a result of the Hearing Officer's findings, the Claimant was dismissed from service.

The Organization contends that the "Carrier dismissed the Claimant without the benefit of a fair and impartial hearing due to an improperly performed drug and alcohol test." The denial of a fair Hearing, the Organization asserts, violated Rule 57 of the parties' Agreement. The Organization asserts the following in support of its position that the Claimant was not provided a fair Hearing: (1) the Carrier did not produce the original breathalyzer that was used on June 13, 2005, for testing the Claimant; (2) the Technician testified that she smelled alcohol on the Claimant, but the Supervisor who spent the morning with the Claimant did not smell any alcohol; (3) the Claimant was in compliance with the Carrier's Rules and policies that were in effect at the time of the test.

In its Submission to the Board the Organization takes the position that the alcohol breath tests performed by the Technician were invalid because the Technician performing the test had not confirmed that the testing device was properly calibrated as required by the Federal Railroad Administration regulations, specifically 49 CFR Subpart D. The Organization cites testimony by the Technician that she never checked for calibration before performing a test to make sure the instrument was calibrated. It makes the contention "that the test that was performed on the Claimant that ultimately determined his fate of dismissal should not have been applied until it was deemed to be accurate."

The Organization argues that the Carrier's denial of the Organization's request to produce at the Hearing the instrument that was used to test the Claimant for alcohol deprived it of the opportunity to determine whether the machine was truly accurate. The denial, the Organization asserts, "leads one to believe that there could possibly have been a problem with the testing device, and thus cannot be accepted as proof of the accuracy of the readings that it recorded."

The testimony of the Technician that she smelled alcohol on the Claimant, the Organization argues, indicates that she had already determined beforehand that the Claimant would test positive because the Claimant's Supervisor, who, the Organization asserts, "spent time with the Claimant from the time he arrived at work," testified that he did not smell any alcohol. The Organization further asserts that the Technician was a hostile witness towards the Organization, and that this should be taken into account in assessing her credibility. Finally, the Organization contends that the Carrier failed to meet its burden of proof. It requests that the Carrier be required to reinstate the Claimant and compensate him for all lost time.

The Organization cited no federal regulation which requires the technician who performs a breath alcohol test to check the calibration of the machine. The Technician who tested the Claimant testified that it is not her responsibility to calibrate the testing instrument, that that responsibility rests with the owner of the company. The Carrier presented unchallenged testimony by the Operations Manager of Compliance Network, who was the Technician's former supervisor at that company, that the Technician does not know how to calibrate the testing

instrument, that you have to be a certified calibration technician to be able to do that on that device.

The Operations Manager identified the Quality Assurance Program ("QAP") for the Alco-Sensor IV, which, with regard to calibration, states, "It is highly recommended that the instrument be inspected by a certified technician at least once every two years of service." The Carrier also introduced a letter dated April 29, 1996, to Intoximeters, Inc., manufacturer of the Alco-Sensor IV, from a Highway Safety Specialist of the United States Department of Transportation, National Highway Traffic Safety Administration stating that the QAP for the Alco-Sensor IV breath analysis instrument had been approved as meeting the requirements of 49 CFR Part 40, "Procedures for Transportation Drug and Alcohol Testing Program."

The Operations Manager for Compliance Network also identified the factory recertification certificate showing that the Alco-Sensor IV instrument used to test the Claimant was recalibrated in July 2004, which was less than one year prior to the date the Claimant was tested on June 13, 2004. The Carrier also introduced into evidence the log book for the instrument showing that, without fail, it had passed numerous accuracy checks following the July 2004 recalibration. Under these circumstances there was no requirement for the Carrier to recalibrate the instrument between the time of its last recalibration in July 2004, and time it was used to test the Claimant on June 13, 2005. The Board finds that the Carrier established by substantial evidence that the breath analysis instrument used to test the Claimant on June 13, 2005, was properly calibrated and that the results of the screening and the confirmation tests were accurate. The Organization has not established that the knowledge or lack thereof, on the part of the testing Technician regarding the details of the calibration of the instrument is a basis for invalidating the test results or the discipline issued to the Claimant. From the Technician's testimony it is clear that she assumed that her employer would provide her with a properly calibrated instrument, and she was correct in that assumption.

The Organization argues that the failure to produce the actual instrument that was used to test the Claimant prevented a determination of whether the machine was truly accurate. The Organization has not explained how production of the testing instrument on September 17, 2005, when the Hearing was held would

permit a determination of whether or not the device was accurate on June 13, 2005, when the breath tests of the Claimant were conducted. The accuracy of the testing instrument as of June 13, 2005, was established by evidence showing that it was recalibrated in July 2004, that all accuracy checks performed after the recalibration until the Claimant was tested showed the device to be accurate, and that an accuracy check performed on June 13 shortly after the testing of the Claimant found it to be accurate.

The testing instrument used to test the Claimant on June 13 was not a portable device but was installed in the mobile testing vehicle. On the date of the Hearing the vehicle was in New Hampshire while the Hearing was held in Somerville, Massachusetts. There is no evidence that the Organization requested to have the testing instrument at the Hearing until the Hearing was well underway on September 17, 2005. The Operations Manager of Compliance Network happened to have in his vehicle an Alco-Sensor IV testing instrument very similar to the one used to test the Claimant, and the Hearing Officer instructed the Operations Manager to fetch the instrument from the vehicle so that the Technician could demonstrate how she performed the test on the Claimant. The Hearing Officer asked the representative of the Organization if the substitute portable device would suffice, and the representative answered that it would. The Hearing Officer acted within his discretion in denying the request to bring the mobile test vehicle from New Hampshire to the Hearing site. There has been no showing that the Claimant was in any way prejudiced by the fact that the actual testing device was not available at the Hearing.

The Organization argues that the Technician was not a credible witness because she testified that she smelled alcohol on the Claimant's breath while the Claimant's Supervisor said that he did not smell alcohol. It is well known that people differ as to the keenness of their sense of smell. In addition, the Technician was standing close to the Claimant in the confined quarters of a mobile testing vehicle. The record does not disclose whether the Supervisor was with the Claimant indoors or outdoors or how close physically they were to one another. Moreover, the actual test results would seem to lend credibility to the Technician's testimony that she smelled alcohol on the Claimant. The Board finds no basis for questioning

the credibility of the Claimant based on her testimony that she smelled alcohol on the Claimant.

The Organization also claims that the Technician demonstrated hostility towards the Organization and the Claimant. The Board carefully read the transcript and discerned no evidence of hostility on the part of the Technician toward either the Organization or the Claimant. She was at all times respectful to those questioning her and cooperated with the Organization by agreeing to remain for an hour after her original examination and cross-examination were completed in the event the representative of the Organization had additional questions to ask her. Despite the fact that, according to her testimony, she found it stressful to do so on an instrument she had never used before, she demonstrated at the Hearing how she conducted the tests on the Claimant. The Board finds no basis for calling the testing Technician a hostile witness.

With regard to the date the testing of the Claimant was done, the Board finds no violation of Carrier policy or of Department of Transportation Regulations. Neither the Code of Conduct, the Drug and Alcohol Policy, or the Rule G Waiver Agreement states how the date for a follow-up test is to be determined.

There is no document in the record that states that in a case where a follow-up test is not conducted on the originally scheduled test date, failure to reschedule the test on the employee's next available duty tour will invalidate the test. The objective, in accordance with Department of Transportation regulations and the Rule G Waiver Agreement, is to accomplish at least six unannounced follow-up tests during the first 12-month period of active service following the employee's return to duty. That objective is not furthered by invalidating a follow-up test that meets all Department of Transportation requirements and where there is no company Rule, regulation, or policy invalidating such test because it is given a day or two later than originally contemplated.

Where there is no company Rule or policy specifically addressing the question of the date of the test, it is appropriate to follow the applicable Department of Transportation regulation on the subject. The applicable regulation is found in the Federal Railroad Administration, DOT regulations in 49 CFR Part 219, Control

of Alcohol and Drug Use. 49 CFR §219.405(f) Follow-up tests provides for follow-up tests in accordance with 49 CFR §219.104, which in subparagraph (d) states, "The railroad must comply with the return-to-service and follow-up testing requirements, and the Substance Abuse Professional conflict-of-interest prohibitions, contained in §§40.305, 40.307, and 40.299 of this title, respectively." The specific regulation dealing with the selection of a date for a follow-up test is found in 49 CFR §40.309 and provides as follows:

> "§40.309 What are the employer's responsibilities with respect to the SAP's directions for follow-up tests?
>
> (a) As the employer, you must carry out the SAP's follow-up testing requirements. You may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP.
>
> (b) You should schedule follow-up tests on dates of your own choosing, but you must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the employee is given no advance notice. (Emphasis added.)
>
> (c) You cannot substitute any other tests (e.g., those carried out under the random testing program) conducted on the employee for this follow-up testing requirement.
>
> (d) You cannot count a follow-up test that has been cancelled as a completed test. A cancelled follow-up test must be recollected."

The applicable regulation clearly states that the employer is to schedule follow-up tests on dates of its own choosing. Here the Carrier chose to reschedule the Claimant's follow-up test to June 13, 2005. Just as the Carrier had the right to schedule the test on June 9, it had the right to reschedule it to June 13, so long as the test was unannounced and did not follow a discernible pattern. The Board finds that the follow-up testing of the Claimant was not rendered invalid because the Carrier changed the date of the test from June 9 to June 13, 2005.

The Board finds that the Carrier established by substantial evidence that the Claimant violated the Rule G Waiver Agreement he signed on April 1, 2005; the Code of Conduct as it pertains to being under the influence of alcohol beverages; and the Drug and Alcohol Policy when he tested positive for alcohol on June 13, 2005, in a follow-up drug and alcohol screening shortly after reporting for duty that day. The Board is satisfied, for the reasons discussed above, that a properly calibrated instrument was used to conduct the screening and confirmation tests and that the test results were accurate.

In the Rule G Agreement the Claimant agreed that he must provide a negative drug and/or alcohol specimen for at least six unannounced follow-up tests during the first 12-month period following his return to duty. He expressly agreed that if he tested positive in any future drug/alcohol test he would be "dismissed from all MBCR service." He testified that he read the Agreement before signing it and that, in addition, it was explained to him by a Carrier representative at the time of signing, including the penalty of dismissal in the event of a positive test. In his very first follow-up test, he tested considerably above the .02 alcohol concentration level that signifies a positive test. Under these circumstances the Board can find no basis for disturbing the Carrier's decision to dismiss the Claimant from all MBCR service.

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 27th day of March 2008.