

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 160

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2018-00007

Claimant: T. Klang

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The dismissal imposed upon Mr. T. Klang for alleged violation of USOR Rule G - Drugs and Alcohol was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2018-00007 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Klang's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Claimant was notified by letter dated January 24, 2018, to attend an investigation, which provided:

The investigation is being held to develop the facts and to determine your responsibility, if any, in connection with an incident that occurred at approximately 0845 hours, January 22, 2018 at or near Proctor, MN, when you allegedly refused to submit a requested observed reasonable suspicion

urine test, and whether you violated any Company rules, regulations and/or policies in connection with the incident.

The investigation was conducted on February 6, 2018. Following the formal investigation and review of the record, Claimant was advised by letter, dated February 14, 2018, which provided:

The record contains credible testimony and substantial evidence proving that you violated:

US Operating Rule G-Drugs & Alcohol

Violation Level 4

In consideration of the incident, the proven rules violations, and your past discipline record, you are hereby assessed the following discipline:
Dismissal From Service

The Carrier maintains that substantial evidence has shown that Claimant failed to produce a second urine sample and refused to sign off on the document indicating he produced the second sample.

The Organization responds that the handwritten statement should have been excluded, the witness should have testified at the hearing, and that the record contains evidence of a second sample being produced. The Organization continues that on the record before this Board, there is no evidence to prove the charges.

A review of the transcript indicates that Mr. Blank observed Claimant after he arrived late at work. Claimant's appearance indicated to Mr. Blank a reasonable suspicion to warrant a drug and alcohol test. Mr. Blank's testimony indicated that his suspicion was reasonable and his response appropriate. He performed properly when confronted with an employee he believed may be under the influence of drugs or alcohol.

The issue in this claim revolves around the Organization's claim of a lack of evidence that Claimant failed to comply with the requirements of the urinalysis. The Carrier claims that merely introducing a handwritten statement of an employee of a third-party tester is sufficient to establish Claimant's failure to comply. The Carrier's argument fails. Key to the Carrier's argument is the following, from the submission:

The Organization objects to the tester's statement, **however they never provide evidence that Claimant provided a second observed**

sample, as requested, they never refute that Claimant refused a test, that he provided a cold sample or that he left the premises and did not complete testing. However, in the appeal the Organization attempts to make the assertion for the first time that Claimant did indeed provide two separate samples of urine as instructed. They attempt to make a connection between a chain of custody number on Exhibit 7 to establish that a 2nd sample was provided, but it is unclear how the Organization has made this unsubstantiated leap that a number on a piece of paper somehow verifies that a 2nd sample was given. The Organization neglects to address why there is no signature or information completed, as required by the donor in Step 5. This document further confirms the tester's statement that Claimant refused to sign the paperwork. For the Organization to claim that "No where either on Exhibit 7 or any other form entered in to evidence, is there any indication that the Claimant tested positive for any prohibited substance." is merely an attempt to deflect from the issue at hand. There is no positive test, because there was no valid specimen collected. It was a refusal. (emphasis added)

The burden of establishing substantial evidence is upon the Carrier and not upon the Organization. There was nothing for the Organization to refute other than conjecture raised by a handwritten statement of a witness who did not appear. There was absolutely no testimony in the record about what occurred with the test. Further, the Organization objected to the inclusion of the handwritten statement. The hearing officer refused to rule on the objection – leaving it to this Board to determine whether it should have been included in the record.

There was no witness to testify that Claimant failed to provide a second sample. Indeed, the form indicates a chain of custody and references a second sample. Had there been a witness at the hearing, then the witness could have testified about this discrepancy. Moreover, the hearing officer never asked the Claimant whether he produced the second sample. In addition, the hearing officer never asked the significant question of whether Claimant was asked to sign the form and refused to sign. Mr. Blank was not there and could not testify to the alleged incident. The only questions the hearing officer asked Claimant about the incident are:

- Q. Please state for the record what you know about this incident and your involvement in it.
- A. Just that they wanted me to submit to a urinalysis, I guess.

MR. LETIZIA: I would object. If you have any specific questions for Mr. Klang, I would ask that you ask those. He's not here to incriminate himself or develop testimony against himself.

HEARING OFFICER: Would you like to make a statement for Mr. Klang?

MR. LETIZIA: No.

BY HEARING OFFICER:

Q. Mr. Klang, Mr. Blank entered a rule into record, USOR Operating Rules as Exhibit 3 and 3A. Are you certified on the USOR?

A. Yes, I am.

Q. Do you understand the rules that Mr. Blank has submitted?

A. Yes.

Q. Mr. Klang, or Mr. Letizia, if you wish to answer for Mr. Klang, on the date in question as identified in the notice of investigation, do you believe you complied with this rule?

A. Yes.

In PLB 7566 Award 55, this Board addressed a similar situation and sustained the Organization's claim:

A review of the record indicates that there were three passengers in the truck that Claimant was driving on the date in question. A Carrier official read their statements into the record. He did not witness the event. One witness did appear at the hearing but had no knowledge of any damage to the vehicle other than somebody telling him that it was out of alignment.

Based upon a review of the evidence, the record establishes that the Claimant was denied his right to a fair and impartial investigation because there was no opportunity for the Claimant to cross-examine the witnesses the Carrier relied upon in support of the charges against him. Further, Claimant had no recall of anything out of the ordinary or any incident while driving in the yard. The only witness to testify stated that Claimant was doing 20 mph in the yard and crossed the tracks while travelling too fast. He was unaware of any damage to the vehicle before the event. His only knowledge of damage was a comment by a coworker.

Similar to the facts in Award 55, the Carrier here presented only the testimony of Track Supervisor Blank as the only witness at the hearing. He was not at the scene of the alleged infraction and had no personal knowledge of the incident. This Board cannot

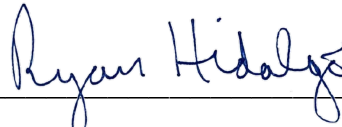
determine what occurred at the urinalysis test because there is no competent evidence in the record.

Claim sustained.

In Dissent:



John K Ingoldsby
Carrier Member



Ryan Hidalgo
Organization Member



Brian Clauss
Neutral Member

Dated: 12-18-20