

AWARD NO. 331
Case No. 331

File No. Rothwell-S-K-09-21-INV/MW-BHAM-21-54-BB-715 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) 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. S. Rothwell, issued by letter dated September 23, 2021, in connection with his alleged: (1) violation of the Carrier's Policy on Alcohol and Drugs ('Rule G'), in that while working as a foreman in Harriman, Tennessee on August 12, 2021, he tested positive for alcohol on the followup breath test and (2) failure to follow instructions in connection with the above charge in that he failed to comply with the instructions issued to him by the Norfolk Southern Chief Medical Officer by letter dated January 7, 2021 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Rothwell-S-K-09-21-INV/MW-BHAM-21-54-BB-715 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Rothwell 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.

In March of 2020, Claimant S. K. Rothwell tested positive for prohibited substances during a random drug and alcohol test, constituting a violation of Rule G and the Carrier’s Policy on Alcohol and Drugs. Claimant was instructed to complete evaluation and any rehabilitation required by DARS. Claimant was returned to service in January of 2021, 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 August 12, 2021, Claimant was subject to a follow-up breath test, the results of which were positive for alcohol.

By notice dated August 25, 2021, 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 Chief Medical Officer, in that he tested positive for prohibited substances in the follow-up breath test. The hearing was held September 9, 2021, after which Claimant was found to be guilty as charged, and by notice dated September 23, 2021, 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 person who administered the test was unfamiliar with basic testing procedures at several points in the testing process, pointing to a statement from the tester addressing errors she made during the handling of Claimant’s test form. It also points to Claimant’s testimony that the tester seemed confused, and that she used a different testing apparatus than had been used to test Claimant

previously. The Organization further cites Claimant's testimony that the tester handled the testing differently than in previous tests with respect to the order of breath testing, urine testing and the second breathalyzer test. It quotes Claimant as stating that the positive result was due to a "botched test" on the part of the tester. The Organization adds that Claimant's test results (0.020% and 0.018%) would have been considered negative if it had been a DOT test. It asserts that 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 further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 11 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 breathalyzer test was positive for alcohol in excess of company limits, in violation of Rule G and the Policy on Drugs and Alcohol.

The Carrier denies that there were any irregularities in the testing procedures which could have impacted the positive results. It asserts that it was established that there was an appropriate waiting period of 15 minutes between the two tests, and that any errors on the forms in no way impacted the outcome of the tests. The Carrier states that the tester did follow instructions regarding noting that the first test did not print, and that she confirmed the accuracy of the testing device. It also points out that Claimant signed the test form, stating that he had been shown the positive results of both tests and that they were accurately recorded. The Carrier asserts there is no reason to question the fact that Claimant tested positive for alcohol on the follow-up testing.

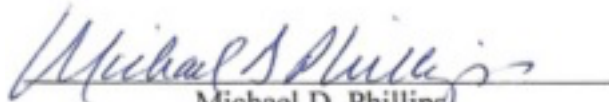
With respect to the level of discipline imposed, the Carrier states Claimant was well aware that a violation of the Drug and Alcohol policy as committed here would subject him to dismissal, noting that the Medical Director reminded Claimant of that aspect of the policy in her January 7, 2021, letter 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, 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 alcohol 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.

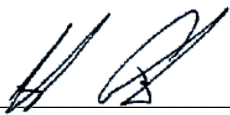
We have carefully reviewed the record in this case and the parties' arguments, and we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the relevant rule and policy. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, 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.

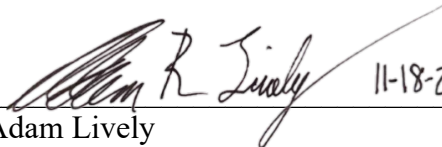
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant reported to work with alcohol in his system. The results of both the initial test and the confirmation test were positive for alcohol in excess of company limits. The company has the right to set lower limits than the DOT, so that fact that the test results were below DOT limits does not alter that conclusion. We have reviewed the documentation in question, as well as the Carrier's witness's testimony on that subject, and while it is apparent that the tester erred in some respects in completing the form, we find nothing in the record which would indicate that the test results were invalid. Although Claimant testified that he had not ingested alcohol, 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

 11-18-2024
Adam Lively
Carrier Member

Dated: November 18, 2024