

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43838
Docket No. MW-44814
19-3-NRAB-00003-180313

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when the award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. B. Bevill, by letter dated March 9, 2017, for alleged violation of GCOR Rule 1.5 – Drugs and Alcohol and the Drug and Alcohol Free Workplace Policy on February 10, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File KCS700SN17D/K0417-7196 KCS).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Bevill shall now be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and shall be compensated all lost time, straight and overtime.”

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.

At the time of the events that resulted in his discharge, the Claimant had approximately seven years' seniority in the Carrier's Maintenance of Way Department. On February 10, 2017, the Claimant was working as a Ballast Plow Operator, which he had been doing for two years. He was given a random alcohol breathalyzer test, which returned a reading of 0.022 in terms of his blood alcohol level. By letter dated February 16, 2017, the Claimant was instructed to attend a formal investigation into his positive test results.

The Investigation was held February 23, 2017. By letter dated March 9, 2017, the Claimant's employment was terminated, based upon violations of GCOR 1.5, Drugs and Alcohol, and the Carrier's Drug and Alcohol Free Workplace Policy. The Organization appealed the Carrier's decision by letter dated April 7, 2017. The parties having been unable to resolve the dispute through their grievance process, it was appealed to the Board for a final and binding decision.

The Carrier contends that the evidence is undisputed that the Claimant tested positive for alcohol in his system when he underwent a random alcohol test on February 10, 2017. No objections to the testing procedure or chain of custody were raised during the proceedings below. KCS has a zero tolerance policy toward any level of alcohol or illicit drugs in an employee's system. The policy also makes clear that employees who violate or fail to comply with the policy "will be subject to dismissal" (Emphasis in original). The hearing procedures were fair and impartial. The level of discipline imposed is consistent with other cases where employees have been found to have violated the policy.

The Organization argues that the Claimant did not intentionally report to work with alcohol in his system. Rather, he has special medical conditions that research has shown leads to blood alcohol readings that otherwise would not occur. He underwent gastric bypass surgery in 2013. He has not had a drug test since he was initially hired, and he was unaware that gastric bypass surgery resulted in his system not being able to metabolize alcohol at anywhere near the rate of individuals who have not had the

surgery. He ate his supper the night before at 9:30 p.m., where he consumed some alcohol, then went to bed. It had been at least eight hours since he had consumed any alcohol before he reported to work. He was not under the influence of alcohol when he reported to work or when he was tested. He exhibited no signs of intoxication while he was at work. The Carrier has failed to substantiate the charges against the Claimant. He has almost seven years' seniority with the Carrier, with a good record. He has contacted the EAP Program. Under the circumstances, the discipline imposed, termination of employment is excessive and unreasonable. The purpose of discipline is to rehabilitate, correct and guide employees; termination serves no purpose here.

As a Ballast Plow Operator, the Claimant occupied a safety-sensitive position and was subject to US Department of Transportation mandated testing under Federal Motor Carrier Safety Administration (FMCSA) regulations. On February 10, 2017, he was notified that he had been randomly selected for a drug and alcohol test. Claimant provided a breath sample and on the initial screen had a positive test result of 0.028. The Breath Alcohol Technician recalibrated the breathalyzer and after a DOT-mandated waiting period of fifteen minutes, retested the Claimant. The results of the confirmation test were 0.022.

The General Code of Operating Rules (GCOR), Rule 1.5, Drugs and Alcohol, states:

“The use or possession of alcoholic beverages, while on duty, on company property or while occupying facilities paid for or furnished by the company ... is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, while on company property, or while occupying facilities paid for or furnished by the company. . . .”

The Drug and Alcohol Free Workplace Policy, Policy 2.0 (effective 03/01/2016) goes into more detail:

“C. Prohibited Behavior

1. Alcohol

- a. **The use or possession of alcoholic beverages while on duty is prohibited. No individual may report for service, or remain on duty or in service while:**
 - (i) **under the influence of or impaired by alcohol; or**
 - (ii) **having .02 or more alcohol concentration in the breath or blood.**

- b. **The use of alcohol prior to reporting for duty or while on call is also prohibited when doing so *could* impair the individual's ability to work safely and/or productively upon reporting for duty. Specifically, no individual may use alcohol for whichever is the lesser of the following periods:**
 - (i) **within four hours of reporting for service**
 - (ii) **after receiving notice to report for service**

.....

G. Consequences

.....

- 2. **Employees who fail to comply with the provisions of this policy or otherwise violate this policy will be subject to dismissal.”**

.....”

This Policy is reflected in the Carrier’s Discipline Policy, where "Drugs and Alcohol” is listed in Section C., Dismissal Infractions, as Rule 1.5.

The Claimant’s blood alcohol following a confirmation test was 0.022, which was in excess of the 0.02 level established as a cutoff in the Drug and Alcohol Free Workplace Policy. The testing appears to have been properly conducted in all respects. Accordingly, the Carrier has established that the Claimant was in violation of the Policy. Section G of the Policy, Consequences, paragraph 2 states that employees who violate the policy "will be subject to dismissal." So the Carrier has established that it had just cause to discipline the Claimant, at a minimum.

The Organization argues that Claimant's blood alcohol level was unintentional and was the result of his metabolism having been altered following gastric bypass surgery—a result that he was unaware of until this drug test took place. At the investigative hearing, Claimant's wife, a registered nurse, presented a statement she authored after doing research on the Internet, referring to studies showing that alcohol metabolism was significantly different between gastric bypass patients and a control group who had no stomach surgery. The Organization also submitted an article from the Massachusetts Criminal Defense Lawyer blog stating that new research supports the correlation between gastric bypass and higher breath test readings and an article from the Journal of the American College of Surgeons, titled "Alcohol Has Stronger Impact on Gastric Bypass Patients." The documents certainly suggest that Claimant's theory could be true. But there is no statement from any of Claimant's physicians attesting to the fact that he personally experiences the effects suggested in the articles. The Board has to base its conclusions on solid evidence, and the submissions from the Organization are not sufficient for the Board to conclude with any confidence that Claimant's elevated blood alcohol level on February 10, 2017, was the result of his gastric bypass surgery four years before.

The Organization also argues that the level of discipline imposed on the Claimant was excessive. The Carrier has adopted a stringent alcohol and drug policy for good reason—safety is critically important in the railroad industry. Even small slips can have catastrophic consequences. The Policy notified employees that if they violated the alcohol and drug policy, they would be subject to immediate dismissal. The penalty imposed by the Carrier was consistent with the Policy, and the Board will not disturb its judgment.

AWARD

Claim denied.

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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 4th day of September 2019.