

The Second Division consisted of the regular members and in addition Referee Thomas V. Bender when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
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(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Freight Car Repairman Edward E. Warthon was held for investigation on July 26, 1979, for charge of violation of Rule G on July 19, 1979.
2. Freight Car Repairman Edward E. Warthon was unjustly assessed 20 days actual suspension July 31, 1979.
3. That the Chicago and North Western Transportation Company be ordered to compensate Freight Car Repairman Edward E. Warthon eight (8) hours pay per day for the 20 days he was unjustly suspended, plus 6% interest on all lost wages and all benefits to which he is entitled in accordance with Rule 35.

Findings:

The Second 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 waived right of appearance at hearing thereon.

The Claimant in this matter, a Carman at the Carrier's Proviso Repair Track, Chicago, received a twenty (20) day actual suspension for allegedly violating Rule G, covering the use/possession of alcohol/drugs by employees on duty or subject to duty. The investigation into this charge focused on the use and/or possession of marijuana by the Claimant on July 19, 1979, at approximately 7:00 p.m. The Carrier presented two witnesses in support of the discipline assessed. General Car Foreman Dan Miller and Special Agent Eshoo.

A review of the investigation transcript clearly shows the Carrier did not sustain its burden of proof in this matter. Mr. Miller testified as follows:

- "Q. Mr. Miller, did you see Mr. Warthon and Mr. Valadez smoking marijuana.
- A. I saw Mr. Valadez take a long drag. I saw him pass something which I would say was a cigarette, to Mr. Warthon.

- Q. So you can't really say that whatever they were smoking and passing was marijuana then.
- A. As I stated earlier, it had to be small, and I was suspicious of it, so ---
- Q. But you can't definitely say it was marijuana that you saw them passing, supposedly? You just saw them pass an object, is that all?
- A. It was a cigarette, some type of cigarette.
- Q. But you can't state definitely whether or not it was marijuana?
- A. No, but it was handed as though it was a marijuana cigarette.
- Q. That's just your opinion?
- A. Yes, it's my opinion."

The testimony given by Mr. Miller also includes the following:

- "Q. When the Special Agent was questioning Mr. Warthon, how did Mr. Warthon appear, was he passing the test the Special Agent was giving him, and answering the questions clearly?
- A. He was answering the questions clearly. On the physical portion of the test, Mr. Warthon did have some problems. He was a little unsure of himself about performing some of the tests.
- Q. Which tests were those?
- A. The walking the line, and the one where they were picking up the coins.
- Q. Can you state definitely whether or not Mr. Warthon was under the influence of marijuana?
- A. No, I cannot."

The most persuasive testimony is that given by Special Agent Eshoo, a man obviously trained in these matters. In relevant part Special Agent Eshoo stated:

- "Q. Would you please read for the record the results of this report?
- A. Sure.

My observation was: Clothing, he had an orange hard hat, no jacket or coat, blue and white shirt and green work slacks. His breath had moderate traces of alcohol, his attitude was excited, but cooperative and polite. He had no unusual actions, his speech was fair and he seemed to be excited.

He had no signs or complaint of illness or injury.

On the performance test we completed, his balance was unsure, walking, unsure. This, I believe, was because he didn't understand my instructions too well. His turning was sure, finger to nose test was sure, and his coin test was sure. His balance during the coin test was good. This test was performed on the 19th of July at 8:35 P.M., and my opinion was, the effect of alcohol was slight and he was fit to drive.

The chemical test data was refused, which consisted of a screen test and an alcohol influence tests, which would be given by Elmhurst Hospital.

Q. Mr. Eshoo, in your investigation, after asking Mr. Wharton these various questions conducting this test, did it appear to you that he was under the influence of drugs?

A. Drugs? No.

Q. Is this the reason you came down, were called by Mr. Miller, is that he felt that Mr. Warthon was under the influence of marijuana?

A. Yes, it was."

A review of the investigation discloses the following conclusion:

- 1) No marijuana was found on the Claimant's person.
- 2) No marijuana was found in Claimant's locker.
- 3) A special agent gave the Claimant a battery of tests and yet concluded that Claimant was not under the influence of drugs or alcohol on July 19, 1979.
- 4) General Car Foreman Miller was some distance away from the Claimant when he saw what in his opinion was a marijuana cigarette. But he very candidly admitted that was only an opinion.

Rule G, as it is presently constituted must be strictly enforced by the Carriers and scrupulously observed by all employees. It is designed to protect the employe from being injured or injuring a fellow employe. The use and abuse of chemicals and alcohol has become a major problem in our country. And, depending on one's philosophical bend the problem may be treated as a disease or merely part of a dynamic social scene. That is all right for some segments of society but not for the Railroad Industry. Here, there can be no middle ground because of the tremendous opportunity for injury. For these reasons, we commend Mr. Miller for his prompt action. He obviously recognizes the potential danger presented by employes who are not in complete control of their faculties. Once the investigation was completed the matter should have been dropped vis a vis Mr. Worthon.

A number of procedural issues are raised by the Organization. These related to the Claimant's ability to prepare for the hearing and its fairness. Because of our award we do not have to address them. However, a reading of the transcript shows that Mr. Worthon's representative did a fine job and, that the testimony of the Carrier's chief witnesses was candid and forthright.

The Claimant shall be made whole for all wages lost as a result of the twenty (20) day suspension.

This award is not subject to interest. The Second Division has repeatedly repudiated the assessment of interest on Awards and we choose to follow that long line of authority.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of June, 1982.