

AWARD NO. 309
Case No. 309

File No. Plemmons-BA-01-20-INV/MW-GNVL-20-04-LM-075 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. B. Plemmons, issued by letter dated February 28, 2020, in connection with his alleged failure to comply with the Carrier's Policy on Alcohol and Drugs and the instructions of Medical Director F.K. Litow, M.D. in her letter dated September 17, 2019, in that he allegedly tested positive for prohibited substances in a follow-up drug screen conducted on January 9, 2020 (System File Plemmons-BA-01-20-INV/MW-GNVL-20-04-LM-075 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Plemmons shall now be reinstated to service with all seniority rights restored and all entitlements to and credit for benefits restored including vacation and health insurance benefits, being made whole for all financial losses as a result of the violation including compensation for: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service and with all notations of the dismissal removed from all Carrier records."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On June 25, 2019, Claimant B. A. Plemmons, who was employed as a machine operator, tested positive for methamphetamines during a random drug and alcohol test. Claimant was instructed to complete evaluation and any rehabilitation required by EAP. Claimant was returned to service in September 2019, at which time he was issued a letter from the Carrier's Chief Medical Officer containing, among other things, instructions to keep his system free of prohibited substances. On January 9, 2020, Claimant was subject to a follow-up drug test, the results of which were also positive for methamphetamine and amphetamine. A split sample also tested positive for the same substances.

By notice dated January 28, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to comply with the Carrier's Policy on Alcohol and Drugs and the instructions of the Medical Director, in that he tested positive for prohibited substances in the follow up drug screen. The hearing was held February 13, 2020, after which Claimant was found to be guilty as charged, and by notice dated February 28, 2020, he was dismissed from service.

The Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence of chain of custody to prove that the samples were properly handled and not altered. It also objects that the Carrier did not submit a drug screen report showing the actual results of the urinalysis test. Third, it states that the confirmation letter certifying the results of the report was not legible. The Organization asserts that with the lack of such documentation, the Carrier cannot meet its burden of proving an alleged violation of Rule G, and that the Board thus must overturn Claimant's dismissal.

The Organization also points to Claimant's testimony that he was not in violation of the Carrier's Drug and Alcohol Policy because he did not have any drugs in his system. It asserts that, because the evidence supplied by the Carrier was illegible, Claimant's testimony is the only reliable evidence of record.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 23 years of service and it contends that such length of service indicates his performance has been satisfactory. It states that prior awards have recognized that rehabilitation is appropriate if an employee's career can be salvaged, and that the goal of discipline should be corrective rather than punitive. The Organization concludes that in light of Claimant's years of service to the Carrier, dismissal was not warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that the record contains substantial evidence to support the discipline assessed. It states that there is no question Claimant's follow-up test was positive for methamphetamine and amphetamine, in violation of Rule G and the Policy on Drugs and Alcohol. The Carrier notes that the split sample also tested positive for the same substances, and that both tests were confirmed by the MRO.

The Carrier denies that there were any irregularities in the testing procedures which could have impacted the positive results. It asserts that the forms introduced were clear enough to establish the necessary information and to establish that it was Claimant who tested positive for the prohibited substances. The Carrier states that the medical review officer would not have signed off on the positive results unless the chain of custody had been adequately established and she had reviewed the lab results, and it asserts there is no reason to question the fact that Claimant tested positive on the follow-up testing.

With respect to the level of discipline imposed, the Carrier states Claimant was well aware that a violation of the Drug and Alcohol policy as committed here would subject him to dismissal, noting that the Medical Director reminded Claimant of that aspect of the policy in her September 2019

letter of instruction. The Carrier states that Claimant put himself, his coworkers and the general public at risk by reporting to work having ingested a substance that can impact one's judgment and ability to function safely while he was operating heavy machinery, and it points to prior awards which have upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as stated in the policy and that it has no obligation to retain in its employ an individual who reports for service with the presence of prohibited substances in his system. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of Claimant's record and the policy guidelines.


We have carefully reviewed the record in this case and the parties' arguments, and we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the relevant rule and policy. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

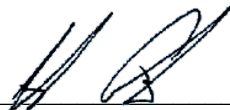
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant reported to work with prohibited substances in his system. The results of both the initial test and the split sample test were positive for methamphetamine and amphetamine, which was confirmed by the MRO. We have reviewed the documentation in question, as well as the Carrier's witness's testimony on that subject, and while portions of the documents are somewhat blurry, the relevant portions are sufficiently legible, and we find no reason to question the validity of those results. Although Claimant testified that he had not ingested a controlled substance, we believe this presented a credibility issue which the Carrier was not obligated to resolve in Claimant's favor, and which we are not in position as an appellate body to second guess.


The next question before us concerns the level of discipline assessed. There is no doubt that employees who report for work with prohibited drugs or alcohol in their systems pose a significant safety threat, and the Carrier is indeed well within its rights to set rules and policies to address any

such transgressions. We also note that instances in which railroad employees are afforded opportunities for reinstatement after such test failures typically involve the employee taking responsibility for the violation, and as noted above, that factor is not present here. Moreover, this incident was Claimant's second positive test for prohibited substances in a short time frame. In any event, to overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. On this record, we cannot find that the Carrier's actions were an abuse of discretion, so we will not substitute our judgment for the Carrier's now.

AWARD: Claim denied.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023