

PUBLIC LAW BOARD NO. 7803

Brotherhood of Maintenance of Way)	
Employees – IBT Rail Conference)	AWARD NO. 1
)	CASE NO. 1
and)	
)	
Northern Indiana Commuter)	
Transportation District)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. J. Leonard under date of October 10, 2013 for alleged violation of ‘* GCOR Rule 1.5 and the terms of your signed Waiver of Investigation Agreement dated July 18, 2013, ***’ was arbitrary, capricious, excessive, and in violation of the Agreement (System File D-83-13-570-04-N NIC).**

(2) As a consequence of the violation referred to in Part (1) above, the discipline shall now be expunged from Mr. J. Leonard’s record, he shall be reinstated to service with all rights and benefits intact and he shall be compensated ‘...for all lost wages, straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled*’.”**

OPINION OF BOARD:

Public Law Board No. 7803, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant entered into Carrier’s service in January 2003 and was employed as a Track Welder. By notice dated October 3, 2013, Claimant was directed to attend a formal investigation on October 7, 2013 in connection with his alleged failure to pass a breath alcohol test on October 1, 2013, in violation of the provisions of his signed Waiver of Investigation Agreement dated July 18, 2013 and GCOR 1.5. The investigation was held as scheduled, and on October 10, 2013, the Claimant was dismissed from Carrier’s service. The Organization submitted a claim dated December 6, 2013 challenging the dismissal, which the Carrier in turn denied on January 31, 2014, and at every step thereafter, in

accordance with applicable grievance procedures in the parties' Collective Bargaining Agreement. The matter is now before the Board for final and binding determination as to its merit.

The Carrier initially points out that the Claimant was previously charged with a violation of GCOR Rule 1.5 after testing positive for cocaine as a result of a hair follicle test. On July 16, 2013, in lieu of holding an investigation on these charges, the Claimant was offered and accepted the Carrier's By-Pass option, which requires at least 24 months participation. By electing to enter the By-Pass program, and signing a waiver of investigation for the GCOR 1.5 violation, the Claimant agreed to stay drug and alcohol free and to be subject to random follow-up testing. At the Claimant's request, the waiver signed by the Claimant on July 18, 2013 provided that follow-up testing using hair follicle technology would not be used to verify his compliance with the terms of the waiver.

Less than three months later, on October 1, 2013, the Claimant was directed to participate in a follow-up breath alcohol test while on duty. The results showed a breath alcohol concentration of .026 on the initial test and .023 on the confirmatory test. The Carrier submits that the Claimant was aware of his obligations under the waiver agreement but he nevertheless reported for work with alcohol in his system. Carrier contends that the test results also demonstrated a violation of GCOR Rule 1.5, which provides in pertinent part: "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."

Carrier argues that there is substantial evidence in the record to support the charges lodged against the Claimant and no procedural reasons warrant a different finding. As for the penalty, longstanding precedent establishes that positive follow-up tests or failure to comply with rehabilitation program obligations are each sufficient reasons on their own to support dismissal. A track welder attempting to work on commuter rails in an impaired state places himself and others at risk of injury or death and is a situation that cannot be tolerated in this industry. As Claimant failed at his second and final chance to attain sobriety, the claim must be denied.

The Organization asserts that the Carrier failed to meet its burden of proof, in several respects. First, the Organization maintains that the Claimant's July 2013 alleged positive drug test was based solely on hair follicle testing that is not a generally accepted base test for the presence of illicit substances. Although Claimant signed a waiver of investigation following this incident, the Board should conclude that the waiver was invalid given the questionable circumstances surrounding the testing.

Second, the Organization points to the Claimant's testimony indicating that he did not know he was prohibited from drinking alcohol while off duty. Further, the Organization argues that the alcohol testing administered on October 1, 2013 should be deemed unreliable in view of the confusing testimony presented by the testing technician during the investigative hearing. For these reasons, the Organization maintains that the alleged violation stands unproven and should not have resulted in dismissal.

After careful review of the record, the Board concludes that there was substantial evidence to support the finding that he violated GCOR 1.5 and the terms of his signed Waiver of Investigation Agreement dated July 18, 2013. Claimant accepted a bypass option after testing positive for cocaine in July 2013. In so doing, he agreed to waive his right to file a claim regarding the matter. If he thought the drug test results were wrong, he had the option to proceed to an investigation. There is no basis to conclude that Claimant was not fully aware of all the implications of the bypass program and the terms of the waiver. On the contrary, the evidence indicates that he and the Carrier negotiated those terms. Claimant cannot now circumvent the terms of the waiver he voluntarily and knowingly signed by challenging the matters that he waived.


The Board also finds unpersuasive the Claimant's testimony that he could drink just so long as he stopped "in sufficient time for any alcohol I had drank to exit my system before I reported for duty which I thought was the conditions of my Waiver." Claimant admittedly understood that he could be subject to follow-up testing on the job for a two-year period under the terms of his waiver agreement and he admitted that he failed the breathalyzer test twice on October 1, 2013 after drinking alcohol the night before he was subject to follow-up testing while on duty. GCOR 1.5 specifically prohibits employees from having measurable alcohol in their system "when reporting for duty, while on duty, or while on company property." By reporting for duty with measurable alcohol in his system, the Claimant was in violation of GCOR 1.5 and the terms of his waiver agreement.

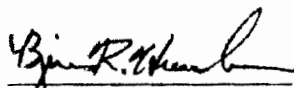
In addition, there is no basis to set aside the breathalyzer test results. The Organization failed to demonstrate that the two test results were invalid or unreliable. In the absence of any proper reason for questioning the accuracy of the Claimant's two positive breath alcohol test results on October 1, 2013, it must be concluded that the evidence substantiates the Carrier's determination that Claimant was guilty of the charges in this case.


The Claimant was offered a second chance to retain his employment but, less than three months after signing the waiver, he reported for work with measurable alcohol in his system. Under the circumstances, the Carrier's decision to discharge the Claimant was a reasonable exercise of its discretion that will not be overturned. The Claimant was provided a fair and impartial hearing and there are no procedural infirmities that would serve to vitiate the penalty imposed. Moreover, no mitigating or extenuating factors are present that would outweigh Carrier's compelling interests to secure and insure the safe operations of its commuter rails. Carrier concluded that the Claimant was a risk to its operations because he could not maintain the personal sobriety necessary for safely performing his duties. Consistent with well-established precedent in this industry and on this property, the Board cannot find that the Carrier's position in that regard was unreasonable, arbitrary or capricious. Accordingly, the claim must be denied.

AWARD

Claim denied.


ANN S. KENIS, Neutral Member


Bjarne Henderson
Carrier Member


Zac Voegel
Organization Member

Dated this ^{5th} day of February, 2018.