

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 195/Award No. 195

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2019-00044
Claimant: Jacob Hendrickson

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. J. Hendrickson for alleged violation of USOR General Rule G - Drugs and Alcohol was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00044 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Hendrickson'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.

Facts

Mr. J. Hendrickson has established and holds seniority in the Carrier's Maintenance of Way Department. He was hired on March 5, 2018 and was a Trackman at the time of the incident that resulted in his discharge. During the pre-employment screening he tested negative when given a blood/alcohol test. During his tenure, the Carrier discovered that he was one of twenty-seven (27) employees whose pre-employment drug/alcohol screen was not in compliance with FRA/DOT mandates. Therefore, when he reported for work on April 25, 2019, the Claimant was subjected to an FRA/DOT approved drug/alcohol screen and tested positive for marijuana. He was taken out of service and by letter dated May 3, 2019 directed to report for an investigation that

was ultimately held on June 11, 2019. By letter dated June 28, 2019 the Carrier informed the Claimant that he had been found to have violated USOR General Rule G – Drugs & Alcohol and was immediately dismissed. By letter dated August 8, 2019 the Organization filed a timely claim on Mr. Hendrickson’s behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

The analysis of the Claimant’s urine sample and his admission that four days prior to the urinalysis he ingested marijuana provided by his girlfriend provide substantial evidence of his violation of Rule G. Minnesota law is superseded by the DOT testing mandate. The hearing afforded the Claimant was fair and impartial without prejudgment, with Mr. Hendrickson afforded representation, a Hearing Officer who acted professionally and who did not commit procedural violations. The dismissal was just and with sufficient cause. There is no mitigation. 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 did not follow its drug and alcohol protocol when the Claimant was ordered to submit to a “pre-employment” screening when he had successfully completed his probation period and had accumulated over a year of tenure. The test was not a random screen and there was no existing reasonable cause for the test because the Claimant showed no signs of being under the influence. The Carrier has not met its burden of proof because proper procedures were not followed. The Claimant’s admission alone is insufficient proof. According to the Organization, the Claimant was not told of his right to request a split sample and none was sent to a second lab. Initially, no information was given to him about the EAP, but when he finally got the phone number and reached the EAP, he made an appointment. The dismissal was harsh, arbitrary and unwarranted, as relevant Minnesota law requires rehabilitation under the circumstances.

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 “While on duty or on company property, the use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited. Employees must not possess, sell, use, or have in their bodily fluids any illegal drug or controlled substance while on or off duty.”

It is uncontested that the test of the Claimant's urine was positive for the presence of THC, that he admitted to using marijuana four (4) days prior to being tested and by his own admission at the investigation, he was told of the split test option and ended that conversation without electing the option (see TR-51, ll 2-10).

The Board must answer two questions. The first is whether the Carrier had a right to require a second "pre-employment" test more than a year into the Claimant's tenure and after he had passed his initial pre-employment test. The Claimant was not singled out but, instead, was one of twenty-seven (27) retested because their pre-employment tests were not in compliance with FRA/DOT requirements. However these tests are characterized, the Board finds that the Carrier's decision to retest this group of employees, the Claimant included, was a reasonable, logical exercise of managerial authority. Would the Organization really want the Carrier to knowingly continue to operate contrary to FRA/DOT mandates, particularly when such operation could have implications for the safety of the Claimant, other employees and the public?

The second question involves the relationship between Minnesota state law and FRA/DOT dictates. In his August 8, 2019 initial appeal on the Claimant's behalf, General Chairman Letizia set forth Minnesota Statute 181.953 Subdivision 10 that forbids discharging an employee for a first-time confirmed positive drug/alcohol test result if the employee has been given and has accepted the opportunity to participate in an approved drug/alcohol counseling and/or rehabilitation program. It is uncontested that during the investigation, the Claimant took responsibility for his actions and stated that he had an upcoming appointment with the EAP.

In its December 6, 2019 denial of the initial appeal, the Carrier response included the statement that "Minnesota case law holds that the requirements of the Minnesota testing law (including the requirement to offer continuing employment after a first-time positive test result) would not apply so long as the employee is covered by the DOT testing mandate. In a March 2, 2020 e-mail to the author of the denial, General Chairman Letizia asked that he be provided with the relevant case law. No case law was provided and in a March 18, 2020 response to the denial, the absence of relevant case law was noted. There is no case law in evidence for this Board to consider.

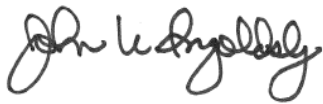
The Board finds that the inclusion of the Minnesota law as part of the Organization's initial appeal establishes a *prima facie* case that the law applies, thereby shifting the burden of persuasion to the Carrier to rebut the *prima facie* case. Because the Carrier has not provided the relevant case law, the Board has only an assertion without evidentiary support. The *prima facie* case prevails; the claim is sustained in part. The Claimant is to be reinstated following the successful completion of an approved drug/alcohol counseling and/or rehabilitation program. The S.A.F.E. Policy, Part E. Compliance with Conditions of Return to Active Service will apply. The Claimant's work history will reflect his time out of service as a Level 3 suspension.

Award

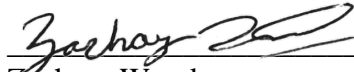
Claim partially sustained.

Order

The Carrier is hereby ordered to make an award partially favorable to the Claimant in accordance with the above-noted findings.



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member



I.B. Helburn
Neutral Member

Dated: December 9, 2021

CARRIER MEMBER'S DISSENT

To

PLB 7566 AWARD No. 195

Brotherhood of Maintenance of Way Employees & Wisconsin Central Limited

(Referee I.B. Helburn)

A review of the Award issued by the Board indicates without doubt, the Board erred in its decision when it exceeded its authority by asserting, without basis or reference, that inclusion of a reference to state law in the Organization's appeal somehow creates a *prima facie* case, requiring rebuttal and case citations from the Carrier. The Board has no authority to make a determination on the unsupported assertion that Minnesota state law overrides federal regulations. After making the improper determination that mere reference to a state law creates a *prima facie* case that the somehow created fatal error in the appeal process, the Board next committed the error of shifting the burden of proof to the Carrier to establish the priority of federal regulations vs. state law, a decision which is properly reserved for the Courts.

The Carrier's drug & alcohol policy integrates company and U.S. federal requirements when it comes to drug and alcohol testing. All US Department of Transportation alcohol and drug testing must comply with the rules governing testing procedures in 49 CFR Part 40, which identifies the procedures for transportation workplace drug and alcohol testing programs and which employees the DOT regulations are applicable to. Coverage of this regulation includes safety sensitive transportation employees which include Claimant's duties as trackman.

As stated above, the Board lacks jurisdiction to determine whether, or not, US Department of Transportation regulations, which the Carrier is required to follow, are inferior to, or restricted by, state law. In the instant case, Claimant was subject to a drug/alcohol screening which produced a positive, or non-negative result, these facts are not in dispute. Following the violation of the Carrier's rules, Claimant was assessed discipline in accord with the Carrier's Discipline and Substance & Alcohol Free Environment (SAFE) policies, which prohibit the use of prohibited substances and carry the penalty of dismissal from service.

The Board asserted, incorrectly, that the Carrier then had an obligation to provide case citations to the Organization to rebut their assertion that Minnesota Statute 181.953 somehow prohibits the application of federal regulations. The Carrier maintains this Public Law Board is not the proper venue for such a determination, and is reminded that a determination could only be made in the proper venue, which is the appropriate state or federal court.

The Board is limited to determine the issues authorized by the RLA, which are: whether or not Claimant was proven guilty as charged, was Claimant provided a fair and impartial hearing, and, if so, whether or not the discipline assessed was warranted. The record established that Claimant received a fair and impartial hearing, as defined in the applicable collective bargaining agreement, was conclusively proven guilty as charged, and the discipline assessed was just and with sufficient cause. As the Board has clearly exceeded its authority by making an assertion that mention of a state law creates a *prima facie* case, that requires the Carrier to perform the Organization's legal research is without substantiation. For these reasons the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.



John K. Ingoldsby
Carrier Member

December 9, 2021