

PUBLIC LAW BOARD NO. 7564

Case No.: 14/Award No.: 14
Carrier File No.: 11-10-0349
Organization File No.: S-P-1510-G
Claimant: Alfred L. Hull

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on April 1, 2010 Claimant Alfred L. Hull was dismissed for violating the BNSF Railway Policy on the use of Alcohol and Drugs, dated April 15, 2009 and MOWOR 1.5, Drugs and Alcohol.

As a consequence of the violation, the Carrier should expunge the discipline from the record and make the Claimant whole for any and all losses, including straight-time and overtime compensation, credit for vacation and insurance benefits, with make-whole to include time the Claimant was withheld from service pending investigation.

Facts:

By letter dated February 18, 2010 the Claimant was directed to attend an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your allegedly reporting for duty intoxicated at 0700 hours, Thursday, February 18, 2010, at Bridge 38.3 on the Bellingham Subdivision at Marysville, Washington, and subsequent positive test of 0.055 for alcohol, while working as Bridge Tender (BBOX0132), headquartered in Marysville, Washington." After mutual agreement to postpone, the investigation was held at 1100 hours, March 9, 2010. The claimant was withheld from service pending the investigation.

Carrier Position:

A fair and impartial investigation resulted in the assessment of appropriate discipline. Mr. Crespin's telephone testimony did not prevent the Claimant from questioning him. The Claimant knew the relevant rules; simply because he had been withheld from service did not give the Claimant an excuse for attending the 0700 hours, February 18, 2010 meeting in an intoxicated state. He could have requested a different meeting location or remained sober. The Organization's claim that the Claimant tested

positive for alcohol because he had used Nyquil was an affirmative defense that the Organization was required to prove. The requisite proof was not produced. The positive finding of 0.055 was above the threshold and was the second time within 10 years that the Claimant had violated the rule.

Organization Position:

The Claimant did not receive a fair and impartial hearing for several reasons. He was charged with showing up for work intoxicated but was found guilty of appearing for a meeting with alcohol on his breath. The shift by the Carrier deprived the Claimant of his right to a defense. The Claimant did not report for work on February 18, 2010 as that day was both a rest day and a day when he had been withheld from service, despite the Carrier's claim that the Claimant had not been officially notified and could have worked. Because Mr. Crespin was allowed to testify by telephone, the Claimant was deprived of an opportunity to confront and question him. Mr. Crespin's testimony was obviously scripted and showed that he could have attended the investigation in person. Furthermore, sequestration of witnesses was a joke because during a recess Mr. Crespin provided a document to Mr. Stafford. Structuring the investigation so that the Conducting Official, Mr. Boldra, introduced most of the Carrier's documents deprived the Claimant of the opportunity to confront and question Mr. Boldra. The Claimant, knowing that he had been withheld from service, used Nyquil, but he did not violate the rule against appearing for work while intoxicated. Carrier officials who observed the Claimant did not say that he was intoxicated or impaired, but only that they smelled alcohol on his breath. The positive finding of 0.055 was only slightly above the DOT standard of .04 and below the standards in every state. Rule 42 was violated because the Carrier failed to provide reasons for disallowing the claim.

Findings:

The investigation was fair and impartial. That part of the charge that indicated that the Claimant showed up to work rather than simply to attend a meeting is obviously incorrect, but that inattention to detail does not doom the Carrier's case in this particular instance because it does not affect the crux of the charge, which is that the Claimant came to the meeting intoxicated. Here intoxicated does not mean slurring one's words or stumbling around unable to maintain balance. Rather, in the context of this case, intoxicated means a blood alcohol level above 0.020%. The notice to the Claimant to appear for the investigation noted the 0.055% positive finding. Whether the Claimant reported for work or for a meeting, he was on Company property. Since without a positive finding there could be no viable charge, the Organization surely knew what it had to defend against, as MOWOR 1.5 Drugs and Alcohol clearly states that "Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property."

Manager Crespin's telephone testimony did not deprive the Claimant of the right to confrontation and cross questioning. Confrontation does not have to be face-to-face, but can occur in a variety of ways, including telephonically. Mr. Garisto, the Claimant's

representative, had an opportunity to question Manager Crespín about his testimony and related documents. And, the training document that the Manager provided for Trainmaster Stafford did not make a joke of the sequestration rules because there is no indication that these two witnesses discussed actual testimony. Manager Crespín's testimony about the testing procedure and the supporting documents establish without question that the breathalyzer was properly calibrated on February 18, 2010 and that established procedures were followed in administering the breathalyzer test to the Claimant.

There is no basis for disputing the results, nor has the Claimant disputed the results. He has asserted that the results are explained by his use of Nyquil during the previous two days and particularly the night of February 17, 2010. Manager Crespín's testimony established to the Board's satisfaction that in view of a normal alcohol dissipation rate of .02 per hour, a normal 165-180 lb. male would have dissipated two shots of Nyquil taken on the evening of February 17, 2010 long before his 0700 hour appearance at Bridge 38.3 on February 18, 2010. The Claimant provided no reason why his dissipation rate would be abnormal. Therefore the Claimant has not met his burden of proving the affirmative defense.

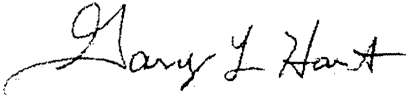
The rule is clear that two positive tests within a 10-year period will subject an employee to dismissal. That has happened in this instance. There is no reason for the Board to substitute its judgment for that of the Carrier

Award:

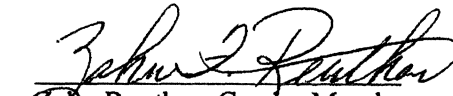
Claim denied.

Orders:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be made.



Gary Hart, Organization Member



John Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 28, 2013