Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44688
Docket No. MW-46026
22-3-NRAB-00003-200744

The Third Division consisted of the regular members and in addition Referee Pilar Vaile when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. K. Lyons, by letter dated August 23, 2019, for alleged violation of NORAC: Operating Rule G, Keolis Code of Conduct: Rule 8 Prohibited Behaviors and Keolis Drug & Alcohol Policy: Prohibited Conduct in connection with his alleged failure to provide a negative test result during a post-accident/injury testing event on May 20, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE 24/2019-19.209. KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant K. Lyons shall be reinstated to service with no loss of seniority and exonerated of all charges, be made whole for all lost wages, as well as any missed benefits and credits for vacation."

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 makes the following additional findings, upon consideration of the record as a whole and giving due deference to the original finder of fact:

The Claimant, Mr. K Lyons, is an Assistant Foreman, and at the time of the incident in question had been employed with Keolis since July 1, 2014, when Keolis CS assumed the operation and maintenance of the commuter rail service under agreement with the Massachusetts Bay Transportation Authority ("MBTA"), and the responsibilities of the collective bargaining agreement then in effect between MBTA and the Organization. However, he had accumulated approximately ten (10) years of service with the Carrier prior to the incident involved herein. (TR 42.)

On May 20, 209, the Claimant was the subject of a Post-Accident/Injury Drug test, which was necessitated by an on-duty injury to his shoulder that he sustained when he tripped on debris on the floor and had to grab a door handle to stop himself from falling. After sustaining his injury at approximately 4:30 a.m., Foreman Rob McMorrow brought the Claimant for medical treatment at South Shore Hospital, according to standard procedure. Five (5) hours later or at approximately 9:39 A.M., the Claimant was administered two breathalyzer tests 17 minutes apart, immediately upon his release from the hospital and return to the worksite at the Braintree Tower property.

The tests were performed by a mobile testing unit from the company Occupational Drug Testing/DISA and the mobile drug tester performed the tests using a Department of Transportation approved Evidential Breath Testing device. (TR 31, 37). The initial test resulted in a reading of .027 blood alcohol level, while an amount of .02 is deemed under the influence. The second or "confirmation" test still had a reading of .02 blood alcohol level. (TR 33; Carrier Exs. N, O.) The purpose of the 15-minute gap between tests is to ensure, with an adequate interval of time, that the original test did not produce a false positive. (TR 33-34.)

The Carrier's Code of Conduct and NORAC Rule G both prohibit intoxication or use of intoxicants while on duty, and authorizes discipline up to and including

termination for their violation. Moreover, at the time of the incident, the Claimant was on a "Rule G Waiver" as a result of a of August 17, 2018 failure to provide a negative breath alcohol test, under which he agreed that further violation of the Carrier's drug and alcohol policies would result in immediate termination. NORAC RULE G, entitled "Drugs and Alcohol", reads as follows:

> **Employees are prohibited from engaging in the following activities while on duty or reporting for duty:**
>
> **1. Using alcoholic beverages or intoxicants, having them in their possession, or being under their influence.**
>
> **…**
>
> **An employee may be required to take a breath test and/or a urine sample if the company reasonably suspects violation of this rule. Refusal to comply with this requirement will be considered a violation of this rule and the employee will be promptly removed from service.**
>
> **(*Id.*, emphases added.)**

Due to his failure to provide a negative breathalyzer test, and also pursuant to policy and the Rule G Waiver, the Complainant was escorted home and formally removed from service. Thereafter, on May 22, 2019, the Claimant was formally terminated based upon the results of an on-property hearing. The Claimant denies having consumed any alcohol while on duty and asserts that he cleaned up and used mouthwash upon his return to the property, which he asserts is part of his standard personal hygiene practice. He also faults the testing company for failing to advise him that mouthwash could affect his test results; and says that he only learned of this possibility afterwards, from the Internet.

The Organization timely filed a claim to challenge the discipline under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Carrier argues that there were no procedural defects with the breath alcohol testing as the Organization asserts, and the Carrier has proved through substantial evidence that Claimant violated all of the rules he was charged with violating. It is clear from the test results that Claimant reported for duty under the

influence of alcohol and that his breath alcohol content was over the FRA proscribed .02% limit. He was, therefore, in clear violation of NORAC Rules as well as Keolis rules and policies. The Carrier also asserts that it is not significant that the confirmation test was not exactly 15 minutes after the first test, as stated under the Carrier's rule. DOT regulations, to which Keolis and its employees are subject, require the confirmation test be at least 15 and no more than 30 minutes apart. Nor did the Claimant offer any concrete evidence in support of his affirmative defenses, *i.e.*, that false positives were cause by his recent use of mouthwash and/or that the machine was not calibrated properly. Finally, Claimant was already on a Rule G waiver at the time for a prior negative breath alcohol testing; and was on notice that a subsequent failed drug and alcohol test would result in his dismissal. He was therefore justly dismissed for his failed breathalyzer test and the discipline must be upheld.

The Organization argues that the Carrier has failed to prove the charges against the Claimant, and also failed to follow its own policy in administering the alcohol breathalyzer test since it waited too long to retest the Claimant. The Organization also asserts that the results may have been thrown off by the Complainants recent use of mouthwash, which contained an extremely high amount of alcohol; there may have been issues regarding the calibration and accuracy of the testing unit; and the Carrier failed to prove that the testing device used to administer the test was approved by DOT. The Claimant additionally testified that because he knew he was on a Rule G Waiver he "wouldn't have taken the test" if he had had reason to believe at the time "that [he] would have any alcohol in [his] system" as a result of his mouthwash use; and the person administering the test assured him the test could not be "set…off" by "things." (TR 48.) Since the Carrier offered no other evidence whatsoever to show that the Claimant was in violation of the cited rules, Claimant's testimony that he consumed no alcohol and that the testing was flawed must be accepted as the only reasonable and possible conclusion; and his termination must be overturned.

Upon consideration of the whole record developed on-property, the Board finds and concludes as follows. First, the Carrier's Drug and Alcohol Policy, which says test "15 minutes later", was correctly applied by the Hearing Officer to align with DOT regulations, which are a controlling regulation; but even if that were not the case, the Organization offers no argument or evidence that a two-minute delay somehow unfairly prejudiced the Claimant. The Organization offers no rational factual or policy reason(s)

for interpreting the Carrier's policy to be at variance with federal transportation safety regulations. As such, the Hearing Officer had a rational basis for crediting testimony that DOT regulations required the second, confirming test be issued between 15 and 30 minutes after the first test; and that the testing procedures complied with federal and Carrier safety rules.

Second, the on-property hearing established "direct, positive, material and relevant evidence" from which the Hearing Officer could reasonably conclude that the testing equipment was accurate and reliable, and also complied with federal and Carrier safety rules. *See* Third Div. Award 24412, *BMWE and Consol. Rail Corp. (formerly The NY, New Haven and Hartford Rail Co.)* (Cables 1983); *see also* Third Div. Award 21372, *BMWE and The Texas and Pacific Railway Co.* (Cables 1977) (the Carrier must "demonstrate convincingly that an employe is guilty of the offense"). Admittedly, the Carrier witness who oversees the Carrier's drug and alcohol program and medical review process did not have a very sophisticated level of knowledge about testing technology. Nevertheless, it would not have been abuse of discretion for the Hearing Officer to conclude that the Witness's knowledge was adequate for her role in implementing the policies and federal regulations. Her knowledge was also adequate to create a rebuttable presumption of reliability that the Organization failed to challenge outside of levying bare and speculative assertions. Specifically, the Witness testified clearly, unequivocally and without unrebuttal that the mobile drug tester performed the breathalyzer using a DOT approved Evidential Breath Testing (EBT) device that the Witness knew was "calibrated regularly when they're supposed to be". (TR 31, 37.) *Cf.* PLB No. 6394, Award 4, *BMWE (Consolidated and Pennsylvania Federations) and Norfolk Southern Railway Co.* (Malin 2001) (that the Board usually accepts lab and MRO documentation regarding drug test results and/or adulteration of samples, when not rebutted by expert or other reliable testimony).

Third, the Hearing Officer had a rational basis for rejecting the Claimant's "mouthwash defense". On one hand, this possibility was not established by expert testimony; on the other hand, the self-serving and convenient claims related to mouthwash is simply not credible. Indeed, the "just used mouthwash" defense to a positive breathalyzer test result has been widely dismissed by arbitrators and the Board as ineffective and unpersuasive, in the past. *See, e.g.*, *Amtrak*, PLB 6779, Case No. 69 (Parker 2010) (finding the mouthwash defense unpersuasive where Claimant offered no evidence in support of the defense); *Amtrak*, PLB 4863, Case No. 121 (Peterson 2008) (finding mouthwash defense unavailing there because "it would have dissipated

before Claimant arrived at work, if not during the 24 minute waiting period between administration of the initial breathalyzer test and the subsequent confirmation test"); *Amtrak*, PLB 7480, Case No. 3 (Ref. D. Lalor 2012) (stating that mouthwash has generally been rejected as a defense by arbitrators and that "[s]ixteen minutes [fifteen minutes minimum required by DOT rules] wait period between rests was allowed to ensure elimination of surface alcohol in the mouth, if any"); *Port Authority Trans-Hudson Corporation*, PLB 5596, Case No. 17 (Ref. T. Rinaldo 2004) (concluding that a medical doctor's testimony that the alcohol content from mouthwash dissipates within fifteen minutes negates the mouthwash defense).

Based upon this on-property record, the Carrier presented substantial and convincing evidence of the Claimant's intoxication and it is not this Board's role to second-guess the Hearing Officers findings on liability or her credibility determinations absent evidence that she "ignored reality". *See, e.g.,* Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.* (Bierig 1999) ("In discipline cases, the Board sits as an appellate forum" and "do[es] not weigh the evidence de novo"); Third Div. Award No. 42713, *BMWED - IBT Rail Conference and BNSF Railway Co. (Former Burlington Northern Railway Co.)* (Helburn 2017) ("in this industry, the credibility determinations of Conducting Officers are to be accepted" unless they "ignore[] reality"); and PLB No. 7564, Award No. 15, *BMWED – IBT Railway Conference and BNSF Railway Co.* (Helburn 2013) (noting that "with rare exception, the Conducting Officer's credibility determinations are to be accepted because the Conducting Officer had the opportunity to question and observe the demeanor of the various witnesses"; and determining that was such a rare case, because the Hearing Officer "credited equivocal, hesitant testimony from the supervisor over that of multiple employees' clear, and unhesitant testimony").

Lastly, the Board considers whether termination was nonetheless excessive based upon the on-property record. *See* Third Div. Award 19488, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employees and The Baltimore and Ohio Railroad Co.* (Brent 1972) ("the severity of punishment must be reasonably related to the gravity of the offense"). However, having reviewed the record and determined that the Hearing Officer's findings were supported by substantial and convincing evidence, the Board's role in this regard is fairly constrained. Specifically, the Board may only overturn or mitigate the penalty chosen for proven misconduct if the record shows that the Carrier abused its discretion in selecting the penalty it did. *See* Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.*

(Bierig 1999) (where the charges are sustained, the Board is "not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion"). This case does not present any such quandary since the Claimant was already on a Rule G waiver and, as such, was on notice that further infraction would lead to immediate termination. *See* PLB 5596, Case No. 17, *Port Authority Trans-Hudson Corporation* (Ref. T. Rinaldo 2004) ("the question of leniency is one for the Carrier to address" and "[t]he Board finds no reason to disturb the Carrier's termination decision" in a Rule G Waiver case); and SBA No. 934, Award No. 581, *IBEW and Metro-North Commuter Railroad* (Capone 2015) (the issuance of a Rule G Waiver was the Carrier's exercise of leniency).

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 28th day of January 2022.