

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

| | | |
|--|---|---------------|
| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES |) | |
| DIVISION – IBT RAIL CONFERENCE |) | Case No. 134 |
| |) | |
| and |) | |
| |) | Award No. 134 |
| NORFOLK SOUTHERN RAILWAY COMPANY (FORMER |) | |
| NORFOLK & WESTERN RAILWAY COMPANY) |) | |

Richard K. Hanft, Chairman and Neutral Member
Scott M. Goodspeed, Carrier Member
Adam N. Gilmour, Organization Member

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

1. The Carrier’s discipline (dismissal) of Mr. T. Elton, by letter dated September 15, 2021, in connection with his alleged violation of Norfolk Southern’s Policy on Alcohol and Drugs (‘Rule G’), in that he tested positive for the presence of alcohol during a random breath test administered at approximately 6:43 A.M. on August 5, 2021 in Muncie, Indiana, while assigned as a Bridge and Building (B&B) carpenter foreman, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-FTW-21-191-BB-644 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Elton shall now be reinstated to service immediately, striking this offence from his record and be made whole for all losses incurred, including all credits and benefits due in his absence.

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, at the time giving rise to this discipline and claim had ten (10) years tenure with the Carrier as a B & B Carpenter foreman. On August 5, 2021 after arriving at work, Claimant was chosen to be tested in a random test for drugs and/or alcohol. Claimant submitted to the test that showed at 06:43 am Claimant had a blood alcohol content of 0.033.

A second test was performed at 07:03 that showed a blood alcohol content of 0.026. Claimant, at that time requested a follow-up blood test with the request being denied. Claimant was thereafter removed from service pending formal investigation.

A short time thereafter on that same morning, Claimant presented himself at the Concentra Health Care Center and was administered a breathalyzer test and a blood draw. At 08:35 AM the results of those tests showed Claimant's blood alcohol level to be at 0.00.

Claimant then went to Ball Hospital and had a blood draw done at 12:56 PM and the results published at 13:51 PM showed a result of less than ($<10\text{Mg/dL}$) consistent with no ethanol present. Claimant thereafter had a hair follicle test performed on August 14, 2021 with results showing no Ethyl Glucuronide within six (6) months.

The Organization contends that the Carrier failed to meet its burden of proof because it failed to ensure that testing procedures were accurate; refused to perform a follow-up test; and ignored the results of tests performed by facilities not under contact with the Carrier.

A formal investigation took place on August 31, 2021. At the conclusion of the investigation, after hearing and weighing all of the evidence, it was determined that the Claimant was guilty as charged and dismissed from service.

The Board has reviewed and considered all of the evidence on this record as well as the arguments presented by the respective parties.

The Board finds that Claimant was afforded all procedural due process guaranteed by the parties' collective bargaining agreement generally and specifically with regard to the System Discipline Rule 30.

Further, the Board finds that the charges against the Claimant were proven by substantial evidence.

Although the Claimant submitted to further testing that showed a 0.000 Blood Alcohol Content ("BAC") at 08:35 AM at the Concentra Medical Center and then a blood draw at Ball Hospital at 12:56 PM that same day showing a 0.000 BAC, neither of these tests show the Claimant's BAC at 06:43 AM on the morning the Claimant submitted to the random testing.

The results of the tests fell subject to the "Federal Regulation on Control of Alcohol and Drug Use in Railroad Operations, Subpart "B," (49 CFR § 219.10 (a) 94) (i) & (ii) and was actionable under the Norfolk Southern Policy Statement on Alcohol and Safety and General Conduct ("SGCR") Rule G.

While the further testing that Claimant submitted to at 8:35 in the morning showed zero alcohol in the Claimant's system at that time, it does not alter the fact that the test given two (2) hours earlier showed that Claimant had alcohol in his system at 6:35 am when he was randomly selected to be tested. The charge was thus proven by substantial evidence.

Inasmuch as this was Claimant's first violation of Carrier's policy on Drugs and Alcohol and in light of Claimant's past service record, the Board determines that the Claimant shall be returned to service without compensation for time out of service and subject to the parties and the Claimant entering into a last chance agreement and further subject to an evaluation by Carrier's Drug and Alcohol Rehabilitation Services ("DARS") and completion of any rehabilitative conditions imposed.

Award:

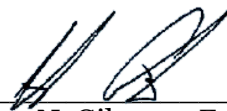
Claim sustained in accordance with the findings. The Carrier is directed to comply with the Award on or before thirty (30) days following the Award date below.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.