NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26670
THIRD DIVISION Docket Number MW-26745

James R. Johnson, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(New Orleans Public Belt Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Bridgeman Helper J. P. Curet for alleged '*** use of Marijuana ... in violation of General Order No. 220.' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant was employed as a Bridgeman Helper on Carrier's Huey P. Long Bridge near New Orleans, Louisiana. Such employees were subject to annual physical examinations. The Carrier asserts that it had reason to believe that certain employees working on the bridge were using drugs or other controlled substances, and in February, 1984, added drug screens to the physical examinations.

In February, 1984, two of the employees received a "positive" result on the drug screen. The Carrier contacted the Organization, and arranged joint meetings with the employees. At such meetings, the employees were reminded that the use of marijuana and other substances was prohibited by Carrier's Rules and inconsistent with the nature of their employment. The Carrier advised the employees that it would suspend the drug screens for several months in order to enable employees who were using such substances to cease its use and allow their systems to remove all traces, but that the drug screens would be resumed at a later date.

The drug screens were resumed in July, 1984, and the Claimant was tested on August 2, 1984. The results of his test showed the presence of 355 ng/ml of THC, which indicated the use of marijuana, and the Claimant was discharged from the service on August 20, 1984. The Claimant requested a hearing, as provided in the contract, and the hearing was held on September 13, 1984. At the hearing, the Claimant submitted a second drug screen, taken on August 27, 1984, which showed "negative" results for the presence of THC. The discharge was confirmed by the Carrier following the hearing.

The Organization raised several objections with regard to the propriety of the test used, as well as the fairness of the investigation, and the Carrier challenges the significance and validity of the second test presented by the Claimant.

Considerable documentary evidence was presented by both parties with respect to the nature and accuracy of the tests, and this evidence greatly assisted the Board in making its determination. With respect to the validity of the tests, the Board notes that both appear on forms and stationery which bear the names of appropriate testing facilities. In the absence of any evidence to the contrary, the Board will accept both tests as valid tests taken at competent facilities. With respect to the Organization's objection that the preparer of the Carrier's test was not available for cross-examination, the Board has ruled previously that such tests are acceptable in their own right, and the absence of the preparer is not fatal to the case. Further, the Board notes that the preparer of the Claimant's second test also was not available for cross-examination by the Carrier.

With respect to the contradictory result of the two tests, the evidence reveals that there is no real conflict. The evidence shows that nearly all traces of THC are eliminated in approximately twenty days, and the second test was taken twenty-five days later. If Claimant discontinued using the substance following the first test, the second test would produce a "negative" result.

The August 2, 1984 test established Claimant's use of marijuana in violation of Carrier's Rules. Claimant had been appropriately warned, and given an opportunity to cease its use, but failed to do so. Such action on Claimant's part was at his peril. The discipline assessed was commensurate with the gravity of the offense and will not be disturbed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1987.

LABOR MEMBER DISSENT
TO
AWARD 26670 - DOCKET MW-26745
(Referee Johnson)

The Majority erred when it decided this dispute in favor of the Carrier and held that:

> "Considerable documentary evidence was presented by both parties with respect to the nature and accuracy of the tests, and this evidence greatly assisted the Board in making its determination. With respect to the validity of the tests, the Board notes that both appear on forms and stationery which bear the names of appropriate testing facilities. In the absence of any evidence to the contrary, the Board will accept both tests as valid tests taken at competent facilities. With respect to the Organization's objection that the preparer of the Carrier's test was not available for cross-examination, the Board has ruled previously that such tests are acceptable in their own right, and the absence of the preparer is not fatal to the case. Further, the Board notes that the preparer of the Claimant's second test also was not available for cross-examination by the Carrier.
>
> * * *
>
> The August 2, 1984 test established Claimant's use of marijuana in violation of Carrier's Rules. Claimant had been appropriately warned, and given an opportunity to cease its use, but failed to do so. Such action on Claimant's part was at his peril. The discipline assessed was commensurate with the gravity of the offense and will not be disturbed."

A review of the above-quoted excerpts discloses that the Majority made assumptions as to fact which were not established in the record and ignored critical facts which were established in the record. There are at least two (2) errors readily apparent in the reasoning relied upon by the Majority in this case.

First, with respect to the validity of the tests involved in this case, the Majority assumes, without any reasonable cause, that such tests should be regarded as valid tests taken at competent facilities. While it may be convenient to make such an assumption, the fact is that there are good reasons not to do so. For example, the fact that a drug testing report is entered into evidence in a disciplinary hearing, which is printed on forms and stationery bearing the name of a testing facility, only establishes that someone was aware of the location of a competent printing facility. We are impelled to point out that forms and stationery do not represent evidence that any institution is either reputable or competent. The assumption relied upon by the Majority in this connection is particularly striking when consideration is given to the fact that there has been a great deal of reportorial discussion and public concern regarding the poor performance of testing facilities of the character involved in this dispute. When consideration is given to this fact, coupled with the fact that it is a fundamental principle established by this Board that the burden of proof in cases of discipline is squarely on the Carrier, one is led inexorably to the conclusion that more than a mere testing report is necessary in drug testing cases. Without documentation there is absolutely no way of knowing whether or not the testing facility is staffed by properly accredited and trained personnel, the specimen collection site was staffed by properly trained and certified personnel, the specimen was properly handled and receipted for, the proper protocols were followed at the testing facility or other factors entered into the test result.

Second, this case centered on the Carrier's allegation that the Claimant violated its "General Order No. 220". However, a review thereof

discloses that said rule addresses itself only to on-duty use or possession of intoxicants. This fact places the instant case four-square in point with the cases decided by Award Nos. 22 and 30 of Special Board of Adjustment No. 925. In those cases the Majority held in sustaining the claim and restoring the Claimant there to duty, that there was no conclusive proof that the accused employe was using controlled drugs on the job site or that he had reported for duty under the influence of said drugs. This is particularly important here because General Order No. 220, Paragraph No. 14, reads:

> "14. The use or possession of alcoholic beverages, intoxicants, narcotics or any other substance that will adversely affect an employee's alertness, coordination, reaction, response or safety, while on duty, or when reporting for duty, is forbidden."

As we pointed out to the Majority in this case, drug screening tests of the character involved in this case can not correlate the physiological or psychological effects of the drugs tested for, with the levels of metabolites reported therein. Hence, there can be no question but that the test report, standing alone, could not possibly have shown that the Claimant was in violation of General Order No. 220.

In the final analysis, the only reasonable conclusion that can be educed from a reading of Award 26670 is that the Majority simply applied its subjective notion of justice without regard for fundamental principles of evidence and proof. I dissent.

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE TO
LABOR MEMBER'S DISSENT TO
AWARD NO. 26670, DOCKET NO. MW-26745
(Referee Johnson)

The Labor Member asserts:

> "First, with respect to the validity of the tests involved in this case, the Majority assumes, without any reasonable cause, that such tests should be regarded as valid tests taken at competent facilities. While it may be convenient to make such an assumption, the fact is that there are good reasons not to do so."

* * * * *

> "Without documentation there is absolutely no way of knowing whether or not the testing facility is staffed by properly accredited and trained personnel, the specimen collection site was staffed by properly trained and certified personnel, the specimen was properly handled and receipted for, the proper protocols were followed at the testing facility or other factors entered into the test result."

Initially, in the interest of there being no misunderstanding as to the scope of the Majority decision in this dispute, it should be noted that the aforementioned arguments were vigorously raised by the Claimant's representative at the investigation. In fact, he requested a postponement until such time as the toxicologist who performed the test could be present as a witness.

The Majority correctly decided that these arguments had no merit and rejected them, as evidenced by the following excerpt:

> "...In the absence of any evidence to the contrary, the Board will accept both tests as valid tests taken at competent facilities. With respect to the Organization's objection that the preparer of the Carrier's test was not available for cross-examination, the Board has ruled previously that such tests are acceptable in their own right, and the absence of the preparer is not fatal to the case. Further, the Board notes that the preparer of the Claimant's second test also was not available for cross-examination by the Carrier." (Emphasis added)

According to the Labor Member, the Majority's second "error" involved its conclusion that the Claimant violated the New Orleans Public Belt Railroad's General Order No. 220. In support of that position, Award Nos. 22 and 30 of Special Board of Adjustment No. 925 (BMWE vs. BN) were cited. Rule 556 of the BN's Safety Rules and General Rules, as quoted in Award 22, reads as follows:

> "Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance."

Even a cursory reading of the NOPB's General Order No. 220 reveals that the two rules are very dissimilar. Subject rule reads thusly:

> "14. The use or possession of alcoholic beverages, intoxicants, narcotics or any other substance that will adversely affect an employee's alertness, coordination, reaction, response or safety, while on duty, or when reporting for duty, is forbidden."

This obvious distinction was recognized by this Board in Third Division Award 26394 wherein it was held:

> "The Organization's reliance upon Special Board of Adjustment No. 925, Award Nos. 22 and 30 is misplaced. Those Awards involved situations where the employees tested positive for marijuana and were disciplined under a Rule prohibiting the reporting to work under the influence of drugs. In those Awards it was determined that there was no showing that the employees were under the influence as required by the rule at issue. This matter does not involve such a rule..."

This Board held likewise in Second Division Award 11412:

> "Finally, the Organization's reliance upon Special Board of Adjustment No. 925, Award No. 22 does not change the result. The Rule at issue therein prohibited employees from reporting to work 'under the influence' of drugs. The terms of Rule G quoted above in this matter are broader prohibiting 'use, . . . while on or off duty of a drug, . . . which affects alertness . . . .' See Third Division Award 26394, supra."

Further evidence of the correctness of the Majority's holding in this dispute is found in the record of this case as developed on the property. Unlike the other arguments which were vigorously argued by the Organization, the only reference in the on-the-property handling to the "under the influence" argument is presumed to be in the Organization's December 11, 1984 appeal letter wherein it was broadly contended that:

> "...the New Orleans Public Belt Railroad failed to prove the alleged charge by evidence of substantial value..."

Other than that vague assertion, we fail to find any evidence in the record that the "under the influence" argument was ever broached, let alone joined on the property.

Interestingly enough, at Pages 6 and 11 of the investigation transcript, respectively, the Claimant's representative acknowledged:

> "...the specific charge is that Mr. Curet is alleged to having narcotics in his system, and we ask that the Hearing be confined to that specific subject.
>
> * * * * *
>
> "...the dismissal of Mr. Curet was based upon his allegedly having Marijuana in his system."

Obviously the parties on the property knew why the Claimant was discharged and understood the applicability of Paragraph 14 of General Order No. 220, and no additional amount of rhetoric can change that fact.

Even where the involved rule refers to one being "under the influence," as opposed to the "use" of controlled substances, there exists precedent in support of the position that a positive test even absent overt signs of impairment is, nevertheless, substantial evidence to conclude that one is in violation of Rule G.

In this vein, the Findings of Award No. 7, Public Law Board No. 4066 (UTU vs. BN) are on point. Therein, Rule G of the BN's Consolidated Code of Operating Rules read in relevant part as follows:

> "Employes must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana or other controlled substance, or medication, including those prescribed by a doctor, that may in any way adversely effect their alertness, coordination, reaction, response, or safety."

The Majority held:

> "'Traditional detection techniques will not provide the capability to detect on-the-job impairment.' (Federal Railroad Administration, Comment to Final Rule on Alcohol and Drug Abuse, 1985). The testimony of Mr. Moore that he did not notice any impairment of Claimant, that 'I didn't notice anything unusual', does not, in the circumstances, invalidate or contradict the urinary test results.
>
> The record shows substantial probative evidence in support of the Carrier's determination that Claimant was in violation of Rule G. The Carrier's decision was not arbitrary or capricious or made in bad faith." (Emphasis added)

The Majority's decision is based on prior Board precedent as well as sound reasoning.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost