

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44702
Docket No. MW-46370
22-3-NRAB-00003-210001**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 (time served suspension/successful completion of an EAP program/final warning) imposed upon Mr. C. Dwinell, by letter dated December 20, 2019, for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of Rules, Rule 5 - Examination of Fitness and Rule 8 Behavioral Expectations and Prohibited Behaviors, Keolis Drug and Alcohol Free Workplace Policy and NORAC Operating Rule G in connection with his alleged failure to provide a negative test result during a random drug and alcohol testing event on November 14, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File BMW 19.447 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Dwinell shall be returned to service effective immediately with all seniority unimpaired, exonerated of all charges pressed against him by the Carrier and be made whole for all lost wages, as well as any missed benefits.”**

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, Assistant Foreman Cody Dwinell, has been employed by the Carrier since July 1, 2014. He was dismissed on December 20, 2019, for violating the Carrier's Drug and Alcohol – Free Workplace Policy (hereinafter referred to as the "Policy"), its Code of Conduct, and "NORAC Operating Rule G", for failing to provide a negative result from a random drug test conducted on November 14, 2019. The Carrier's Medical Review Officer ("MRO") reported a positive test result of methamphetamine. A Notice of Formal Investigation was issued on November 26, 2019, for a hearing to be held on December 2, 2019. Following a postponement, the hearing was held on December 13, 2019.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon a careful review of the record, we find the Carrier has not met its burden of proof that the Claimant violated its Policy and applicable rules. Ample arbitral precedent has determined that the Carrier has the discretion to impose severe discipline, up to and including dismissal, where it establishes an employee has violated its drug and alcohol prevention program. However, arbitral doctrine has also found that flaws in the testing regimen, chain-of-custody procedures, and MRO verification of the results, are grounds to vacate the Carrier's decision.

Here, the Board finds that the MRO, Dr. Paul Cheng, failed to ensure the integrity of the Claimant's drug testing results and fulfill his responsibility to comply with the Carrier's Policy when he did not properly notify the Claimant of his option to have the split specimen tested as provided for under 49 CFR Part 40, Section 40.153 of the applicable federal regulations. We also find that MRO Cheng

did not complete the Federal Drug Testing Custody and Control Form (hereinafter referred to as the “COC”), dated November 14, 2019, as required.

This Board, in Award No. 42714, found that shortcomings in the handling of a split sample and not providing the specifics of the drug test result to be fatal flaws. The Board found that an employee “. . . has the right to have every drug/alcohol test administered with absolute, unwavering conformity to the established protocols. When positive test results can place an individual’s employment in jeopardy or worse, end that employment, the individual must be afforded all the protection inherent in the testing process.”

The record does not contain any evidence that MRO Cheng informed the Claimant of his option to have the split sample of his specimen tested after being told he was positive for methamphetamine. Dr. Cheng did not complete or sign Step 7: Completed by Medical Review Officer – Split Specimen of the COC. Dr. Cheng was not produced as a witness and therefore, the Board finds the Claimant’s testimony and the incomplete COC, provide sufficient evidence that the MRO did not comply with federal regulations as provided for in the Carrier’s Policy.

In addition to the MRO’s failure to complete Step 7 of the COC, he did not complete or sign Step 6: Completed by Medical Review Officer – Primary Specimen, which requires his confirmation of the positive drug test result. Dr. Anu Konakanchi, the MRO Supervisor, testified that she believed Dr. Cheng performed all his duties under CFR 49 Part 40. However, Dr. Konakanchi was not the MRO who reviewed the test results with the Claimant and therefore, cannot sufficiently confirm what was discussed and cannot supplant the absence of information required by Step 6 and 7 with her testimony alone. The Board also notes that the MRO listed on the COC is “Terri Hellings MD” and not Dr. Cheng.

Based on the foregoing, we find the Carrier did not comply with the governing federal regulations relied upon in its Policy and failed to ensure the validity and integrity of the Claimant’s random drug test results. The MRO’s errors are fatal flaws and as such, the Carrier’s decision to discipline the Claimant must be set aside.

The Claimant shall have the discipline assessed expunged from his record and be made whole for lost earnings while out of service, with his seniority unimpaired. No other remedies are awarded.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find the Carrier has not provided substantial evidence that the Claimant violated its rules.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of March 2022.