

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44689  
Docket No. MW-46155  
22-3-NRAB-00003-200035**

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

**(Brotherhood of Maintenance of Way Employees 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. W. Post, Jr., by letter dated February 7, 2019, for alleged violation of Code of Conduct Rule 1, Knowledge of the Rules, Code of Conduct Rule 2, Courtesy and Professional Conduct, Code of Conduct Rule 3, Personal Appearance and Uniform, Code of Conduct Rule 8, Behavioral Expectations for Keolis CS employees and Prohibited Behaviors, Code of Conduct Rule 11, Protecting the Company's Property and the Keolis Commuter Services (KCS) Drug and Alcohol-Free Workplace Policy in connection with incidents that occurred between the dates of January 8 and 11, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE 11/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Post, Jr. shall be reinstated to service 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 whole record developed on-property:**

**At the time of the incident in question, Claimant W. Post, Jr. had been employed within the Carrier's Maintenance of Way Department as a track employee 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.**

**On January 8, 2019, the Claimant worked as an Assistant Foreman in the West Concord INR. At approximately 4:11, the Claimant completed his day and punched out, leaving in the Carrier's truck (a hi-rail vehicle) that he was authorized to drive to and from his home as part of his duties. After leaving the Carrier property in the Carrier vehicle, the Claimant drove to several locations in New Hampshire (NH) for personal activities, eventually pulled over to sleep in a parking lot, and was arrested hours later on suspicion of driving under the influence of alcohol (DUI).**

**First, the Claimant went to a residence in Manchester, NH to pick up a check for a baseball league in which he plays. He arrived there at 6:53 PM and left at 7:05 PM according to GPS evidence. From there, the Claimant took the company truck to a bowling alley located in Manchester, NH for an event for the baseball league. He arrived there at 7:29 and left at 8:57 according to GPS evidence. GPS evidence shows that from there the Claimant drove for 47 minutes to go approximately two and a half miles before parking at a gas station in Goffstown, NH, which was located in the opposite direction from his residence. GPS further shows that he idled in the truck there for 24 minutes before the engine was turned off.**

**At approximately 3:00 AM on January 9, 2019, the Claimant was approached while he was sleeping in the Carrier vehicle by Goffstown Police, who questioned him.**

His appearance, smell, demeanor or other factors evidently prompted the police to breathalyze him, as the Claimant refused a breath alcohol test and was arrested on suspicion of violating RSA 265-A:2, titled “Driving or Operating Under the Influence of Drugs or Liquor; Driving or Operating With Excess Alcohol Concentration”.

As a consequence of his arrest, the Carrier vehicle was impounded. The owner of the tow truck company would alert Carrier personnel later that day that a Carrier vehicle had been impounded on suspicion of DUI, initiating the Carrier’s investigation into the matter that day and following.

After being charged and processed, the Claimant was released on January 9 pursuant to a Bail Order that prohibited him from driving until 3:00 PM that afternoon. Additionally, his license was administratively suspended, and he was provided at temporary license valid for 30 days. GPS records show that on January 9, 2019, the Claimant retrieved the Carrier’s truck from the impound lot at 1:47 PM and drove it back to his residence, arriving there at 2:45 PM., while still prohibited from driving under the Bail Order.

All of these events occurred while the Claimant was working under a November 16, 2018 Rule G waiver for violations of the Carrier’s Drug and Alcohol-Free Workplace Policy. The Rule G waiver was based on his failure to provide a sufficient sample when a test was required. NORAC Rule G, entitled “Drugs and Alcohol”, prohibits the use, possession, or influence of alcohol “while on duty or reporting for duty”, among other things. The Rule G Waiver is essentially a “two strikes and you’re out” policy, under which the employee agrees that subsequent violation of the Carrier’s drug and alcohol policies will result in immediate termination.

After speaking with the tow truck company owner and the Goffstown Police, the Carrier removed the Claimant from service on January 11, 2018; and issued a notice of investigation on January 14, 2018. The charge was “violation of the Keolis Commuter Services (KCS) Drug & Alcohol-Free Workplace Policy”, and the factual bases identified were: use of the Carrier vehicle for non-authorized purposes; being arrested on suspicion of DUI; driving the Carrier’s vehicle without a valid driver’s license on January 10 and January 11, 2019, before he was removed from service; failure to notify the Carrier that he had been arrested for suspicion on DUI while operating a company hi-rail vehicle; and that all of these actions shed a negative on the corporation and had the potential to cause serious harm to the vehicle, the Claimant, and the public.

The Claimant reported the incident to Carrier January 15, 2019, the day after he received the notice of investigation.

Thereafter, upon extension at the Carrier's request, an on-property hearing was held on January 29, 2019, as a result of which the Hearing Officer sustained all of the charges. By letter dated February 7, 2019, the Carrier adopted those findings and terminated the Claimant, citing the charges and the Rule G waiver.

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.

On April 11, 2019, the Claimant's Goffstown criminal DUI charges were "dismissed w/o objection" and the Carrier was notified of this during the on-property appeal process.

The Carrier argues that all of the charges were proven by a preponderance of the evidence described above. It further argued that, even if alcohol or another intoxicant was not involved (which it asserts is "extremely doubtful"), termination was justified based upon the following proven and inappropriate conduct while he was on a Rule G waiver: sleeping in the Carrier's hi-rail car, refusing a sobriety test, having his car impounded, driving without a valid license thereafter, and failing to report the incident to the Carrier immediately.

The Organization argues that there was no evidence that the Grievant's stops on January 8-9, 2019 were other than along his established route, and there was no proof, only suspicion, that the Claimant had been operating the vehicle while under the influence of drugs or alcohol. Significantly, the criminal charges were just misdemeanor charges, and they were dismissed without prejudice; and the Claimant denied consuming alcohol on January 8-9, 2019. The Claimant also testified that he pulled over as a safety measure because he was overtired due to his excessive work commute, and also disoriented due to severe weather, including snow and low visibility; and that he did not refuse a breathalyzer but rather woke up disoriented at 3:00 AM on January 9, 2019, and did not understand what the police were requesting of him. The Organization additionally argues that the Claimant was terminated before he had a chance to report the incident, assuming he was required to under what it describes as a confusing policy; and that there is no evidence he publicly tarnished the Carrier's reputation since only

the tow company owner and police were aware of the incident. Lastly, even if the charges were proven, discipline was excessive.

Upon consideration of the whole record developed on-property, the Board finds and concludes as follows. First, the on property hearing established “direct, positive, material and relevant evidence” from which the Hearing Officer could reasonably conclude that the Claimant was driving the Company while intoxicated. *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 employee is guilty of the offense”). Based on the bizarre facts alone, the Hearing Officer could reasonably conclude that he was using the Carrier vehicle while intoxicated.

At the same time, his shifting and inchoate multiplicity of excuses, in addition to whatever demeanor-based evidence he provided on-property, could have reasonably justified her discrediting his testimony that he was sober and was confused about the reporting requirements. *See, e.g.,* Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.* (Bierig 1999) (“[i]n 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) (the Conducting Officer's credibility determinations are to be accepted because he or she had the opportunity to question and observe the demeanor of the various witnesses).

Second, there was substantial evidence in the record from which the Hearing Officer could conclude that DUI in a Carrier vehicle was prohibited under both policy and the Rule G waiver, even though the Claimant was off duty at the time. Rule G Waiver states that “all sites at which company business is conducted are to be drug and alcohol-free workplaces,” and that Carrier employees “are prohibited from using alcoholic beverages, intoxicants or controlled substances while subject to duty.” It cannot be credibly denied that the Carrier’s vehicle is a “site at which company business is conducted”, or that the Claimant was “subject to duty” while driving or in control of a Carrier vehicle.

Third, there was substantial evidence in the record from which the Hearing Officer could conclude that the other factual basis were either satisfied or not necessary to support the gravamen of the complaint, DUI. As to the DUI reporting requirements in particular, the policy applies on its face to both felony and misdemeanor charges and arrests; there is no ambiguity in the phrase “must immediately notify” the Carrier; and the 10-day limit for providing a court complaint is unrelated to the requirement of immediate notification of charge/arrest.

Lastly, the Board finds and concludes that termination was not excessive based upon the on-property record, including the egregiousness of the misconduct and the Claimant’s Rule G waiver status. *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”). Under the record developed on-property, there is no basis for the Board to conclude that the Carrier abused its discretion in terminating the Claimant. *See* Third Div. Award No. 33432, *BMW 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”); PLB 5596, Case No. 17, *Port Authority Trans-Hudson Corporation* (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 28<sup>th</sup> day of January 2022.