Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26920
THIRD DIVISION Docket No. MW-27035
88-3-86-3-62

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Portland Terminal Railroad Company

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

(1) The dismissal of Sectionman J. A. Porter for alleged:

'... responsibility, if any, concerning the alleged personal injury, failure to protect a regular assignment, and being on company property with the odor of alcohol on your breath and a blood alcohol content of .06%. ***'

was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (Carrier's File BMWE 500).

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

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

As a result of charges dated December 13, 1984, hearing on December 19, 1984, and letter dated December 21, 1984, Claimant, a Sectionman with approximately six years of employment with the Carrier, was dismissed from service.

On November 29, 1984, Claimant was operating a spiking gun. The gun slipped from Claimant's hand and Claimant was pulled or jerked towards the gun's compressor. Claimant noticed oil leaking from the compressor. Claimant did not inform the Carrier's Supervisors on November 29, 1984. that the incident occurred. According to Claimant, he did not feel at the time that he sustained an injury.

Although Claimant was scheduled to begin working at 7:30 a.m. on November 30, 1984, he did not report for duty at that time and further did not call in to report off. Claimant testified that when he awoke at 5:30 a.m. he felt a sharp pain in his lower back. Claimant took a muscle relaxer as a medication that "make[s] you sleep." Claimant was previously instructed by a physician that after taking the medication ("flexadril") that "I am not suppose to drive or run any kind of machinery." Claimant was driven to a hospital emergency room at 9:30 a.m. and, after a brief examination, was given prescriptions for medication and was released. Claimant then drove to work.

Between 11:00 and 11:15 a.m. Claimant reported at the Carrier's Guilds Lake Yard and told Track Foreman G. Kasahara that he was injured at approximately 2:00 p.m. on the previous day. At the time, Claimant presented Kasahara with slips verifying that he sought medical attention. Kasahara called the Carrier's Engineer D. Mathison who then met with Claimant and Kasahara. Claimant also told Mathison that he injured himself at approximately 2:00 p.m. the previous day. According to Mathison, at the time he spoke with Claimant on November 30, 1984, Claimant had already completed a written report concerning the injury.

After reviewing the injury report, Claimant, Kasahara and Mathison inspected the spiking gun that Claimant was using at the time of his injury. After returning to Kasahara's office, Mathison asked Claimant why he did not call the Carrier earlier that morning to report off. Claimant responded that his back hurt him to such a degree that he proceeded directly to a hospital emergency room. The conversation then turned to Claimant's ability to perform light duty on that day. Mathison agreed that Claimant could perform light duty that day since the extent of his injury was not known. Kasahara then stated that Claimant had alcohol on his breath. Claimant was asked if he had been drinking. Claimant denied drinking but stated that he was drinking during the previous night. Claimant testified that the last drink he had was "about midnight" and that:

> "I had just about as many as everybody else there had. I don't know. It was probably about eight bottles of beer [sixteen ounce cans] and between me and Collins we drank about three pitchers of beer at the tavern."

Mathison and Kasahara testified that they noticed nothing in Claimant's appearance or actions that caused them to suspect that Claimant was under the influence of alcohol. Claimant was asked to take a blood alcohol test. Claimant agreed and the test was administered at approximately 1:00 p.m.

At approximately 5:00 p.m. on November 30, 1984, Mathison received a call from Dr. W. Jones who told Mathison that the laboratory had the results of Claimant's test and the test revealed a blood alcohol content of .06%. The record in this proceeding shows a note from Dr. Jones dated November 30, 1984, attaching the test results from the laboratory. The tests results further state:

"less than 0.05% = negligible
0.05% - 0.09% = influencing
greater than 0.09% = intoxication"

At the hearing, Carrier's Chief of Police D. Gulosh testified that based upon his experience as a police officer and his training with the Oregon Police Academy concerning drunk drivers, breathalyzer certification and having been trained in the area, it is standard knowledge that alcohol dissipates from the body at the rate of approximately .015% per hour. Based upon Claimant's test results showing .06% at 1:00 p.m. and by extrapolation, Gulosh concluded that Claimant's blood alcohol level would have been .25% at midnight; .15% at 7:00 a.m.; and .09% at 11:00 a.m. Further, according to Gulosh, Oregon law at the time of this incident considered a level of .08% to be under the influence.

Claimant does not own a phone. Claimant did not return to work until December 12, 1984. At that time and up until his dismissal, Claimant performed light duty.

The Organization first argues that Claimant was denied a fair and impartial hearing within the meaning of Rule 26(a) since the Hearing Officer (who was also the charging officer) refused to testify. Standing alone, the fact that a hearing officer assumes multiple roles does not indicate that the employee was denied a fair hearing. See Second Division Award 8272. Our examination of the record discloses that aside from the notification of the charges and the date of the hearing, conducting the hearing and issuing the letter of December 21, 1984, dismissing Claimant from service, the Hearing Officer had no direct first hand involvement in the events leading up to the disciplinary action that would require him to testify. As set forth above, the Carrier officials with that knowledge were Mathison and Kasahara. Those individuals testified at length concerning the incidents and were subjected to rigorous cross examination. Inasmuch as the parties' Agreement does not preclude the procedure utilized by the Carrier in this case concerning the conduct of the hearing and further since there is no evidence that Claimant's right to a fair hearing was otherwise violated by the procedure utilized under the particular facts of this case, we must reject the Organization's assertion that Claimant was deprived of a fair and impartial hearing. First Division Award 20071 cited by the Organization is not applicable since that Award refers to situations where the hearing officer has played an integral part in the investigation of the events leading up to the disciplinary action and is believed to possess necessary and material information for the fact finding proceedings. This record does not show that to be the case in this matter.

The relevant Rules state:

> "D. Accidents, injuries, . . . must be reported by the quickest available means of communication to the proper authority, and must be confirmed by wire or on required form."
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> "G. The use of alcoholic beverages or narcotics by employes subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on Company property is prohibited. The use or possession of alcoholic beverages or narcotics while on duty or on Company property is prohibited."
>
> "702 Employes must report for duty at the designated time and place. . . . They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

With respect to the Rule G violation, we are of the opinion that substantial evidence exists in the record to support the Carrier's conclusion that a violation of that Rule occurred. First, Claimant readily admits that he consumed a rather substantial amount of beer several hours prior to his scheduled reporting time. By his own account, by midnight prior to his scheduled reporting time Claimant consumed eight sixteen ounce cans and shared three additional pitchers with another individual. Second, the unrefuted evidence shows that Claimant had the odor of alcohol on his breath when he appeared on the Carrier's property at 11:00 a.m. on November 30, 1984. Third, although we do not place as much independent weight upon the results of the blood alcohol test but view that test more in the nature of corroborative evidence (see discussion below), the record does demonstrate that Claimant tested high for blood alcohol content almost six hours after his scheduled reporting time. We find it unnecessary to assess weight to the testimony concerning the precise level of blood alcohol that could be extrapolated by the asserted dissipation rates since we are not required to determine whether those extrapolations show that Claimant was legally under the influence under the provisions of Oregon's statutes. The fact remains that when Claimant appeared on the Carrier's property on November 30, 1984, he admittedly had been drinking substantial amounts of beer several hours prior to reporting for duty; he had the odor of alcohol on his breath and he tested positive several hours after his scheduled reporting time. Under the substantial evidence standard we need go no further to conclude that the Carrier has met its burden. Contrary to the Organization's argument, the fact that Claimant was not technically "on duty" when he appeared at the Carrier's yard on November 30, 1984, does not negate the violation. By its terms, Rule G prohibits an employee from being under the influence not only while on duty, but also while "on Company property."

Considering the above, the Organization's arguments that Claimant's due process rights were violated as a result of the introduction of a copy of the blood alcohol test administered to Claimant on November 29, 1984, without presenting the author for cross-examination cannot change the result in this case. The admission of written statements in investigations without the writer being present is not error per se. See Second Division Award 6232. However, a balance must be struck and when all of the evidence against an employee consists of assertions in written statements whose authors cannot be cross-examined because they are not present at the investigation and where the employee further denies the allegations contained in those statements, the right to a fair hearing may well be infringed upon. In this case. while the author of the medical report was not present at the hearing, Claimant nevertheless has admitted that several hours prior to his scheduled reporting time he consumed a rather substantial amount of beer. Coupled with the evidence that Claimant had the odor of alcohol on his breath, in the final analysis, the report is merely corroborative and cumulative of Claimant's admissions and the other independent evidence showing his condition and the Rule G violation. On balance, we do not believe under the circumstances that the failure to present the preparer of the report can change the result.

Under the provisions of Rule D Claimant was required to report the injury to the Carrier by "the quickest available means of communication." He did not do so. The record is unclear concerning the specifics of the incident on November 29, 1984. The only direct evidence in this regard came from Claimant who testified that on November 29. 1984, the spiking gun slipped out of his hand and he was "taken down to the compressor . . . [p]ulled me down into the machine." The evidence further shows that at the time of the incident, Claimant felt no pain. His pain was not manifested until the following morning at 5:30 a.m. Rather than calling the Carrier, Claimant went to the hospital. Giving Claimant the benefit of the doubt for November 29, 1984. the Rule nevertheless required Claimant to at least notify the Carrier "by the quickest available means" on November 30, 1984, after he experienced the back pain. Although Claimant did not have a phone, he certainly could have called the Carrier from the hospital. This is not the kind of situation where it was impossible for Claimant to call due to the gravity of his condition or the medical treatment that he was receiving. On the contrary, Claimant received outpatient treatment and was well enough to drive to work after the hospital visit. Here, Claimant was also well enough to be considered for light duty. He could certainly have made contact with the Carrier earlier than he did. As do similar injury reporting rules, Rule D protects both the Carrier and the employee. The prompt reporting of an injury permits the Carrier to take steps to eliminate the cause of the injury and limit further liability (in this case, corrective action concerning the spiking gun so that no other employee suffered a similar injury) and also benefits Claimant due to the Carrier's obligation to furnish medical care. See e.g., Second Division Award 11130, Third Division Award 26232, Fourth Division Award 4199. It is well established that an employee who fails to comply with accident reporting rules does so at his peril. Thus, the record supports the conclusion that Claimant did not use, in the Rule's terms, the "quickest available means" to report the injury. Claimant waited almost four hours after his starting time to make the report, The record supports the conclusion that he could have done so sooner. Indeed, Claimant was specifically asked at the hearing if he followed the provisions of Rule D and Claimant admitted that he had not.

With respect to the Rule 702 violation, again, substantial evidence supports the Carrier's determination that a violation of that Rule has taken place. The Rule specifically requires that employees not absent themselves from duty without proper authority. The Carrier's Job Bulletin 11429 further states that "If you are unable to report for your regular shift because of sickness or an emergency, you are responsible to inform Foreman Kasahara or Engineer Mathison prior to the beginning of your shift." Claimant was absent on November 30, 1984, for almost four hours without proper authority and without calling in. Clearly, Claimant failed to protect his assignment.

Our function is not to substitute our judgment for that of the Carrier. We are confined only to determine whether substantial evidence exists to support the Carrier's conclusions. After close examination of this record, and for the reasons discussed, we are satisfied that substantial evidence exists in the record to support the Carrier's determination that the above discussed Rules were violated. Under our limited review capacity we cannot disturb the amount of discipline imposed unless it appears that the amount of discipline was arbitrary or capricious so as to constitute an abuse of the Carrier's discretion. Under the articulated review standard we are unable to say that when the violations are viewed in their totality Claimant was not deserving of the degree of discipline imposed. The Carrier has attached Claimant's prior disciplinary record to its Submission along with correspondence concerning Claimant's participation in an Employee Assistant Program and argues that dismissal was not excessive. We agree with the Organization that we cannot consider those items since they were not a part of the proceedings on the property. Nevertheless, the facts in this case show that Claimant delayed reporting an injury; failed to report for duty as required and further failed to call in prior to his reporting time; and finally appeared on the Carrier's property under the influence of alcohol. Such offenses are quite serious when taken as a whole. We can find no basis to disturb the Carrier's action in this case.

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 30th day of March 1988.