

AWARD NO. 335
Case No. 335

File No. MW-BHAM-23-10-LM-108 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. P. Nelson, issued by letter dated March 27, 2023, in connection with his alleged: (1) violation of Norfolk Southern's Policy on Alcohol and Drugs ('Rule G') in that he tested positive for alcohol on a follow-up breath test administered on February 13, 2023 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 October 22, 2019 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier's File MW-BHAM-23-10-LM-108 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant P. Nelson shall now be reinstated and be cleared of the unsubstantiated charges with all rights, privileges and back pay associated therewith restored to him."

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 2015, Claimant P. H. Nelson tested positive for prohibited substances during a drug and alcohol test, constituting a violation of Rule G and the Carrier's Policy on Alcohol and Drugs. After completing a program required by DARS, Claimant was returned to service in October of 2019. At that 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, and advising that a failure to comply, positive test, or violation of Rule G would subject him to dismissal. On February 13, 2023, Claimant was subject to a follow-up breath test, the results of which were positive for alcohol.

By notice dated February 22, 2023, 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 alcohol on the follow-up breath test. The hearing was held March 8, 2023, after which Claimant was found to be guilty as charged, and by notice dated March 27, 2023, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first argues that Claimant was denied a fair and impartial hearing when the testing technician who performed the breathalyzer test was not present at the hearing to be cross-examined. It contends that this was important because there were several unexplained discrepancies with the testing equipment and the testing process which the charging officer could not answer. The Organization cites prior awards for the proposition that it is the Carrier's responsibility to present all witnesses with pertinent information, and it argues that the absence of the tester requires the discipline to be overturned.

With respect to the merits, the Organization maintains that the Carrier failed to meet its burden of proof in connection with all of the charges. It again states that there were discrepancies in the testing process and equipment which could not be explained, such as the difference in temperature on the initial test result printout and the confirmation test result printout. It contends that if the person who administered the test had been present for cross-examination, he could have offered clarification.

The Organization further cites the charging officer's testimony that he did not know what device was used to administer the test or if it had been properly calibrated. It also argues that Claimant testified the tester did not wear protective gloves, and that he had already tested someone else prior to testing Claimant. It claims that the technician appeared to have brought his own hand sanitizer in lieu of using gloves.

The Organization notes the charging officer's testimony that Claimant showed no signs of impairment prior to the test. It adds that Claimant willingly participated in the test, and that he had no reason to believe he would fail the drug and alcohol test, going so far as drinking two cups of coffee to allow him to comply with the urine screen. 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 had 18 years of service, and it contends that such length of service, as well as his supervisor's testimony, 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 (0.051% and 0.048%), in violation of Rule G and the Policy on Drugs and Alcohol, and it notes that this was Claimant's second violation of the rule and policy.

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 it points to the tester's certification that the tests

were performed in accordance with DOT regulations and that he was qualified to perform them. 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 October 22, 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, 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 no procedural barrier to our consideration of the merits. The procedures employed here, including those regarding the presence of witnesses, were similar to those commonly employed in disciplinary hearings in this industry, particularly those involving drug and alcohol testing, and which have been found to be unobjectionable. We find no reason to reach a different conclusion here. Moreover, we find no indication in the record that the Organization requested the presence of the tester at the hearing.

We also 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.

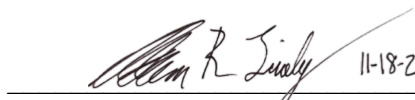
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant reported to work with alcohol in his system. The results of both the initial test and the confirmation test were positive for alcohol at a fairly high level. Claimant himself testified that he had ingested alcohol the day before, and we find no reason to believe that it was not still in his system as established by the breath tests.

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. This incident was Claimant's second Rule G violation, it occurred less than four years after his return to service from the first violation, and although this offense involved alcohol while the first violation involved methamphetamine, reporting to work with either substance in one's system is a violation of the same rule and policy. 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