

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 194/Award No. 194

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2019-00032
Claimant: Colin Goetz

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. C. Goetz for alleged violation of USOR Rule G – Drugs and Alcohol was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00032 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Goetz's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement.”

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.

Facts

The Claimant has established and holds seniority in the Carrier's Maintenance of Way (MOW) Department and was working as a weekend Track Foreman with eleven (11) years seniority when upon reporting for duty on March 8, 2019, he was subject to an FRA/DOT random drug/alcohol test. The Carrier's Substance and Alcohol Free Environment Policy (S.A.F.E.) states that the presence of breath alcohol at a level of .02 or above constitutes a violation. The Claimant initially “blew” a .023 and approximately 19 minutes later the test showed a concentration of .027. The breathalyzer had not had an internal calibration within the preceding year, as prescribed. External calibrations had been performed on March 1, 2019 and again after the test was administered, with no adverse indications. The positive results were reported to the Carrier, the Claimant was removed from service pending the results of an investigation which, by letter dated

March 12, 2019 he was directed to attend. Following the investigation, by letter dated April 10, 2019 the Claimant was informed that the Carrier had concluded that he was guilty of a Level 4 violation under the CN Discipline Policy because he had violated U.S. Operating Rule G – Drugs & Alcohol and that he was immediately dismissed. The above-noted claim was timely filed on April 24, 2019, properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

The Carrier points to conclusive proof of the violation of USOR Rule G, with the Claimant admitting during the on-property consideration of the claim that he had made a mistake. Regardless of the internal calibration issue, there is no evidence indicating that the breathalyzer results were inaccurate or incorrect. The investigation was fair and impartial without prejudgment, with the Claimant afforded representation, a Hearing Officer who acted professionally and who did not commit procedural violations. The dismissal was just and with sufficient cause. The Board is an appellate body that should not substitute its judgment for that of the Carrier in the face of a proven violation.

Organization Position

The Carrier has not met its required burden of proof because the breathalyzer had not been internally calibrated within the year prior to the Claimant's test. The Claimant's admission is disputed, but he indicated enrollment in an Alcoholics Anonymous program. The dismissal was unwarranted in view of Mr. Goetz's eleven (11) years of service with no prior discipline and his assurance that he had sought help. The dismissal has created undue hardship.

Findings

The Carrier's Discipline Policy lists Level 4 violations, those that involve "conduct that is extremely serious enough to result in immediate termination," including "(f)ailure or refusal of a drug or alcohol test. USOR Rule G states in relevant part that "The use or possession of alcoholic beverages while on duty, on company property, or while occupying facilities paid for or furnished by the company is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property."

During the on-property processing of this claim, the Organization asserted that the Carrier's failure to provide a copy of Rule 31 – Discipline Procedure, is a "fatal error" that requires a sustaining award. We disagree. The omission of Rule 31 from the pre-hearing documents was an error, but not a fatal error because the omission did not impede the Organization's ability to defend Claimant Goetz. Indeed, Rule 31 appears as Employes' Exhibit B in the Organization's submission to this Board. We do, however, caution the parties not to assume that omission of critical documents in the future will not be judged as harmful, and thus fatal, error.

The Organization has disputed the Claimant's admission that he has a problem with alcohol. Again, the Board disagrees. To be sure, during the investigation the Claimant did not make an explicit admission. However, when asked by the Hearing Officer if he "would . . . like to say what you know about the situation" (TR-51, ll. 24-25), Mr. Goetz indicated his belief that he should get a second chance and that while he had contacted the EAP, he "ended up going a different route" and was "going to some meetings to try to correct my situation" (TR-52, ll. 9-11).

The Claimant's implicit admission does not establish a violation of USOR Rule G on the morning of March 8, 2019. The Carrier has the burden of establishing the violation with substantial evidence. Thus, we turn to the breathalyzer exam. Had we been presented with the above-noted test results, with evidence of an outdated internal calibration of the breathalyzer and no evidence of a timely external calibration, a sustaining award would have been issued. But, the record shows that an external calibration had been performed on March 1, 2019 and again on March 8, 2019 after the breathalyzer exam had been administered. Because the external calibrations did not indicate anomalies and because there is no evidence that would prompt the Board to question the test results, we find that the Carrier has met the burden of proving a violation of USOR Rule G. The seven (7) prior awards attached to the Organization's submission, including PLB No. 7566, Award No. 160, in which the Board sustained the claim because the Carrier failed to provide substantial evidence that the Claimant failed to comply with the requirements of urinalysis, do not call our finding into question.

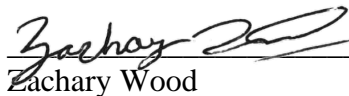
We have carefully considered the Claimant's tenure and prior work record as well as the dangers inherent in the industry and the Claimant's assignment as a weekend Foreman. The Board is well aware of the industry practice that leaves leniency in the hands of the employer and not the various Boards. We do not find that in this case the dismissal represents an abuse of discretion such that it would be appropriate for this Board to order lesser discipline.

Award

Claim denied.



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member



I.B. Helburn
Neutral Member

Dated: December 9, 2021