

PUBLIC LAW BOARD 6532

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY

and

NMB Case No. 3
Claim of D. L. Smith
Dismissal

THE UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim of Wenatchee Switch Foreman D. L. Smith for reinstatement to service with compensation for all earnings and benefits lost from the date he was removed from service, February 28, 2001, until reinstated, with removal of all reference to this incident from his service record.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on August 16, 2002 at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

On February 28, 2001, Claimant was assigned as Switch Foreman on Yard Job 101G at Wenatchee, Washington with an on-duty time of 0630 hours. Shortly after arriving on the property, Claimant was informed that he had been selected by computer for a Federally mandated random drug and alcohol test. Technician Donna Wisemore (a certified Breath Alcohol Technician) conducted the breath alcohol test using a Breathalyzer 7410 (Serial No. ARPC-0566) manufactured by Drager. A Certificate of Calibration and a test log in the record indicate that this specific Breathalyzer 7410 was calibrated on December 13, 2000.

There is no dispute Claimant provided a breath sample and a urine sample as directed. The record establishes that at 0917 hours (following a 0.000 air blank test), Claimant's breath alcohol measured 0.051. A follow-up test was performed at 0934, again after a 0.000 air blank test, and Claimant's breath alcohol registered 0.040. Insofar as the record indicates, Claimant's urine sample did not produce a positive result. Claimant was removed from service and directed by letter dated February 28, 2001 to attend a formal investigation in connection with the following charge:

Attend investigation ... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violation of GCOR Rule 1.5 and Section 3.1 and 7.9 of the Policy on the Use of Alcohol and Drugs effective September 1, 1999, as a result of random test performed at approximately 0900 hours on February 28, 2001, while you were assigned as switch foreman, Wenatchee Yard, on duty at 0630 hours, February 28, 2001 at Wenatchee, Washington.

At the request of the Organization, the evidentiary hearing originally scheduled for March 8, 2001, was postponed to April 5, 2001, and then postponed again to April 25, 2001.

Testimony adduced during the investigation confirmed that Claimant's breath tested positive for alcohol during random FRA drug and alcohol testing while on duty and on company property on February 28, 2001. At the investigation, the Organization challenged the accuracy of the Breathalyzer 7410 (Serial No. ARPC-0566), the Carrier's failure to present Ms. Wisemore at the investigation, and the Carrier's failure to exchange information with Claimant's representative not later than 48 hours prior to the investigatory hearing (as required by the Parties' Memorandum of Understanding ("MOU") dated July 23, 1996 regarding "Uniform Investigation Rule for UTU represented employees").

The record of investigation also established that Claimant was previously dismissed in May of 1995 after testing positive for alcohol while on duty, and was subsequently reinstated on a leniency basis after participating in the Carrier's EAP program.

As to the instant charge, Claimant admitted drinking the night before he was tested on February 28, 2001, but asserted that he had consumed his last drink at about 9:00 p.m. and as such was "very surprised" when his breath tested positive for alcohol. (Tr. 21.)

By letter dated May 3, 2001, Claimant was dismissed for violation of General Operating Rule 1.5 which states in pertinent part:

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any alcohol on their breath or in their body fluids when reporting for duty, while on duty, or while on company property.

The Organization timely presented the instant claim for reinstatement. The Carrier denied the claim in accordance with applicable schedule rules. Resolution of the matter could not be

reached on the property, and it was submitted to the Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that Claimant's dismissal was justified on the basis that his breath tested positive for alcohol while on duty and on company property on February 28, 2001 in violation of General Operating Rule 1.5.

The Carrier further points out that Rule 7.9 of its Alcohol and Drug Policy provides that two-time offenders are subject to permanent dismissal if both Rule 1.5 violations occur within the same 10-year period.

The Carrier rejects the Organization's objection to the authenticity of the breath tests, with respect to the accuracy of the Breathalyzer machine, noting for the record that the machine was calibrated on December 13, 2000 as recommended by the manufacturer.¹ As to the Organization's argument that the manufacturer of the breath test machine also recommended monthly "accuracy checks", which, according to the record were either not performed or not recorded, the Carrier maintains that negative air blank tests performed immediately prior to Claimant's initial and follow-up tests, indicated that the machine was operating properly. As such, argues the Carrier, the value of the test results are not subject to question.

As to the Organization's contention that Claimant was deprived of due process because the technician who performed his breath tests on February 28, 2001 was not summoned to the investigation as a witness, the Carrier argues that because the results of the test were not materially suspect, the presence of the technician for cross-examination was unnecessary. In support, the Carrier cites numerous arbitration awards in the industry, in which other referees concluded similarly. Among them is Award 411 of PLB 94 (Moore), which states in pertinent part:

In conclusion the Board finds the claimant was not deprived of a fair and impartial hearing as alleged by the Union. A laboratory report is a scientific analysis. A laboratory personnel's presence would not have added to the hearing nor would their testimony materially affect the outcome of that proceeding.²

1/ The Carrier supplied confirming calibration records documenting maintenance on the Breathalyzer 7410 (Serial No. ARPC-0566).

2/ See also PLB 94 Award 410 (Moore), PLB 1849 Award 21 (O'Brien), PLB 5719 Award 32 (Lynch), PLB 3634 Award 50 (Mangum), PLB 4865 Award 1 (Blackwell), SBA 18 Case 1558T (Vernon).

The Carrier maintains that the Organization's procedural objections failed to negate its *prima facie* case against Claimant, and accordingly urges the Board to deny the claim in its entirety.

The Organization urges the Board to reinstate Claimant on the basis that he was deprived of a fair and impartial investigation. The Organization asserts that the technician who administered the test was sloppy and unprofessional in her methods, and accordingly challenges the result of Claimant's random test. The Organization further argues that the technician was not present at the investigation for cross-examination as to her practices, and as such asserts that the Carrier fatally jeopardized the propriety of its response to Claimant's test. In support, the Organization cites First Division Award 23911 (Twomey), which states in pertinent part:

When no qualified medical expert was called to testify, the Organization objected and appealed the decision in part on that point. The eleven page document from the Carrier's designated testing laboratory's director of toxicology dated January 14, 1988 was a belated attempt by the Carrier to address matters that should have been handled at the August 2, 1987 investigation enabling the Carrier to fulfill its obligation to provide a fair investigation under its Agreement...³

The Organization also argues that the Carrier failed to maintain the Breathalyzer machine used to test Claimant in accordance with its manufacturer's recommendations, and as such questions the validity of the positive result. The Organization cites the manufacturer's note that, "The Breathalyzer 7410, after initial calibration, should be checked for accuracy at least once a month or every 30 days (minimum)." The Organization argues that the Carrier's apparent failure to document the recommended "accuracy checks", prompts a logical conclusion that they were not performed. The Organization further rejects the Carrier's argument that the machine was calibrated within standards recommended by the manufacturer.⁴ The Organization cites on property Award 30 of PLB 5928 (Klein) in support, which states in part:

3/ See also PLB 4375 Award 7 (Eischen) and SBA 18 Decision 5937 (Vernon).

4/ On this point, the Organization points out that the time designated by the Breathalyzer machine in both Claimant's breath tests on February 28, 2001 was off by three hours, and as such questions the validity of Carrier's December 13, 2000 calibration methods. The Carrier, however, explains that the machine was calibrated in a different time zone, and this accounted for the precise 3-hour time variance.

The claimant does not deny that he consumed alcohol on the previous evening. However, the claimant does deny that he reported for work or performed work in violation of Rule 1.5 of the GCOR. The board finds that the breath alcohol test administered to the claimant by the Carrier must be discounted as presumptive evidence that the claimant had measurable amounts of alcohol in his breath while on duty for the following reasons.

According to the manufacturer of the CMI Intoxilyzer, the breath alcohol testing device utilized by the Carrier, the device should be calibrated every thirty(30) days at a minimum. The testimony reveals that the breath alcohol testing device utilized in this case was last calibrated thirty-two (32) days prior to the test administered to the claimant. The Board finds that the manufacturer's recommendation must be followed by the Carrier (and outside contractors) in order to ensure the proper operation and accuracy of such mechanical devices, particularly when those test results can create a presumption of a violation of the rules under the Carrier's alcohol and drug policy. The Carrier failed to follow the proper procedures for calibration of the breath alcohol testing device in this case.

Without accurate breath alcohol test results, the Carrier is unable to establish a presumption that the claimant violated Rule 1.5...

For the foregoing reasons, the Organization urges the Board to sustain the claim in its entirety.

DISCUSSION AND ANALYSIS: Based on review of the record, the Board finds that the Carrier failed to establish substantial evidence in the record to sustain a finding of Claimant's guilt.

Calibration

The Carrier's Policy on the Use of Alcohol and Drugs acknowledges that the Carrier is subject to Federal regulatory requirements, including 49 CFR Part 40 "Procedures for Transportation Workplace Drug Testing Programs". Forty-nine CFR Section 40.55 provides that in order to be used for screening or confirmation alcohol testing, an EBT (such as the Breathalyzer 7410) "shall have a quality assurance plan (QAP) developed by the manufacturer." Section 40.55 further provides that the QAP shall designate the method and tolerances to be used for external

calibration and the "minimum intervals" for performing such calibrations; the interval may vary based on use, environmental conditions, and context of operation. The QAP must be approved by the National Highway Traffic Safety Administration ("NHTSA"). The Employer is required to comply with the NHTSA-approved QAP.

The QAP for the Drager-manufactured Breathalyzer 7410 provides that it must be calibrated every six months "and/or when Accuracy Checks are out of tolerance". The QAP also provides that the Breathalyzer 7410 "should be checked for accuracy at least once a month or every 30 days (minimum)." (Emphasis supplied).

A Certificate of Calibration and a test log in the record indicate that the Breathalyzer 7410 (Serial No. ARPC-0566) that was used to test Claimant's breath alcohol had been calibrated on December 13, 2000. That date is within the six month calibration period prescribed by the QAP. The QAP does not appear to establish what procedure, if any, is necessary in order to conduct the accuracy tests which are to be performed every 30 days. The use of the word "should" in the QAP's direction to test accuracy every 30 days indicates, however, that the accuracy test is intended as a recommended guideline, not a strict requirement, as contrasted to the requirement that "calibration must be done at a minimum of every 6 months." (Emphasis supplied). The evidence establishes that the air blank test run prior to testing Claimant registered 0.000 percent. In addition, the record establishes that Claimant was the last member of his crew to be tested, and Switch Foreman J. W. Lucas testified at the investigation that his breath test, administered on the same machine, was negative. (Tr. 41, 43).

In its appeal letter dated June 27, 2001, the Organization challenges the accuracy of the breath alcohol test based on the difference between the time recorded on the clock in the Breathalyzer 7410 (Serial No. ARPC-0566) and the actual time at which events occurred. The Carrier indicates that the difference in clock readings resulted from the manufacture of the Breathalyzer 7410 (Serial No. ARPC-0566) at a location that was two time zones away from where it was used in this instance, and that one more hour of difference was added by the switch to daylight savings time.

For all of these reasons, the Board finds that the breath alcohol test administered to Claimant was not invalid based on a violation of the Quality Assurance Plan ("QAP") (which is required by the CFR) or of the CFR itself. The Board concludes that the test produced an accurate result as to Claimant's breath alcohol level.

Technician

The Parties' MOU dated July 23, 1996 regarding "Uniform Investigation Rule for UTU represented employees" provides, in relevant part:

Article II - Formal Hearing

(a) Notice of Hearing

(3) The Carrier will be responsible to produce sufficient witnesses to develop the facts concerning the incident or occurrence being investigated. . . .

NOTE: A witness with material facts is an individual who can give pertinent testimony in connection with the specific occurrence resulting in charges against the employee and without whose testimony all essential facts upon which to base a decision would not be developed.

There is no dispute that Ms. Wisemore, the technician who performed the alcohol test on Claimant, was not present and did not testify at the April 25, 2001 investigatory hearing on the property. The record shows that she was a certified Breath Alcohol Technician. The Carrier argues that there is a practice on the property not to call such testers as witnesses to formal investigations. The Organization rejects the assertion that the Parties have agreed upon such a practice. In presenting arguments based on general authority from other Public Law Boards or Special Boards of Adjustment, the Organization cites cases which involve chain of custody matters (especially departures from usual procedures) and/or challenges to qualifications of laboratories and/or technicians. More on point are the cases cited by the Carrier which indicate that the absence of laboratory personnel at a hearing did not produce a fatal defect in the legitimacy of the proceedings. Therefore, in the absence of a material challenge by the Organization, the Board declines to require the presence of laboratory personnel in order to prove the results of the laboratory tests.

Document Availability

The record indicates that by letter dated March 23, 2001 signed by Local Chairman Lawrence Kozlowski, the Organization submitted a comprehensive request for witnesses, materials, and records to the Carrier in anticipation of the investigatory hearing

that was originally scheduled for April 5, 2001. The records requested included the training records of Ms. Wisemore; the employment and training records of Mr. Beryl Krueger (the technician who calibrated the Breathalyzer 7410 used to test Claimant's sample); various manuals, records, and certificates - including the QAP - for the Breathalyzer 7410 that was used to test Claimant's sample; the agreement between the Organization and the Carrier regarding selection of crews for testing; the Carrier's plan concerning drug and alcohol tests; the letter designating which crew or individuals were to be tested; the telephone records of the Wenatchee Yard Office for the two weeks prior to February 28, 2001; and the urinalysis results for Claimant, including the chain of custody documentation.

By letter dated April 4, 2001, the Carrier responded to the Organization's March 23rd letter indicating that it was providing the Organization with Mr. Krueger's certification; the calibration record verifying that the Breathalyzer 7410 was in good working order prior to February 28, 2001; a letter indicating how the Breathalyzer 7410 was calibrated; a copy of Ms. Wisemore's certification; and the QAP for the Breathalyzer 7410. The letter also indicated that the Carrier had already provided the Organization with a copy of the drug and alcohol policy, Claimant's laboratory report; and the evidentiary support for the random test selection.

In his statement at the conclusion of the investigatory hearing on April 25, 2001, Mr. Kozlowski indicated that the April 4th letter and the information transmitted by it had been conveyed to him at approximately 5:30 p.m. or 6:00 p.m. on April 24, 2001 (the previous evening). He challenged this action as a violation of the Parties' MOU dated July 23, 1996 regarding "Uniform Investigation Rule for UTU represented employees". That MOU provides, in relevant part:

Article II - Formal Hearing

(a) Notice of Hearing

(5) Forty-eight (48) hours in advance of the hearing the Carrier and the individual identified as the accused employee's representative will exchange all records, documents, locomotive recorder tapes, etc, as well as any other items to be used as exhibits at the investigation, to allow both parties to prepare for the hearing.

The Carrier argues that the information transmitted by the April 4th letter was made available to the Organization for pick up in advance of the 48 hours required by the MOU. It asserts that the MOU is silent as to the procedure for the "exchange" of information that is required. The Carrier contends that is the normal procedure used by "mutual agreement". This argument is not convincing.

Assuming that the Carrier received the information itemized in the April 4th letter and such information was on hand at that time, there is insufficient evidence in the record to establish that the Organization was advised that the information was available for pick up. The objection by Mr. Kozlowski in the record of the investigatory hearing makes clear that the Organization did not understand such a system to be the "normal" procedure or that such a system was not one that was used by "mutual consent".

Moreover, the evidence does not establish that the Carrier undertook actions which could reasonably have constituted an "exchange" as required by the MOU. An "exchange" need not necessarily be a formal interaction by two persons for the specific purpose of transferring documents and records. It might take many forms from an informal meeting to the placement of the information in a designated pigeon-hole mailbox to mailing (by U.S. Mail or by interoffice mail) or transmitting the information to an address at which the Organization representative is reasonably expected to receive the information. The record does not support a finding, however, that the Parties agreed that an "exchange" could be conducted by telling the Organization that certain documents were available to be picked up.

The information transmitted to the Organization by the April 4th letter goes to the heart of its challenge to the validity of the breath alcohol test that was the basis for Claimant's discharge. The information requested by the Organization (the training and service of the technicians; the QAP, certificates, and manuals for the Breathalyzer 7410; and documents relating to the Carrier's drug and alcohol policy) could have been essential to the Organization's case, especially considering that the evidence indicated that neither Claimant's urinalysis nor his behavior showed that he was under the influence of alcohol.

Due process is an essential element of establishing the lawful basis for dismissal which is inherent in just cause. In the absence of such a process, there cannot be a legitimate discipline. The evidence establishes that the Carrier's failure to exchange information as required by the MOU was prejudicial to the Organization's ability to prepare and present its case on crucial matters that were at issue and thus deprived Claimant of the "fair

and impartial" hearing mandated by Article I(a) of the MOU. This constitutes reversible error. The Award so reflects.

The Carrier argues that if the Organization had difficulty in digesting recently-supplied information (such as the information attached to the April 4th letter) that is presented at the hearing, the proper remedy was to recess the hearing while the Organization "digested" the information. The record does not indicate that such a recess was offered or taken; nor is there any indication that mere delay in the course of the hearing would have afforded the Organization opportunity to research and respond to the tardily-produced information. Thus, even if a recess were an appropriate remedy, that remedy was not instituted and the Carrier's violation of the MOU was permitted to affect the record and, potentially, the outcome of the investigatory hearing. Just cause for dismissal cannot be based on such a record.

Railroad industry employees holding safety-sensitive positions are subject to special testing requirements because of the potentially catastrophic consequences of impairment from drugs or alcohol to the public, the Carrier's employees and property, and to themselves. Both the Agreement and the Federal Regulations contain procedural and technical specifications which must be met in order to produce a valid test. As matters of important public policy, employees are entitled to the contractual and regulatory protections and can only be disciplined for positive test results if the test is valid.

That having been said, Claimant's test results and his own explanation as to the circumstances which preceded his test are cause for concern. Evidence of past alcohol abuse and - at the least - a casual attitude toward alcohol consumption is sufficient to require Claimant's evaluation and possible continued treatment. The Award so reflects.

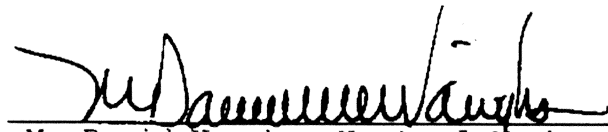
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AWARD: The Organization's claim is sustained. The Carrier failed to afford Claimant procedural due process and thereby failed to prove just cause for his termination. Claimant's dismissal shall be rescinded and he shall be reinstated forthwith. Carrier shall make Claimant whole in accordance with the Parties' Collective Bargaining Agreement. Claimant shall be referred to the Carrier's alcohol treatment program for such testing and evaluation as it deems appropriate, and shall comply with the recommendations of that program for further testing and treating, if any. The program shall be furnished with a copy of this Award to aid in its assessment.

Dated this 16th day of June, 2003.


M. David Vaughn, Neutral Member

 - sec attached 
Robert S. Karov, Carrier Member David B. Snyder, Employee Member

Carrier's Dissent to Case No. 3 of PLB 6532

The Board found that the Claimant's breath alcohol exceeded the legal limits prescribed for by the FRA, being the Claimant's second positive within 10 years (a dismissable offense under the Carrier's Policy on the use of drugs and alcohol.) Notably, the Board states the following: "The Board concludes that the test produced an accurate result as to Claimant's breath alcohol level."

Yet, the Board chose to reinstate the employee (with full back-pay) due to the Carrier not actively furnishing information requested by the Organization to a local chairman within 48 hours of the formal investigation. Rather, the Carrier officer made the information available at his office for pick-up by the local chairman well in advance of the 48-hour stipulation provided for in the Agreement.

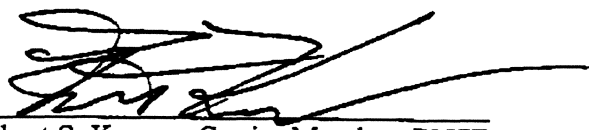
Overturing this case on this procedural ground was an error in judgement for two substantial reasons.

First, the Agreement does not prescribe who or how the information is to be exchanged between the parties. This practice differs at different locations of the railroad, as it may, under the Agreement.

Second, and most importantly, the Carrier was the only party to outline the specific practice for exchanging information at this location, and how it complied with this practice (see local Carrier officer's declination to the local chairman's appeal dated July 17, 2001, wherein he noted in part: "It has been your practice to see the Terminal Manager and pick up documents from him as evidenced by....") The Organization never responded in challenge to the Carrier's assertion during the on-property handling of this claim, and did not articulate in any of its continuing appeals what practice may have utilized instead – noting simply, and generically, that the Agreement prescribed 48-hour exchange period was not heeded.

For the Neutral to gravitate to this flimsy and unsupported argument, particularly in the face of the Carrier's unrefuted written assertion to practice early in the claims handling process, and then to sustain the claim with full back-pay, is utter non-sense. In fact, it jeopardizes public safety and the confidence placed on the arbitration process to assure that proven repeat drug and alcohol offenders do not plague this industry with potential catastrophe.

Therefore, in these regards, this decision cannot be given any weight as future precedent.

A handwritten signature in black ink, appearing to read "Robert S. Karov", with a long horizontal line extending to the right.

Robert S. Karov – Carrier Member, BNSF