

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45020
Docket No. MW-46607
23-3-NRAB-00003-210603**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. C. Celino, by letter dated January 6, 2021, for an alleged violation of Safety Rule PGR-N and the Company Drug and Alcohol Policy in connection with his alleged conduct when he went home without proper authorization and refusing to return to work for a company policy Drug and Alcohol Screen was on the basis of unproven charges, arbitrary, excessive and in violation of Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Celino shall now be ‘***exonerated of all charges brought against him, he be made whole for all lost wages as well as all missed benefits and credits for vacation, and he be returned to service immediately with no loss of seniority. ***’

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.

At the time the incident giving rise to this claim occurred, Claimant C. Celino was assigned as a trackman. On December 15, 2020, he was scheduled to report for work at 7:00 AM. Prior to the end of his shift, at approximately 12:00 PM, Claimant notified his foreman that his sciatica was causing him pain, and he would need to end his shift early and return home. His foreman then drove him to the parking lot and told him to contact the supervisor (Mr. Chessie) to let him know he was leaving for the day.

The record indicates that the Claimant attempted to contact the supervisor by phone but was unsuccessful and left a voicemail for him regarding leaving his shift early. At about 12:35 PM, the supervisor returned the Claimant's call and acknowledged his reason for leaving early. Later, at approximately 1:08 PM, the supervisor again contacted the Claimant and told him to report for a drug and alcohol test. The Claimant informed the supervisor that he had already consumed alcohol, and that he did not have transportation to return to Carrier's facility. The Carrier then removed the Claimant from service pending a formal investigation.

The formal investigation was held on December 23, 2020. Following the investigation, in a letter dated January 6, 2021, the Carrier informed the Claimant that he had been found guilty of violating Safety Rule PGR-N and the Company Drug and Alcohol Policy, and that he was dismissed from Carrier's service as of that date.

The Organization filed a claim on Mr. Celino's behalf on January 25, 2021. The claim was discussed in conference on February 24, 2021, and was then progressed in accordance with the Parties' Agreement, after which it remains in dispute. Accordingly, it is properly before the Board for resolution.

The Carrier contends that the charges against the Claimant have been proven and support the penalty assessed. They point out that the Claimant's foreman informed him that he had to contact the supervisor for permission to leave work early, yet the Claimant left the property and went to his house before making actual contact with his supervisor. It notes that when Mr. Chessie, in his second phone call, asked the Claimant to return to work for a drug and alcohol test, the Claimant refused to submit to a test, which, according to both Carrier and federal policy is a clear violation and equivalent to the employee failing the test. It is, therefore, the Carrier urges, a dismissible offence.

on the Claimant's part. Thus, the Carrier insists, it has met its burden of persuasion in this matter, and the instant claim should be dismissed in its entirety.

The Organization protests that the Carrier has not shown that the Claimant intentionally left work without authorization, nor has it shown a violation of the Carrier's Drug and Alcohol Policy. It points out that when Mr. Chessie first returned the Claimant's voicemail message call, he simply told the Claimant "OK, hang tight." (Tr. p. 9) Therefore, the Organization argues, the Claimant reasonably assumed he had the supervisor's permission to clock out at noon on the date in question, prior to the end of his tour of duty. Moreover, it contends that by the time Mr. Chessie told the Claimant to return to work for a drug and alcohol test, the Claimant told him that he had already consumed alcohol, and had no one to drive him back to Carrier's facility. He could not return to work in his own car, so as not to "drink and drive" and he knew he would fail the test because of his (then off-duty) consumption of alcohol. In light of these factors, the Organization maintains that the instant claim should be sustained in full.

The Board has reviewed the testimonial and documentary evidence in this case carefully. We agree with the Carrier regarding the Claimant's failure to obtain permission before actually leaving work. Testimony on the record clearly establishes that the Claimant left a message for his supervisor, Mr. Chessie, but left before he actually had permission to do so – in fact drove home immediately after leaving the message, (Tr.p.21) rather than waiting a reasonable period of time to ascertain whether he had the supervisor's permission.

The remainder of the Carrier's charge (violating the drug and alcohol policy) is not as well substantiated. The Carrier proposed that the Claimant could have had someone to drive him or called a ride service to take him back to the work site. The Claimant testified without contradiction that the persons he might have called (his co-workers) were all still on duty, that he did not think the Carrier would/could send someone to pick him up, and that he could not have financially afforded to take a ride service (such as Uber or Lyft). (Tr. pp. 21-22) Moreover, there is no evidence on the record to indicate that the Carrier had a rationale, such as the odor of alcohol or cannabis, or erratic behavior, or slurred speech, for requiring the Claimant to return for work for a drug test once it knew the reason for the Claimant's departure. Nor is there any evidence on this record to suggest that the Claimant had previously been known to have a substance abuse problem.

According to the Carrier's own policy the pre-conditions for requiring drug testing are as follows: Pre-Employment; Reasonable Suspicion; Reasonable Cause ("tested while on duty and involved in an accident"); Examinations (e.g. "return-to-

duty”); Random; Post-Accident; and Follow-Up (as required by federal regulation or directed by Company). (Car. Ex. A in transcript documents.) In addition, Carrier’s Exhibit L in the transcript specifies that it is not Carrier policy, except for employees in FRA or FMCSA covered positions to do random testing. Nothing on this record suggests that the Claimant occupied a position that was either FRA or FMCSA regulated. Thus, Mr. Chessie’s decision to require the Claimant to return to work for a drug and alcohol test does not reflect either Carrier’s policy or federal policy.

Carrier’s determination that the Claimant’s honest statement that, while off duty, he had consumed alcohol and would come in at any other time to take a drug/alcohol test constituted a refusal to test, and therefore was grounds for dismissal is, essentially, without any support whatsoever. Accordingly, the Board finds that, under the circumstances in this case, the Carrier’s decision to terminate the Claimant was arbitrary and excessive. However, it has supported its position that some discipline was warranted, given that the Claimant actually left work without getting the required permission to do so.

It is the Board’s determination that the Claimant’s discipline shall be reduced to a two-month actual suspension, and that he be reinstated with back pay and with all privileges and status intact, less the two months’ suspension. In determining the amount of backpay owed, the Carrier and the Organization shall jointly make an assessment of the relevant employee payroll records.

AWARD

Claim sustained in accordance with the Findings.

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 3rd day of August 2023.