

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 26063
Docket No. 46005
04-1-03-1-C-4799

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Canadian National Railway (Illinois Central))

STATEMENT OF CLAIM:

“Claim of CN/IC Conductor R. L. Garlock for reinstatement to service with seniority and vacation rights unimpaired, all notations of discipline assessed on May 19, 2003 expunged from his personal work record and compensation for all time lost as a result of same, including the loss of earnings due to attending the investigation until the date he resumes service, plus out of pocket expenses for health and welfare and any other benefits which would be provided to him as a CN/IC Conductor for the alleged violation of CN/IC Operating Department Rule G on March 27, 2003 at 1930 hours at Decatur, IL while working as a crewmember on L56491-27.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 14, 2003 the Claimant attended an Investigation to determine his guilt in connection with his alleged violation of Rule G following a Random Drug and Alcohol test, conducted pursuant to FRA Regulation 49 CFR Part 219. The Claimant, who had 24 years of service with this Carrier at the time of the incident, subsequently was dismissed from the Carrier's service, on May 19, 2003.

According to the record, on March 27, 2003, upon reporting at 7:00 p.m. for his Decatur, IL, Conductor assignment L56491-27, the Peoria Local, the Claimant was rested and, according to witnesses, performed his customary duties without any showing of unusual behavior or impairment. After approximately 30 minutes on duty, at 7:30 p.m., the Claimant, along with other covered employees at the location, was instructed to undergo a Random Drug and Alcohol (screening) breath test by a certified Breath Alcohol Technician (BAT) employed by Acosta Medical Testing. The evidence shows that 21 minutes later, at 7:51 p.m., the Claimant underwent a confirmation breath test. According to the testimony of Trainmaster Kelly Clough, the Claimant's breath test results were 0.048 % Blood Alcohol Content (BAC) and 0.042 % BAC, respectively. Given the result of the confirmation test, the Claimant was removed from service, pending the Investigation.

The Carrier asserted that the Claimant produced a positive breath test in violation of FRA Regulation 49 CFR Part 219 and furthermore was proved guilty of violating both the Carrier's S.A.F.E. Policy and Operating Rule G, which specifies that "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." It was not disputed that both the screening and confirmation breathalyzer tests taken by the Claimant were conducted in accordance with the applicable federal procedures and performed by a qualified Breath Alcohol Technician on equipment that had been properly calibrated at the time of the Claimant's tests. Pursuant to FRA Regulation 49 CFR Part 219, given the fact that the Claimant's Federal test result exceeded the positive threshold of 0.02 % or greater, the Carrier was permitted under its policies to remove the Claimant from service pending a formal Investigation of the matter.

With respect to the level of discipline imposed upon the Claimant, the Carrier contended that paragraph 3 of Section D, - "Guidelines for Discipline of Substance Abuse Violations" of the S.A.F.E. Policy provides that, Employees will be dismissed for a repeated violation of this policy." The instant offense clearly constituted the

Claimant's second occurrence of a positive result from a random test. Therefore, in the Carrier's view, the Claimant's dismissal in the instant case was indeed mandated by the S.A.F.E. Policy and therefore, such discipline must not be deemed as excessive by this Board.

The Organization emphasized that the discipline of dismissal assessed against the Claimant was unduly harsh. Again, the testimony of Trainmaster Clough confirmed that before undergoing the screening and confirmation breath alcohol tests the Claimant's behavior appeared normal. The Organization acknowledged that the Claimant's employment record reflected a previous Rule G violation that had occurred in October 1991, which had then triggered his removal from service for 13 months before his eventual reinstatement (conditioned on five years of follow-up unannounced testing, which produced no positive results). Since then, however, the Claimant has continued to maintain a satisfactory employment record.

The Organization further stated that immediately following the incident at bar, the Claimant, on the following day, sought professional counseling through the Carrier's Employee Assistance Program (EAP). According to the Claimant, on the recommendation of his counselor he began attending weekly Alcoholic Anonymous meetings, sought medical treatment for a number of health problems, and has taken additional steps toward improving his quality of life, such as being a more involved parent at his son's school and becoming more physically fit. The Organization stressed that such sustainable positive lifestyle changes testified to by the Claimant, and further buttressed by the letters of support submitted on his behalf by his counselor and his minister, should be strongly considered by the Board. The Organization additionally stressed that when admitting his mistakes the Claimant was both truthful and candid, and that Trainmaster Clough's testimony that the Claimant has been a "good employee," should not be ignored.

Moreover, it was also the position of the Organization that the positive test result notwithstanding, the Claimant would have neither knowingly nor intentionally reported for service while under the influence of alcohol, evidenced by the fact that his BAC of 0.042 % was well within most State laws governing driving under the influence of alcohol, i.e., 0.10 % BAC. See Special Board of Adjustment No. 235, Awards 1726 and 1766.

The Board has carefully considered the entire evidentiary record in this matter, as well as the respective positions of both the Carrier and the Organization,

as set forth above. The Board finds that by the Claimant's own testimony, he admitted that on the incident date he had consumed beer with his lunch, between 11:00 a.m. and 12:00 Noon. As the Organization pointed out, the Claimant admitted he drank beer several hours before his regular reporting time of 7:00 p.m., and again, the positive breath test result obtained at 7:51 p.m. stands as unrefuted evidence that, under the Federal regulation, the Claimant was positive for alcohol while on duty in covered railroad service.

As the Carrier pointed out, the assignment for which the Claimant reported was a regular job, thus, he was not on call. The positive confirmation test result was not disputed. From the standpoint of safety, the Carrier's position that it expects all employees to strictly follow the applicable corporate and federal regulations prohibiting drug and alcohol use need not be debated. Clearly, the Carrier's position is reasonable from the standpoint of safety as regards both its employees and the general public.

Having carefully considered all of the arguments advanced by the parties during the on-property handling of this case, we find that the charges were proved by substantial evidence. Pursuant to the above Guidelines contained in the Carrier's S.A.F.E. Policy, the Claimant was indeed subject to dismissal for the proven infraction here. However, in light of the facts and circumstances underlying this particular case, the Board holds that the discipline of dismissal was excessive. According to the record, during the 13-year period that predated this incident, the Claimant had proved himself to be a generally satisfactory employee, which the Board finds, in light of his over 24 years of service, is to the Claimant's credit.

The apparent steps taken by the Claimant toward recovery, and the meaningful lifestyle changes he seems to have adopted as asserted in his testimony and as verified by the letters of support furnished by his counselor and minister, convince the Board that the Claimant has demonstrated a renewed commitment toward adhering to the Carrier's rules and Federal regulations prohibiting illicit drug and alcohol use. In light of his 24 years of satisfactory service, he is entitled to another chance. Therefore, given the unique circumstances present in this case, the Claimant shall be reinstated with seniority rights unimpaired, but without back pay or other claimed benefits. The time held out of service will be considered a period of actual suspension.

The above reinstatement is further conditioned on the Claimant's participation in the Carrier's EAP and his successful completion of an approved treatment plan. In addition, the Claimant must continue to adhere to all applicable Carrier policies and programs and all Federal regulations controlling drug and alcohol use in the rail transportation workplace.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division**

Dated at Chicago, Illinois, this 24th day of November 2004.