

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41793
Docket No. MW-42116
13-3-NRAB-00003-130054

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Pan Am Railways/Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. B. Randall, Jr. by letter dated October 13, 2011 on charges of violating Safety Rules PGR-G and PGR-A in connection with a return to work exam and positive (alcohol) result of a drug/alcohol test on June 24, 2011 was arbitrary, excessive and in violation of the Agreement (Carrier’s File MW-11-20).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Randall, Jr. shall now be reinstated with his full seniority and ‘. . . all discipline assessed against him be removed from his record and that he be made whole for any and all losses he may have sustained as a result of the discipline assessed him.’”

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.

By letter dated June 27, 2011, the Claimant was directed to report for a Hearing concerning the allegation he tested positive for alcohol during a return-to-work physical examination on June 23, 2011, in violation of Safety Rules PGR-G and PGR-A, which prohibit the use of alcohol, drugs and other controlled substances “. . . by employees subject to duty, when on duty or on Company property . . .” and note that a violation is sufficient cause for dismissal. A Hearing was conducted on September 29, 2011 and, by letter dated October 13, 2011, the Claimant was found guilty of the charges and dismissed from employment.

The evidence presented at the Investigation establishes that the Claimant is a 23-year employee with a clean disciplinary record who was working as an I&R Foreman at the time of his knee injury, which required time off from work. It is undisputed that (1) he had notice to report to Concentra Medical Center to undergo a return-to-work physical at any convenient time on June 23, 2011, (2) he did so after noon, and (3) his breath alcohol test was positive at .036 at 12:21 P.M., with a confirmation test result of .032 at 12:32 P.M. The DOT considers anything above .02 as a positive test. The Claimant explained that (1) he had consumed between 16 and 18 beers the prior evening and had no dinner, (2) he was an alcoholic, and (3) he was dealing with his wife's serious illness, which kept him awake for many of the prior 12 nights. The record contains one instance in which a shorter term employee was offered a Rule G bypass agreement when he tested positive for alcohol during a return-from-furlough physical in 2001. Both Assistant Superintendent Pelletier and the RN for the Carrier's occupational health provider testified that the Carrier has a zero tolerance policy for drug or alcohol violations on its property, and has dismissed employees for testing positive without prior discipline or consideration.

The Carrier argues that there is substantial evidence in the record to support the charges, especially in light of the Claimant's and the Organization's admission of a Rule G violation based upon the uncontested results of the breath alcohol tests. It asserts that the Claimant was not disciplined for his alleged illness of alcoholism, which was not proven on the record, but for violating Rule G, which all employees fully understand leads to dismissal. The Carrier notes that it has consistently enforced its zero-tolerance policy for Rule G violations by dismissing employees for a first offense

regardless of the circumstances, and that its approach of not allowing any second chances has been upheld by Section 3 tribunals, citing Public Law Board No. 4623, Awards 105 and 141; Public Law Board No. 7502, Case 1. The Carrier contends that the Claimant's dismissal was neither arbitrary nor capricious because a Rule G bypass was not applicable to the Claimant's situation inasmuch as he was not identified by a fellow employee (or self-identified) prior to a situation arising that led to a disciplinary response. It states that the prior instance in which a Rule G bypass was offered was never implemented; there is no explanation as to why its discretion led to such an offer; and it contends that leniency is at the Carrier's discretion and cannot be granted by the Board. The Carrier further pointed out that the Claimant did not avail himself of the offered Employee Assistance Program (EAP).

Conversely, the Organization contends that dismissal was arbitrary, capricious and excessive for a 23-year employee with an unblemished service record. The Organization maintains that the purpose of discipline is to rehabilitate - not punish - citing Third Division Awards 19037, 21760, 22237, and 26584, and asserts that dismissal in this case does not serve that purpose and is not warranted by the mitigating facts, which include that the Claimant's disease of alcoholism is treatable, and he was dealing with his wife's serious health condition. The Organization argues that the Claimant should have been offered a Rule G bypass in this case, as was another employee at an earlier time, showing that the Carrier has unfettered discretion to determine the appropriate penalty for a first Rule G violation, that there is no zero-tolerance policy, and that the parties provided a mechanism to help employees with alcohol dependency issues by adopting the Rule G Bypass Agreement. The Organization asserts that although a Rule G violation can be a dismissible offense, it does not have to be, and that the Claimant should be offered the opportunity to obtain help for his illness through the mechanism of EAP. It requests that the Claimant be restored to employment and made whole for the losses associated with his dismissal.

After careful review of the record, the Board is of the opinion that the Carrier met its burden of proving that the Claimant was guilty of the charges by substantial evidence. The Organization and the Claimant admitted that he was guilty of violating Rule G by testing positive for alcohol during his return-to-work physical. The sole issue in this case is whether the penalty of dismissal was arbitrary, capricious or excessive in the circumstances of a 23-year employee with an unblemished record whose positive alcohol test was his first infraction, or whether it was more appropriate in this case for the Carrier to utilize the Rule G Bypass Agreement and offer the Claimant the opportunity to seek treatment for his alcoholism through EAP and retain his right to

employment upon successfully meeting the conditions of his agreement. While the Board normally gives consideration to mitigating factors in a dismissal case, it has not done so on this property with respect to the enforcement of the Carrier's zero-tolerance policy for Rule G violations. See, Public Law Board No. 4623, Awards 105 and 141. As noted in those cases, because the Carrier has consistently applied its zero-tolerance policy to all employees regardless of extenuating circumstances, the Board must conclude that it was the Carrier's prerogative to terminate the Claimant's employment for his proven violation of Rule G. There is no basis in this record for the Board to insist that the Claimant is contractually entitled to a Rule G Bypass Agreement, absent the Carrier's exercise of its sole discretion to offer him one. Therefore, the claim must be denied.

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 17th day of December 2013.