CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27632
Docket No. CL-28023
88-3-87-3-832

The Third Division consisted of the regular members and in addition Referee W. F. Euker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago & North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10216) that:

1. Carrier violated the Agreement Rules, particularly Rule 21, when it applied the supreme penalty of dismissal from Carrier's service against Mr. R. A. Hawkinson, Ticket Agent, Chicago Passenger Terminal, account formal investigation held on August 8, 1986, and

2. Carrier shall now be required to return the Claimant R. Hawkinson to the service of the Carrier with all rights restored, his record be cleared on the charges and the discipline assessed him and that he be paid for all time lost as well as for all monies he may have spent for health benefits he would have otherwise received under the group policies now in effect, beginning with the date of August 1, 1986, the date he was held out of service and continuing until he is restored to the service of the Carrier.

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.

The Claimant, a Ticket Agent, was charged with a violation of Rule "G", dealing with the use of an illegal substance, heroin, subsequent to his tour of duty commencing July 28, 1986. Following a formal investigation, Claimant was discharged from the Company's service on August 28, 1986. The Claim was appealed in the usual manner on the property and is now presented for our consideration.

The Organization alleges that Claimant's contractual due process rights were violated, and without receding therefrom, also challenges Carrier's decision on the merits. At the Investigation, the Organization contended the Hearing Officer manifested bias and prejudice toward the Claimant for allowing the results of a voluntary urinalysis test to be admitted and for permitting the introduction of testimony which dealt with a previous drug related incident. In deference to the Organization's repeated requests, the Investigation was recessed, a new Hearing Officer appointed and the Investigation later reconvened.

Although the subject of drug testing and the admissability of evidence therefrom is fraught with thorny legal issues, the problem is academic in this case for the record shows that Claimant not only volunteered to take the test, but also admitted at the Investigation that he used the illegal drug on July 29, 1986.

The issue concerning the admissability of testimony detailing the previous drug related incident was inextricably interwoven with the facts of the present case. The record reveals that several months prior to the incident here involved, Claimant's account had been found with a $1000 cash shortage, and it developed from that Investigation, he had a drug habit which accounted for the missing funds. Claimant was subsequently put into a "Rehab" program. In the present case, Claimant was reported to have had a $300 cash shortage in his account and that fact coupled with several wage advance requests prompted an interview on July 31, 1986, wherein Claimant revealed he had reverted to the use of heroin on July 29, 1986, after going off duty.

We see nothing improper in admitting testimony which establishes a rational nexus between missing funds and a drug habit, which common knowledge shows to be expensive. In our opinion, a proper foundation was laid for the questions, and even under a Court's rigid evidentiary rules, it probably would have been admissable.

The Organization also asserts that Claimant was entitled to independent review at each level of appeal. This Board's conclusions on this issue were recently enunicated in Third Division Award 27610, which are incorporated herein by reference. The Claimant's right to contractual appellate review was observed and preserved by the facts recited herein.

The Organization's primary focus on the merits deals with the issue of Claimant's admitted use of the illegal substance while off duty. Tangentially, they also challenge Carrier's right to promulgate Rule "G" which purports to control an employe's off duty conduct. Rule "G" is set forth in the record and, reads:

"Employees subject to call for duty, reporting for duty, on duty or on Company property are prohibited from using or being under the influence of alcoholic beverages or intoxicants. Possession of alcoholic beverages or intoxicants is prohibited while on duty on Company property.

Employees shall not report for duty, be on Company property or be on duty under the influence of, or use while on duty or on Company property of any drug or other substance that may in any way adversely affect their alertness, coordination, reaction, responses or safety. This prohibition includes prescription medications.

The illegal use, illegal possession or illegal sale of any drug by employees while on or off duty is prohibited."

The second and third paragraphs are relevant to the present case. The essential facts are not in fundamental dispute. The Claimant admitted to a Carrier Officer that he had used heroin on July 29, 1986. The Claimant worked on Thursday starting at 4:45 P.M. July 30, and took his drug test on Friday, August 1, 1986, and that test showed positive for the use of drugs. In short, it was reasonable to conclude that Claimant did perform service for the Carrier during a period when he was under the influence of a prohibited substance, in violation of Rule "G". Under these circumstances, it is not necessary to deal with the more vexing question, whether Carrier may proscribe certain types of off-duty conduct under the aforementioned rule, or the companion question, whether this Tribunal has jurisdiction to consider a challenge to a Carrier promulgated rule.

We are satisfied that Claimant was afforded all his contractual due process rights and the Carrier's actions in dismissing Claimant from the service was neither arbitrary nor an abuse of sound managerial discretion.

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 16th day of December 1988.