

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
DIVISION – IBT RAIL CONFERENCE	)	Case No. 131
	)	
and	)	
	)	Award No. 131
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER	)	
NORFOLK & WESTERN RAILWAY COMPANY)	)	

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Richard K. Hanft, Chairman and Neutral Member  
Scott M. Goodspeed, Carrier Member  
Zachary J. Wood, Employee Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. R. Barnett, by letter dated May 27, 2021, in connection with his alleged violation of Operating Rule G when he tested positive for the presence of alcohol in his system during a random breath test administered on April 26, 2021, while he was assigned as a machine operator in the vicinity of Buena Vista, Virginia was capricious, excessive, harsh and unwarranted (Carrier’s File MW-FTW-21-97-LM-343 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Barnett shall now be reinstated with all back pay, rights and privileges including all time being held out of service count towards his retirement and that all charges are expunged from his record.”

FINDINGS:

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

After thoroughly reviewing and considering the record and the parties’ presentations. The Board finds that the claim should be disposed of as follows:

Claimant in this matter reported for work as a Machine Operator on April 26, 2021 at 07:00. After the morning meeting, Claimant was selected to take a random FRA Drug and Alcohol test. Record evidence indicates that Claimant provided a urine sample and was then subjected to a Breathalyzer test. The results of the Breathalyzer test showed a blood alcohol content (BAC) of 0.04 % at 08:12. A second, confirmatory test was performed at 08:28 and that test showed a BAC of 0.048. Claimant was taken out of service and driven home.

An Investigation was convened on May 20, 2021 to determine Claimant’s responsibility, if any, in connection with his violation of Carrier’s Rule G that provides in relevant part that:

“An employee who...has a positive test result for the presence of alcohol while on duty, on Company property, in Company work equipment or vehicles, or occupying facilities provided by

the Company...will be dismissed.” A transcript of the investigation on the property was submitted to the record for the Board’s review

By letter dated May 27,2021 Claimant was advised that he had been found guilty of violation of Rule G and as a result was dismissed from service. The parties participated in the appeal process provided under the Agreement but being unable to resolve the issue, the Claim now comes before this Board for final adjudication.

The Organization insists that this discipline cannot stand because Claimant was denied the procedural due process guaranteed by the Parties’ Agreement in that the Hearing Officer presiding over the investigation demonstrated bias against Claimant and the Organization and also because the Carrier failed to produce the testing service’s testing technician as a witness as was requested by the Organization.

Moreover, the Organization contends that Carrier failed to meet its burden of proof because the testimony on the record demonstrates that there was no verification that the testing equipment used to test the Claimant had been properly calibrated or was working properly and that the Carrier failed to ensure that the testing process was completed properly.

Finally, the Organization opines that the discipline assessed, dismissal, was arbitrary and unwarranted in light of Claimants twenty-six (26) year service record as a hard-working, dedicated employee. In light of that service record, the Organization insists that the quantum of discipline meted out here was excessive and the claim must be sustained.

The Board, after thorough review of the evidence and testimony on this record finds the Organization’s procedural due process complaints to be without merit. The Investigation concerning this matter was conducted in a fair and impartial manner and Claimant was afforded all due process.

The Board, however, has some doubts about both the calibration of the testing device and the competency of the testing technician in this particular matter. For those reasons, the Board orders that the Claimant shall be reinstated subject to a DARS evaluation. Should that evaluation conclude that Claimant does not have a problem with drugs or alcohol, the Claimant will be reinstated without pay for time out of service. If, however, the DARS evaluation does show that Claimant has a substance abuse issue and needs treatment, then he will be issued a letter to follow the instruction of DARS and can come back to work without compensation for time out of service when he completes his treatment.

In either case, Claimant must agree that going forward, he will keep his system free and clear of prohibited substances while on duty or property.

AWARD:

The Claim is sustained in part and denied in part. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



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Richard K. Hanft, Chairman



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Scott M. Goodspeed, Carrier Member

Dated at Chicago, Illinois, October 20, 2022



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Zachary J. Wood, Employee Member