

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43856
Docket No. SG-45085
19-3-NRAB-00003-180525

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of R.A. Irmen, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal to 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 April 25, 2017. Carrier’s File No. 35-17-0022. General Chairman’s File No. 17-041-BNSF-172-A. BRS File Case No. 15844-BNSF. NMB Code No. 16.”

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 held the position of Signal Maintainer in the Carrier's service, headquartered in Phoenix, Arizona. On April 3, 2017, the Claimant was given notice of an investigation in connection with the following charge:

“An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged positive test results for alcohol during a drug test conducted on March 31, 2017 while working as a Signal Maintainer on SMTR0292.”

After a formal investigation on April 25, 2017, the Claimant was found in violation of MWOR 1.5, Drugs and Alcohol, and was dismissed from the Carrier's service.

The incident that gave rise to the Claimant's dismissal occurred on March 31, 2017, as he reported to work. The Claimant was driving a Carrier's truck northbound on North 59th Avenue in Glendale, Arizona. At about 8:15 A.M., a southbound vehicle crossed two lanes of traffic and collided with the truck driven by the Claimant. There is no dispute that the Claimant was not at fault and was not ticketed by law enforcement.

After the accident, the Carrier administered a blood alcohol test to the Claimant at 11:59 A.M. The result indicated a blood alcohol content (BAC) of 0.057. A second confirmation test, given 16 minutes later, indicated a BAC of 0.054.

The Claimant was immediately removed from service in accord with MWOR 1.5, Drugs and Alcohol, which states, in part, “Any employee whose blood or breath-Alcohol tests indicate a level greater than or equal to 0.02% (positive test) will be considered in violation of the Use of Alcohol and Drugs Policy, subject to applicable law. ... FRA also requires that the employee be removed from covered service until at least the next duty period or for eight (8) hours (whichever is more) if his or her confirmed Alcohol level is 0.02% to 0.039%.”

The Carrier contends that it has provided substantial evidence of the Claimant's violation of MWOR 1.5, Drugs and Alcohol, which states, in part:

“The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property. The use or possession of intoxicants, over-the counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed.”

The Carrier contends that there is no question that the Claimant’s BAC exceeded the allowable limit of 0.02%, as confirmed by two tests given after the accident. The Carrier concedes that Claimant was not at fault for the accident but contends that this does not alter the test results. In addition, the Carrier contends that Claimant admitted to having four alcoholic drinks the night before the accident while at home.

The Carrier contends that it was justified in conducting a BAC test on the Claimant after the accident, even when the Claimant was not at fault. The Carrier contends that it legitimately inferred that alcohol might have been involved and thus, had reasonable cause to administer the BAC test. The Carrier contends that dismissal was appropriate because this was the Claimant’s second serious (Level S) violation during the existing review period.

The Organization contends that the Carrier did not have reasonable cause to subject the Claimant to a BAC test, because he was not at fault in the accident, he was not given a citation and no one who interacted with him that morning observed any sign of impairment. The Organization contends that the Claimant exhibited none of the behaviors necessary for testing under the Carrier’s Drug and Alcohol Testing Policy. The Organization contends that the incident did not give rise to any of the criteria under the Post-Accident testing protocol.

Additionally, the Organization contends that the test results were not reliable because the Claimant has diabetes, forgot to take his morning medication, and consumed a diet soda, energy drinks, and a breakfast burrito between the time of the accident and the BAC test, because no one instructed him otherwise. The Organization

contends that any of these factors could have altered the test to produce a false positive for alcohol. The Organization further contends that the BAC test was not performed in accordance with the instructions for proper use, thereby invalidating the results.

The Carrier's Alcohol and Drug Testing Rule states that Testing will be conducted for several reasons, two of which are "post-accident" and "reasonable cause." When the BAC test was requested, the reason given was "reasonable cause." The Policy describes Reasonable Cause Testing in Section I:

- "1. BNSF Railway employees are subject to BNSF Railway Reasonable Cause testing at any time while on duty.**
- 2. Testing is performed under BNSF Railway authority, using BNSF Railway company forms, and may include a urine Drug screen and/or a breath-Alcohol test.**
- 3. BNSF Railway Reasonable Cause Testing may be used whenever any employee is involved in an accident, injury, near-miss or other incident in which evidence indicates the employee's performance may have caused or contributed to the incident or its severity, and the employee exhibits any of the following behaviors:**
 - a. Neglect of established safety or other BNSF Railway procedures;**
 - b. Errors in judgment and control;**
 - c. Inability to reasonably recount details of an accident and/or incident; or**
 - d. Altercations or extreme displays of negative behavior.**
- 4. BNSF Railway Reasonable Cause Testing should be performed using BNSF Railway authority exclusively. Managers must make an effort to conduct Drug and/or Alcohol testing without exceeding hours of service.**
- 5. Employees tested for Drugs using Reasonable Cause procedures will not be withheld from service pending receipt of Drug test results, but may be withheld from service as a result of a rules violation."**

The Organization contends that the Carrier did not have reasonable cause to conduct a BAC test because there was no evidence that the Claimant smelled of alcohol or that he appeared to be impaired. However, the fact that the Claimant was in an accident was "reasonable cause" under the Carrier's policy. The Carrier did not

need both reasonable cause and reasonable suspicion in order to administer the BAC test.

While the Organization has ably shown that the Claimant did not appear to be under the influence of alcohol while reporting for duty in the Carrier's vehicle, the BAC test results showed differently. The Claimant's alcohol level twice measured above the permissible limit for Carrier employees while reporting for duty, on duty, or on company property.

The Organization argued that the tests should be disregarded for several reasons: The Claimant's diabetes, his forgotten medication, his consumption of food and drink before the test was administered. The Organization presented all these theories to the Carrier's Manager of Medical Services, who ably explained why these factors would not have made the test results unreliable. Accordingly, the Carrier presented substantial evidence that the Claimant was in violation of MWOR 1.5 while reporting for work on the morning of March 31, 2017. Given the Claimant's prior Level S discipline during the review period, the penalty of dismissal was not excessive.

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 4th day of September 2019.