Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41608
Docket No. CL-41637
13-3-NRAB-00003-110327

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-13212) that:

(1) We are hereby rejecting and appealing the decision contained in Mr. McNamara's letter dismissing Canadian Pacific Railway employee Henry Francik for violation of Policy 1810, troubled employee policy.

(2) Carrier violated Rule 26, paragraph b, of the Agreement when they dismissed Mr. Henry Francik via letter dated June 11, 2009, for an alleged violation of Policy 1810, Troubled Employee Policy.

(3) Carrier shall now be required to immediately return Mr. Francik to service with all rights and benefits restored, compensated Mr. Francik for any and all lost time incurred, compensate Mr. Francik for any out-of-pocket expenses for medical, dental or visual benefits and any insurance premiums paid during the period."

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 Board carefully reviewed the record before it and has concluded that the claim is without merit.

By notice of April 17, 2009, the Claimant was directed to report for an Investigation to develop the facts and circumstances in connection with a charge that reads, in pertinent part, as follows:

> "[Your] allegedly testing positive on your return to work exam that was administered to you on April 13, 2009 which may be in violation of Policy 1810, Troubled Employee Policy, and may have violated the conditions of your Personal Program Agreement with the EAP."

The above-mentioned charge arises out of a return-to-service examination for which the Claimant appeared on April 13, 2009 after being released from a treatment program for alcoholism under the Carrier's Employee Assistance Program (EAP) and being out of service for 90 days. A doctor and a physician's assistant at the examining occupational health clinic reported to the Carrier's Manager of Health Services that the Claimant smelled heavily of alcohol and that his face appeared flushed. Based upon these reported observations the clinic was told to administer a breathalyzer test.

There is no dispute that the breathalyzer test as administered showed the Claimant to test positive for alcohol with a reading of .007. The Carrier contends that such reading is not acceptable, and is in violation of a Personal Program Agreement that the Claimant had entered into with the EAP Counselor, a program which called for the Claimant to abstain from the use of all alcoholic beverages. The Agreement included a statement that reads: "I will abstain from the use of all alcoholic beverages. This includes Near Beer and other low alcohol content beers and wines."

The Carrier contends that even though the detectable level of alcohol is small, it indicates that the Claimant failed to maintain a required zero level of consumption.

The Carrier submits that the Claimant offered many excuses as to why the test registered .007. The Claimant averred that he was working on a car for eight hours using acetone, wax and grease remover, which he either breathed into his system or it entered through his skin; the technician who performed the test did not know what she was doing because the test should not have taken 20 minutes, but only two minutes; the technician dropped the machine; the battery fell out of the machine and it was pretty much just hanging out of the machine; the machine broke five times; and, the technician had to keep fixing the machine.

In this latter respect, the Carrier submits that its Manager of Health Services, a board certified health occupational nurse for 31 years, was present for the Hearing and addressed with first-hand knowledge all questions related to the testing procedures and test results, as well as the qualifications of the facility and the employees who conducted the test. Further, the Carrier submits that its Hearing Officer offered to recess the Hearing and make arrangements for anything that could bear on the Hearing, but no such formal request was made.

Accordingly, the Carrier contends that: (1) there has been no abridgement of the Claimant's rights (2) evidence supports the finding of guilt and (3) the discipline assessed was not unreasonable in view of the Claimant having a safety sensitive assignment as a Tower Operator, coordinating with the Train Dispatcher for the movement of freight and passenger trains through the Chicago, Illinois, area.

In defense of the Claimant, the Organization submits that he had previously enrolled himself into a voluntary referral program through the Carrier's EAP program as part of the Carrier's Troubled Employee Policy, and having completed that program, and testing negative on April 8, 2010, he was released for and called to return to service five days later on April 13, 2009.

As concerns the breathalyzer test administered the Claimant upon his reporting for duty on April 13, 2009, the Organization submits that none of the clinic employees were made available at the Investigation for questioning, leaving the issue of whether the Claimant smelled of alcohol purely subjective and not verified through witness

testimony. It asserts that this was a fatal flaw in the Carrier's case, contending that it left undisputed the Claimant's testimony as to those factors, as stated above, about the manner in which the testing machine or breathalyzer device had failed to operate properly.

The Organization also contends that a second test, confirming the breathalyzer result of .007 should have been performed because of the low result and the Claimant's job and livelihood being on the line based upon the Carrier's zero tolerance policy.

Thus, the Organization contends to take the clinic's subjective opinion and broken machines as factual and accurate is improper given the fact that so many factors can easily lead one to determine a false positive result was possible.

The Organization also questions why the clinic report did not make mention of the first of the two breathalyzer tests having a negative result.

In overall study of the Hearing record, the Board finds that the several arguments advanced by and on behalf of the Claimant that the latter was denied the benefit of a fair and impartial Hearing are without merit.

The Board likewise finds no reason to hold that because the Claimant would offer that it took 20 minutes to perform a two minute test supports a finding that the technician who administered the breathalyzer test was not properly experienced to do so. It is recognized, as the Manager of Health Services stated in testimony, that there is a required delay between administering the initial test and the confirmation test of 15 minutes. Further, as concerns the alleged instances of the breathalyzer device breaking numerous times, we find it significant that following a required air blank control test of the breathalyzer showing a printed tape calibrated reading of .000, the tape shows an immediate subject test of .007.

The Board also finds that the Manager of Health Services was able to provide sufficient documentation in support of the test administration, including a copy of the test results form as signed by the clinic's doctor and physician's assistant wherein it states in part in the comments section, "Smells of ETOH," which is the abbreviation for alcohol and flushing.

The Board also finds it significant that the Claimant, on the one hand, testified at the Hearing that when he was told by the doctor that he had tested positive at .007, and was asked if he drank anything that day, that he told the doctor that he did not drink anything that day, "And the last time I drank was November 17, 2008." On the other hand, the Claimant acknowledged that he had just recently been released from a 28-day alcohol rehabilitation program, and that in the past he had relapses of drinking.

It being evident in overall study of the record evidence that the Claimant failed in a responsibility to fulfill the terms of his Personal Program Agreement with the EAP and provisions of Policy 1810, the Carrier's Troubled Employee Policy, the Board cannot properly direct or ask the Carrier, in view of its responsibilities to maintain a safe, efficient, and alcohol and drug free workforce, to do more than it has already done in having provided the Claimant with an opportunity to correct an apparent problem with alcohol abuse so as to maintain a continuing employment relationship with the Carrier. Accordingly, the claim will 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 24th day of April 2013.