

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44348
Docket No. MW-45662
21-3-NRAB-00003-190510**

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

**(ANDREW WOODIN
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK) –
(Northeast Corridor**

STATEMENT OF CLAIM:

“The April 12, 2019 denial of the appeal of Mr. Woodin’s dismissal for violation, of The Alcohol and Drug waiver agreement. Mr. Woodin requests his dismissal be overturned and he be reinstated to employment. He did not violate the terms of his drug waiver agreement.”

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 Petitioner was hired into the Carrier’s service on July 28, 2014. At the time of the dispute herein, Petitioner was holding the position of MW Repairman for the undercutter Gang Y52F, which is a traveling production gang, scheduled Monday to Thursday 6 a.m. to 4:30 p.m. with rest days on Friday, Saturday and Sunday. On July 14, 2017, the Petitioner signed an Alcohol and Drug Waiver agreement (Rule G

waiver), agreeing to keep his body free of all drugs and/or alcohol. He agreed to undergo unannounced drug and/or alcohol tests for two years of active service. He also agreed that he would be dismissed for any future violations of the Policy.

On January 24, 2019, the Petitioner left his hotel room at 6:00 a.m. to begin work. He was notified that he was to be given a breathalyzer test as part of a random drug and alcohol testing event. The Petitioner was given a first breathalyzer test at 6:17 a.m. and then a second test 15 minutes later at 6:33 a.m., both of which were positive with a .046% BAC reading. the Petitioner asserted that the positive reading was the result of his having soaked his dentures in Listerine overnight, and then rinsing his mouth with Listerine shortly before leaving his hotel room.

In a letter dated February 1, 2019, the Carrier provided the Petitioner with this Notice of Discipline:

“On January 24, 2019, you provided a breath specimen during a Federal, Random alcohol testing event. The testing technician reported a confirmed breath alcohol level of 0.046% BAC. As such, you violated Amtrak’s Standards of Excellence and the Carrier’s Alcohol and Drug Policy. Therefore, you are terminated from employment with Amtrak effective immediately.”

The Carrier contends that it has provided substantial evidence showing Petitioner’s violation of its Alcohol and Drug Policy. The Carrier contends that Petitioner’s breath specimen was properly handled and confirmed positive by a repeated test after the initial test. The Carrier contends that the test result was accurate and reliable.

The Carrier contends that it is well-recognized that gargling with Listerine mouthwash will not cause a confirmed positive breath test and that numerous arbitration boards have found that the “Listerine defense” is without mitigating value.

The Carrier contends that the penalty is appropriate. The Carrier contends that violations of Rule G Waivers are self-invoking and occur automatically.

The Petitioner contends that the test results inaccurately indicated that he had consumed alcohol, but the positive BAC test was caused by Petitioner’s having soaked his dentures in Listerine overnight. The Petitioner contends that he reported that he had had a substantial amount of Listerine “hygiene” alcohol in his mouth only minutes

before the positive test, contributing to the BAC level in his result. The Petitioner contends that the presence of dentures and denture adhesives can be a reservoir and trap ethanol from Listerine in the mouth, affecting a BAC test.

The Petitioner contends that it would be unfair to dismiss him based on these inaccurate results. The Petitioner contends that the calibration of the equipment was in question.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Petitioner. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

The Carrier contends that it has presented substantial evidence of Petitioner's violation of the Carrier's Alcohol and Drug policy. It points to two BAC tests showing positive results taken shortly after the Petitioner began his workday. There is no evidence that the testing mechanism produced an inaccurate result.

The Petitioner asserts that although the result may be accurate, the BAC reading reflected an erroneous number due to his use of Listerine just before the tests were administered. Numerous Boards have considered and rejected the "Listerine" defense. *See, e.g.*, Award 312 of Public Law Board 4244, which cited a study conducted by the University of Alabama School of Medicine, writing, "The study concluded that the decay of breath alcohol values following mouthwash use is sufficiently rapid that mouthwash use would not pose a realistic threat to the accuracy of blood alcohol determinations by breath analysis under normal circumstances..."

The Petitioner urges this Board to reject this line of cases because the Petitioner did more than simply "gargle" with mouthwash but soaked his dentures in Listerine overnight. But Petitioner's assertion that this factor would have decreased the accuracy of the results is insufficient to overcome the presumption of reliability for these tests. In any event, the breath alcohol reading, even though marginally over the cut off level, cannot be disregarded.

The Petitioner was in violation of the Amtrak's Standards of Excellence and the Carrier's Alcohol and Drug Policy. As such, 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 Petitioner(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of January 2021.