PUBLIC LAW BOARD NO. 7660
AWARD NO. 203

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. D. Smith, by letter dated July 29, 2020, in connection with allegations that he failed to comply with Rule 1.5 Drugs and Alcohol was excessive, arbitrary, disparate, imposed without due process, without the Carrier having met its burden of proof; and in violation of the Agreement (System File A-1248U-001/1740994 UPS).

2. As a consequence of the violation referred to in Part (1) above, Claimant D. Smith shall be returned to service and '…Claimant now be made whole by compensating him for all wage and benefit loss suffered by him for his employment termination, any and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must also me made whole for any and all loss of Railroad Retirement month credit and any other loss.' (Employes' Exhibit A-2)."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and

that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant has been employed by the Carrier for over 11 years and worked as a Section Foreman Main Line on Gang 4724 at the relevant time. Claimant received a Notice of Investigation dated July 9, 2020, advising him that he was being charged with an alleged violation of the Drug & Alcohol Policy when he tested positive for alcohol on July 2, 2020 in a FRA random test. He was removed from service pending investigation. The Investigation was held on July 21, 2020, and Claimant was served with a Notice of Discipline Assessed dated July 29, 2020, finding him guilty of the charges in violation of Rule 1.5 Drugs & Alcohol, and dismissing him from service. This claim protests such action.

The record establishes that Claimant had tested positive for alcohol in 2014 and signed a Waiver Agreement Letter, whereby he was granted a one time return to service after appropriate EAP interaction, and agreed that he could be dismissed if he tested positive again in the next 10 year period. Claimant underwent numerous alcohol tests in the intervening period, with negative results. On July 2, 2020, shortly after he reported to work at 6 a.m., Claimant was advised that he was being given a random test. Before conducting the initial and confirmation EBT breath alcohol tests, the EBT is given a sample of air, and the result is checked to be 0% and it is recorded. The tester then takes the breath sample from the individual and records the printed result. Claimant was first administered the EBT test at 6:13 a.m., resulting in a reading of .029. His confirmation test, administered 16 minutes later, had a reading of .022. Carrier's rules provide that any result of .02 or higher is considered a positive test for alcohol.

Both the test collector and Carrier's D&A special witness described the procedure utilized, and the fact that the machine had been tested for accuracy on July 1, and then

again after the positive test result on July 2. They explained that the accuracy test is performed by attaching the EBT machine to a tank with a known quantity of alcohol, that the calibration (CAL) standard is .040, and that the machine's result is considered accurate if it falls within the range of .005%. The EBT Accuracy test reports reveal that when the device was attached to the tank, it recorded a value of .044, which was within the .005% range of accuracy, verifying the EBT machine result as accurate. The tester agreed that if .005 is taken off of Claimant's .022 result, it brings it below .020 threshold. She admitted to being confused with the numbers, since she had never had as close a result before. Both she and the special witness testified that the machine only tests the presence of alcohol, and not other items of food such as hot sauce. The Hearing Officer did not permit the Organization to enter documents in the record purporting to be articles concerning possible causes of false positives on breath alcohol tests.

Claimant testified that he ate the same thing, which included hot sauce, for breakfast that morning, as he did the morning he took the test in 2014 and tested positive. He stated that they were both false positives, and he should have contested the first test, but he was advised to accept the waiver and forego the hearing, which he did, and he entered EAP which he did not care for. Claimant noted he had tested negative on over 40 tests in the interim period, and that if he knew that the confirmation test could be administered in the 15-30 minute range, he would have taken it at 29 minutes instead of 16.

The Carrier contends that it proved by substantial evidence that Claimant violated Rule 1.5, and that, as a second time violator and under the terms of his Waiver Agreement, a second positive test results in dismissal. It asserts that the witnesses' testimony as to the procedure followed in the July 2, 2020 EBT test, the results of the equipment accuracy testing occurring on July 1 and again after the positive reading, prove that Claimant's EBT result of .022 was accurate. The Carrier maintains that

Claimant was afforded a fair and impartial hearing, received all of his due process rights, and there were no procedural errors warranting overturning the discipline.

The Organization argues that Carrier failed to meet its burden of proving that Claimant had a positive alcohol test, since the BAT equipment showed a reading of .044 when compared with the .040 CAL standard. Even though it fell within the .005% accurate range, it contends that when the overage of .004 is subtracted from Claimant's .022 BAT confirmation reading, it would bring him below the .020 threshold for a positive test. The Organization maintains that Claimant was denied a fair hearing when the Hearing Officer refused to permit it to enter into evidence articles about how hot sauce could possibly impact the accuracy of an alcohol test result, and when the discipline decision was made by someone other than the Hearing Officer. The Organization argues that the penalty assessed was arbitrary and excessive, relying on PLB 7660, Award 16.

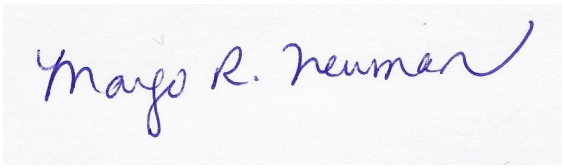
A careful review of the record convinces the Board that Carrier has not met its burden of proving that Claimant violated Rule 1.5. The entire basis of the violation was the accuracy of Claimant's July 2, 2020 EBT results of .022, and the fact that Carrier considers the threshold for a positive alcohol test to be .020. The Accuracy check reports concerning the equipment used in Claimant's EBT test show that it was within the .005% of the CAL standard, which is within the range of accuracy. The CAL standard was .040 and the accuracy result of the equipment was .044. While both expert witnesses agreed that food, such as hot sauce, would not be picked up by the machine to create a false positive, the tester admitted that, although she was confused by the numbers, if .005 is shaved off the score of .022, it would bring the result below the .020 threshold. Although the evidence showed that the machine used for Claimant's breath alcohol test on July 2 tested within the acceptable range of accuracy, Carrier did not present evidence, or any explanation, for why the .004 over the standard is not properly subtracted from

Claimant's .022 confirmation test result, as asserted by the Organization. As noted by the tester, she had no experience with such a close positive finding, or the implications of the deviation of the EBT to the CAL standard in such circumstances.

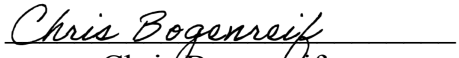
With all of these questions unanswered, the Board is of the opinion that Carrier has not sustained its burden of proving that Claimant's .022 EBT reading on the July 2 confirmation test was sufficient proof of a positive test result to establish a violation of Rule 1.5 or a second offense under Carrier's Drug & Alcohol policy. Although the Board agrees that there were no fatal flaws in the actual testing conducted on Claimant, see, e.g. PLB 6459, Award 64, and that Carrier has every right to permanently dismiss a second offender under its D&A policy, the absence of a witness who could explain how the EBT's deviation from the CAL standard impacts the actual test result undermines Carrier's ability to rely on the test result. See, e.g., PLB 7660, Award 16. Thus we conclude that Claimant must be given the benefit of the doubt, and returned to work. He shall be placed in the same position he was in under the terms of his Rule G Waiver at the time he was dismissed, and be compensated for actual loss of straight time wages and benefits resulting from his dismissal.

AWARD:

The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.



Margo R. Newman
Neutral Chairperson



Chris Bogenreif
Carrier Member

Dated: January 18, 2023

John Schlismann
Employee Member

Dated: January 18, 2023