

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39311
Docket No. MW-39537
08-3-NRAB-00003-060309
(06-3-309)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service beginning May 11, 2005 and subsequent dismissal on June 3, 2005) imposed upon Mr. M. Alvarado in connection with charges of violating Maintenance of Way Operating Rule 1.5, BNSF Policy of the use of Alcohol and Drugs, dated September 1, 2003 and the Policy for Employees Performance Accountability concerning an alleged positive follow-up alcohol test conducted on May 10, 2005 was on the basis of unproven charges and in violation of the Agreement [System File C-05-D070-6/10-05-0217 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Alvarado shall now receive the remedy prescribed by the parties in Rule 40(G).”

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 notice dated May 11, 2005, the Claimant was directed to attend a formal Investigation to develop all the facts and circumstances concerning his alleged positive follow-up drug screen on May 10, 2005, and his alleged violation of BNSF Policy on the Use of Alcohol and Drugs and the BNSF Policy on Employee Performance Accountability. After a postponement, the Investigation was conducted on May 20, 2005. By notice dated June 3, 2005, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge the Claimant.

The Carrier initially contends that the record supports the Claimant's dismissal as warranted. It asserts that in November 2001, the Claimant signed a waiver when he tested positive for drugs and/or alcohol the first time. It argues that this waiver is an admission of guilt by the Claimant. Moreover, the policy in effect at that time also stipulated that any employee testing positive for either drugs or alcohol more than once during a ten-year period would be subject to dismissal.

The Carrier contends that the Claimant failed a second drug test within a ten-year period when he tested positive for alcohol on May 10, 2005. It emphasizes that its policies clearly informed the Claimant of the consequences of such an event. It points out that the Policy on the Use of Drug and Alcohol in effect in October 2001 essentially is the same as the Policy in effect when the second failed test occurred in May 2005. Both versions provide that this type of offense is considered

a serious violation, with a second violation within ten years being a dismissible offense.

The Carrier asserts that the Claimant violated the cited Rules and policies. Moreover, the Claimant admitted that he understood Rule 1.5, and he admitted that he was drinking the night before the test at issue. The Carrier insists that there is no merit to the Organization's argument of an improper test; the record clearly shows a 0.062 percent positive for alcohol at 7:55 A.M. and a 0.049 percent positive for alcohol at 8:14 A.M. The Carrier maintains that the Organization's accusations regarding the testing procedure are inaccurate, and the record establishes that the procedure was proper.

The Carrier contends that the discipline imposed was entirely within the scope of the Agreement and consistent with the Rules and policies that the Claimant admittedly violated. The Carrier points out that the Claimant's seniority and service does not excuse this offense, and the Claimant cannot be allowed to operate large machinery with alcohol in his system, for his own safety and the safety of others.

The Carrier emphasizes that it is sympathetic to the Claimant's life tragedies, but the fact is that he reported to work with alcohol in his system. The Claimant knew that he could be tested at any time, yet he admittedly drank some ten beers the night before reporting to work. As a Machine Operator, the Claimant worked in a safety-sensitive position, and his conduct clearly violated the Rules and could have resulted in tragedy.

The Carrier points out that if the Claimant truly was desirous of maintaining his employment relationship with the Carrier, all he had to do was not test positive for drugs and/or alcohol. The Carrier emphasizes that the Claimant voluntarily could have signed into the Carrier-provided EAP for help in avoiding such a situation, but he did not. Contrary to the Organization's assertion that dismissal was too harsh for such a "valuable employee," the Carrier asserts that the Claimant's conduct was not characteristic of a "valuable employee," but instead was characteristic of an employee who would jeopardize not only his own well-being, but that that of his co-workers and the general public.

The Carrier argues that the Claimant admitted his guilt during his testimony and now is attempting to "throw himself at the mercy of the court." The Carrier contends that the Claimant already was given a second chance, but he voluntarily chose to throw away that opportunity. It asserts that contrition after doing wrong does not undo the wrongdoing.

The Carrier then emphasizes that there are numerous Awards acknowledging that in such factual circumstances, a carrier has no choice but to dismiss an employee from service. The Carrier contends that these Awards demonstrate that the Board very negatively views employees who do not make good on their second chance. The Carrier further points out that the Board repeatedly has recognized the Carrier's obligation to provide a safe workplace. It urges that the Board should keep in mind the public policy of safety in the workplace, and how an employee who uses drugs imperils the safety of all workers and the public at large. The Carrier insists that leniency for a repeat offender such as the Claimant simply is unjustified and could produce tragic results.

The Carrier asserts that its employees deserve an alcohol-free workplace, and the Claimant has no right to endanger himself, his co-workers, or the public with his inability to refrain from using alcohol. It contends that there is no dispute that the Claimant is guilty. It further emphasizes that the penalty for testing positive for drugs and/or alcohol is dismissal, regardless of the employee's length of service. It insists that as the Board previously has found, it is the severity of the offense, not the employee's tenure that determines the punishment. In the instant case, dismissal was warranted because of the second positive test. The Carrier contends that the Board should not consider reinstating any employee, long-term or short-term, who willfully and repeatedly violates Rule 1.5, and does so without consideration for the safety of co-workers and the general public.

The Carrier contends that in a discipline case, it may enforce its Rules and policies to the fullest extent possible under the Agreement. In this case, the Claimant did not comply with the Rules and policies regarding drugs and alcohol. It points out that it granted the Claimant a second chance when it offered him a conditional waiver, and the Claimant accepted this offer knowing that his failure to

comply with any one or more of the conditions would result in his dismissal. The Carrier insists that the Claimant is not deserving of any more chances.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the facts in this matter are undisputed. It asserts that although the Claimant admittedly consumed ten beers on the evening before the test in question, it was undisputed that the tester contracted by the Carrier had not properly calibrated or cleared the breathalyzer testing equipment and failed to follow a number of other protocols required by the Carrier's Drug and Alcohol Policy. The Organization therefore argues that the breathalyzer results are invalid, and the charges and the discipline imposed also are invalid.

The Organization maintains that not only was the breathalyzer testing invalid, but the test results of the Claimant's urine were negative. Pointing to a number of Awards, the Organization emphasizes that because the lifelong career of a well-respected employee is on the line, the quantum of evidence necessary to charge and dismiss the Claimant simply was not met. It insists that the instant claim therefore should be sustained in full.

The Organization emphasizes that the Claimant's subsequent admission cannot excuse the Carrier's reliance upon flawed testing equipment and protocols. The Organization points out that because the known dissipation rate for alcohol is 0.015 percent per hour, and the results obtained by the contractor's testing equipment in the Claimant's case showed a 0.013 percent dissipation in just 19 minutes, something clearly was amiss. The Organization contends that without a positive test result that the Carrier could validly rely upon, there was no reason to charge the Claimant. Under these circumstances, although the Claimant told the truth and admitted to consuming ten beers on the evening before he was tested, the Carrier's decision to discipline the Claimant was procedurally flawed from the outset and should be vitiated.

The Organization further argues that the Claimant was a model employee who was experiencing a period of extraordinary stress. The Organization points out that there is ample precedent on this property to reinstate the Claimant to service.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Board reviewed the evidence and testimony and finds sufficient evidence in the record to support the conclusion that the Claimant was guilty of a second violation of the Carrier's Drug and Alcohol Policy. The record reveals that in November 2001, the Claimant tested positive for drugs and/or alcohol and signed a waiver admitting his guilt and agreeing to take tests throughout the next ten years; and if he tested positive for either alcohol or drugs, he would be subject to dismissal. The record makes it clear that the Claimant failed a second drug test within the ten-year period because he tested positive for alcohol on May 10, 2005. The Claimant admits that he drank a number of alcoholic beverages the night before he came to work. The Claimant's violation of the Carrier Rules and his signed waiver Agreement are irrefutable.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant has been found guilty of a second drug and alcohol violation. The Claimant agreed four years previously that any future violation could lead to his dismissal. The Board recognizes that the Claimant has a great deal of seniority with the Carrier and it is very difficult for us to uphold the discharge of a Claimant who has been such a loyal employee for nearly 30 years. Unfortunately, the question of leniency in these kinds of cases belongs to the Carrier and not the Board. The Board has upheld discharges on numerous occasions for second drug and alcohol offenses after the signing of a waiver. Other than the lengthy seniority of the Claimant, there is nothing else to distinguish this case. Consequently, we regretfully must find that the Carrier had just cause to terminate the Claimant and the action

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that the Carrier took against him was not unreasonable, arbitrary, or capricious. 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 29th day of September 2008.