

AWARD NO. 337
Case No. 337

File No. MW-ATLA-22-64-SG-875 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. L. Shumaker, issued by letter dated February 27, 2023, in connection with his alleged failure to follow instructions and violation of the Carrier’s Policy on Drugs and Alcohol (‘Rule G’) in that on December 13, 2022 he refused to take mandatory drug and/or alcohol test(s) was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier’s File MW-ATLA-22-64-SG-875 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant L. Shumaker shall now be reinstated and be cleared of the unsubstantiated charges with all rights and back pay.”

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 the morning of December 13, 2022, Claimant L. P. Shumaker, who was employed by the Carrier as a machine operator, was told by his foreman that he was required to take a random drug and alcohol test. After Claimant’s supervisor located him talking on his phone, Claimant said that

he would not pass the test, and that he wanted to contact DARS, or the Carrier's Drug and Alcohol Rehabilitation Service.

By notice dated December 21, 2022, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to follow instructions and violation of the Carrier's Policy on Alcohol and Drugs (Rule G) in that he refused to take mandatory drug and/or alcohol tests during the incident described above. The hearing was held February 9, 2023, after which Claimant was found to be guilty as charged, and by notice dated February 27, 2023, 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 the charges. It contends that there were numerous inconsistencies within the supervisor's testimony, which it posits are based on the supervisor's objective of finding Claimant guilty of the charges. The Organization cites several examples of what it deems to be inaccurate or inconsistent testimony from the supervisor, including whether Claimant specifically said he was refusing the drug test. It states that, while the supervisor testified that Claimant said he was not going to take the test, Claimant denied that he refused the test, but that he only said he wouldn't pass it and wanted to contact DARS.

The Organization also cites statements from the foreman and from the DARS representative as confirming that Claimant was on the phone with the DARS representative when the supervisor saw him on the phone, and it contends that this contradicts the supervisor's testimony that he did not know who Claimant was talking to. It posits that this inconsistency, while minor, confirms that the supervisor was testifying in a manner to achieve his objective of finding Claimant guilty, regardless of the actual facts.

The Organization argues that, after Claimant spoke with the DARS representative and asked for advice, he told both the foreman and the supervisor that he wished to self-report and enroll in the DARS program. It submits that Claimant's attempt to self-report was not a means of refusing the test, citing a statement from the DARS representative that he did not know Claimant was subject

to testing, and that if he had known that was the case, he would have told Claimant to take the test. The Organization also cites Claimant's testimony that he called the department head of the DARS program, and that after being informed of the proper procedure, Claimant contacted his supervisor to request to take the test, but that he was denied the opportunity. It says there is a three-hour window for employees to comply with a test, and it claims that Claimant attempted to take it within that window, but the tester had already left the property. The Organization avers that the record shows that Claimant never refused to take the test, and that he took the proper steps to do what he believed was the correct thing to do in order to seek help.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It points out that Claimant has 10 years of service, and it contends that such length of service indicates his performance has been satisfactory. The Organization emphasizes Claimant's testimony that he did in fact enter the DARS program, that he had completed an in-patient treatment program, and that he continued treatment in an out-patient program. 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 mitigating factors present in the record, 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 the supervisor's testimony was honest and forthcoming, and that it clearly established that Claimant had refused to take the test. The Carrier states that the determination of the credibility of witnesses is the responsibility of the hearing officers, and it cites prior awards which have found that it is not the function of an arbitral board to assess the credibility of witnesses or to resolve conflicts in testimony.

The Carrier states that there is no question that Claimant was aware that he had been selected to participate in random drug testing, and that he did not do so, citing Claimant's testimony in which he conceded those facts. It points out that the Drug and Alcohol Policy section pertaining to self-referrals to the DARS program does not allow self-referral in an attempt to circumvent testing

events or to avoid detection of a rule violation. The Carrier states that Claimant was aware of the requirements of Rule G, and that he was informed that refusal to comply with testing would result in his removal from service pending an investigation, but that he still refused to take the required test.

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. 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 refuses to comply with the testing requirements. 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 refused to take the required drug test after being informed he was required to do so. The conflict in testimony between the supervisor, who testified that Claimant said he was not going to take it, he wouldn't pass, and that he wanted to go to DARS, and Claimant, who testified that he only said he wouldn't pass and that he wanted to go to DARS, presented a credibility issue. We note that the statements from the foreman and the DARS representative do not specifically address what Claimant told the supervisor, as they were not witnesses to that discussion. The Carrier was not obligated to resolve that issue in Claimant's favor, and we are not in position as an appellate body to second guess that determination.

Moreover, whether Claimant specifically uttered the words “I refuse” or not, we believe that his actions clearly communicated his intent, which was not to take the test. While he claimed that decision was due to a misunderstanding, Claimant himself ultimately conceded that he had done the wrong thing. With respect to an alleged window for an employee to complete a test, we note that no policy or rules which would afford one were introduced at any point in the proceedings. In any event, the timelines alleged by the Organization, in which Claimant allegedly changed his mind in less than three hours, do not indicate to us that Claimant could have completed the test in that time frame. Furthermore, we do not believe the Carrier is required to keep a tester on property in case an employee who has refused a test later changes his mind.

We also note that the Carrier’s Drug and Alcohol Policy specifically addresses an employee’s attempt to avoid a test with a last-minute self-referral. The Policy provides in pertinent part:

“However, an employee may not use the referral program for the purpose of avoiding the imminent and probable detection of a rule violation by a supervising employee. No employee may take advantage of self-referral after being notified of a testing event or while in imminent risk of being detected for possession of alcohol or controlled substances.”


Here, there is no question that Claimant had been notified of a testing event, and that he was in imminent risk of being detected for a rule violation. Claimant candidly stated as much when he said he would not pass the test. As confirmed by the statement of the DARS representative Claimant contacted, Claimant should have taken the test in those circumstances, but he did not. Whether that was due to a misunderstanding during their call, Claimant by his own admission did the wrong thing in not taking the test.

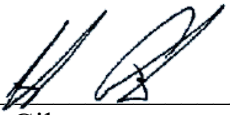
The next question before us concerns the level of discipline assessed. There is no doubt that employees who report for work with prohibited drugs or alcohol in their systems pose a significant safety threat, and the Carrier is indeed well within its rights to set rules and policies to address any such transgressions. In this case, however, we do find mitigating factors. There is some indication

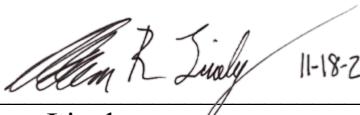
that Claimant, after speaking with the DARS representative, initially misunderstood the ramifications of his actions. It also appears that he attempted to rectify that matter, albeit too late. And, of course, Claimant admitted he would not pass the test, and had he simply taken it and failed, he likely would have been reinstated after clearance by DARS. He then did enroll in a treatment program.

After consideration of the specific facts described above, we conclude that Claimant should be given another opportunity to continue his career. Claimant is to be returned to service, without backpay, subject to clearance through the DARS program. The Carrier is instructed to comply with this order within thirty (30) days of the date of the award.

AWARD: Claim sustained in accordance with the findings.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member

 11-18-2024
Adam Lively
Carrier Member

Dated: November 18, 2024