

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44772
Docket No. MS-46553
22-3-NRAB-00003-210536

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

(J. LOEHRS

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

- “(1) Was the decision on the committee/board unreasonable, arbitrary and/or capricious in that there was insufficient credible evidence establishing that Mr. Loehrs refused testing and/or;
- (2) Was the decision of the committee/board unreasonable, arbitrary, and/or capricious in that there were insufficient credible evidence establishing that Mr. Loehrs violated the Standards of Excellence pertaining to Drugs and Alcohol Policy where the test upon which the carrier relies was not confirmed and adequately reliable and Mr. Loehrs did not refuse confirmation testing?

Mr. Loehrs is seeking reinstatement of his former position with all seniority and benefits unaffected compensation for all time lost, including over-time, and all files and other documents pertaining to this matter removed from his personal record.”

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's seniority date is September 14, 2009. At the time of this dispute, the Claimant held the position of Maintainer in Gang K022, headquartered at Penn Coach Yard in Philadelphia, PA. On November 4, 2019, the Claimant was required to submit to a federal follow-up testing event. He completed the DOT follow-up breath alcohol test, which provided a positive result. Before completing the confirmation test, the Claimant left the testing location and drove off the premises, returning later.

On November 19, 2019, the Claimant was given notice of an investigation in connection with the following charges:

Charge #1: Alleged violation of Amtrak's Standards of Excellence, pertaining to Drugs and Alcohol:

Drugs and Alcohol – “By its very nature, railroading is a constantly demanding and sometimes hazardous industry. Employees impaired by alcohol or drugs pose an unacceptable risk to the safety of passengers, fellow employees and themselves, as well as undermine workplace productivity.

As a result, Amtrak's Drug and Alcohol- Free Workplace Policy is very clear. While performing work for Amtrak (including while on layover) or at any Amtrak property, you must be drug and alcohol-free. Both the use and possession of drugs (or drug paraphernalia) and alcohol are prohibited.

Charge #2: Violation of Amtrak's Drug and Alcohol-Free Workplace Policy 7.3.4 and Instructions Manual Policy 4.0; Prohibitions 4.1(i) –

The refusal to cooperate with a drug and/or alcohol testing event or otherwise engaging in conduct that obstructs, manipulates or attempts to interfere with the testing process;

“In accordance with the Amtrak Drug and Alcohol-Free Workplace Policy and guidelines 7.3.4, Test refusals, adulterated and substituted samples shall result in the employee's termination from Amtrak in all capacities.”

Specification:

On November 4, 2019, Amtrak Maintainer, Jason Loehrs, was required to submit to a Federal Follow-Up testing event. When completing the DOT Follow-Up Breath Alcohol test, Mr. Loehrs provided a screening result of .034% BAC. Once the Breath Alcohol Technician stated that he would need to wait the full 15 minutes before completing the confirmation test, the employee left the testing location and drove his car off the company premises. Since the employee left the testing location before the testing was completed, this is a Refusal to Test and is a violation of not only Amtrak's Standards of Excellence, but also a violation of Amtrak's Drug and Alcohol-Free Workplace Policy, as noted above. It is further noted that the Engineering Department was notified of this by Human Resources Occupational Testing via memo dated November 7, 2019.

After a formal investigation on March 4, 2020, the Hearing Officer found that the Claimant was found guilty of all charges and thereafter the Claimant was dismissed from the Carrier's service.

In a letter dated April 23, 2020, the Organization appealed the Carrier's discipline. The Carrier issued its final denial in a letter dated July 6, 2020. The positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant's violations. The Breath Alcohol Technician presented testimony that the Claimant was told to wait for a confirmation test after receiving a positive result on the administered breath alcohol test but the Claimant left the testing premises. The Claimant does not dispute leaving the area. The Carrier contends that this action constitutes a refusal to test and thus, the charges have been proved.

The Carrier contends that the January 20, 2020, event referred to by the Organization was not verified and has no bearing on a test that was administered on November 4, 2019. The Carrier contends that even if the event were proven, it would not negate the Claimant's leaving the testing premises months earlier. Although the Claimant testified that he was told to leave and come back, documents were introduced to show multiple attempts to call the Claimant to tell him to return. Regardless, it was the province of the Hearing Officer to determine the Claimant's

credibility and that determination should not be disturbed so long as it is supported by the record.

The Carrier further contends that the Claimant elected not to testify at his Investigation hearing, electing not to refute the charges against him or identify mitigating circumstances to be considered. The Carrier contends that the Board should draw an adverse inference from the Claimant's silence. The Carrier further contends that the Claimant had previously signed a Rule G waiver, acknowledging previous violation of the Drug and Alcohol-Free Workplace Policy.

The Carrier contends that the discipline assessed was appropriate as the Carrier's Drug and Alcohol-Free Workplace Policy states that a refusal to test can result in the employee's termination from the Carrier in all capacities. Numerous Boards have confirmed that a failure to submit to a required drug test constitutes a dismissible offense. The Carrier contends that the Claimant was already shown leniency when he was permitted to sign a waiver after a previous positive alcohol test and thus, the penalty should be upheld.

The Claimant contends that he has presented material evidence that the person conducting the breath alcohol test was not reliable or credible. The Claimant presented evidence that the tester's ability to conduct the test was impaired on January 20, 2020. Additionally, this unreliability calls into question both the test results and his testimony that he told the Claimant to wait for a confirmation test. The Claimant contends that no evidence was presented to show that the machine was calibrated or accurate.

The Claimant contends that he would not have done anything to jeopardize his ten years of seniority. The Claimant contends that his supervisors testified that on the morning of the test, the Claimant did not appear to be impaired.

The Claimant contends that he left because of a simple miscommunication that led him to believe that he should leave the testing premises and return for a later test. The Claimant contends that the tester conceded that he could not recall whether the Claimant acknowledged his alleged direction to wait for 15 minutes. Further, the Claimant contends that the record clearly shows that he returned shortly, belying the assertion that he was avoiding being tested.

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 the Claimant.

The Claimant was dismissed from the Carrier's service for violation of the Carrier's Standards of Excellence and Drug and Alcohol-Free Workplace Policy, for a Refusal to Test, based on the Claimant's decision to leave the testing site prior to taking a confirmation test. The Claimant does not deny that he left the site before a confirmation test could be conducted. Thus, the initial test result is immaterial, as is the condition of the tester or the machine. The Carrier's discipline was based on the Claimant's conduct after he was told of the positive test result, not the results of that test. At the Investigation hearing, the Claimant did not refute the testimony or offer an explanation.

It was the province of the Hearing Officer to determine the credibility of the witnesses at the Investigation hearing. As an appellate body, we are poorly positioned to judge the credibility of those witnesses. Thus, it is well-settled that unless the record does not support the determinations made, credibility determinations made by the one who observed the witnesses firsthand will not be disturbed. The Carrier has presented substantial evidence of the Claimant's violation.

With respect to the penalty, there was sufficient warning that a Refusal to Test may result in dismissal. The Claimant had previously signed a waiver, acknowledging that he understood the consequences of a failed test. Under the circumstances, we do not find that the penalty should be disturbed.

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 29th day of July 2022.