

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago & Northwestern Transportation Company (CNWT):

Case No. 1

On behalf of Signalman J. VanAllen that:

(a) Carrier violated the current Signalman's Agreement dated May 1, 1985, as amended, in particular Rule 51.

(b) Carrier now be required to compensate Mr. James VanAllen for 8 hrs. pay for July 22, 23, 24, 27, 28, 29, 30, and 31, or a total of 64 hours at the straight time rate. Carrier also shall clear Mr. J. VanAllen's record and return him to work, as they dismissed him from service for 'your responsibility in connection with an altercation at Highland Park on Tuesday, July 21, 1987.' G.C. File: CNW-G-AV-130. Carrier file 79-87-36.

Case No. 2

On behalf of Signalman J. VanAllen that:

(a) Carrier violated the current Signalmen's Agreement dated May 1, 1985, as amended, in particular Rule 51.

(b) Carrier now be required to clear Mr. VanAllen's record, and compensate him for all time lost. G. C. File CNW-G-AV-131. Carrier file 79-87-37."

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 were given due notice of hearing thereon.

The Claimant was employed as a Signalman. His date of hire is October 10, 1978.

On July 21, 1987, Claimant was involved in an incident which arose when another employee, who was standing in a trench while pulling cable, repeatedly asked Claimant to signal to other employees some distance away. Claimant apparently took offense to the repeated requests and asked the employee, "do you want to make something of it?" According to the testimony of the other employee, Claimant then jumped into the trench and, although the employee did not see the actual blow, struck the other employee. Claimant denied striking the employee and testified that he had been instructed to jump into the trench, possibly striking the other employee unintentionally as he did so.

On the basis of Claimant's conduct in the incident, the Carrier found probable cause to test him for drugs. The test results, which the Organization did not challenge, were reported positive for cannabinoids, the confirmatory test indicating a test level of 127 ng/ml of THC in Claimant's urine.

On the basis of the assault, the Carrier convened an Investigation to determine his "responsibility in connection with an altercation which occurred at the Highland Park Depot on Tuesday, July 21, 1987, at approximately 2:45 p.m." Following an Investigation held July 24th, it dismissed the Claimant for violation of Rule 12.

The Carrier received the positive results of the drug tests on July 29th and convened a Hearing on August 3rd, 1987 to determine his responsibility in connection with violation of Rule G and Rule G (addition). As a result of the Hearing and on the basis of Claimant's positive drug test, the Carrier again dismissed the Claimant, this time for the Rule G violation.

The Carrier argues that it proved the charges against Claimant and that the discipline assessed in each case was appropriate. It asserts that evidence demonstrates that Claimant deliberately struck his fellow-employee in the face without provocation. It urges that the procedural objections raised by the Organization are without merit: the charge was sufficiently specific to place Claimant on notice of the nature of the Investigation; the written statements were not entered into the record because they were not a part of the Investigation, although the Organization was afforded access to them at the investigatory Hearing; and the Investigation with respect to the Rule G charge arose from a completely different charge and was conducted within ten days of the time the Carrier became aware of the test results. The Carrier asserts that both offenses are serious, justifying the penalties imposed; it urges that the Claims be denied.

The Organization argues that the Carrier failed to prove that Claimant was involved in an "altercation," defined by the dictionary as a "noisy quarrel." It asserts that the employee allegedly assaulted was unable to state that he saw Claimant hit him. The Organization argues that the Carrier prejudged Claimant's guilt, pointing to the July 31st entry on his record dismissing him in connection with a Rule G violation July 21, 1987, and thereby denied him the fair and impartial Hearing to which he was entitled. The Organization urges that the Carrier violated Rule 51 by conducting the Investigation with respect to the Rule G charge on August 3rd, more than the contractually-required ten days after the incident. Indeed, it urges that the Carrier considered that it had reasonable cause to believe a Rule G violation had taken place as of July 21st and that the ten day period ran from that date. The Organization asserts, in addition, that since Claimant was held out of service, the Investigation was required under Rule 51 to be convened within three days, rather than ten. The Organization asserts, therefore, that the Claims should be sustained and Claimant returned to duty with seniority unimpaired and paid for all time lost.

The Board is persuaded that Claimant intentionally assaulted his fellow employee. That employee's testimony is sufficient to establish that he was struck and that Claimant was the person rendering the blow, even though that employee did not actually see Claimant hit him. Claimant was the only one in a position to do so. Claimant's testimony that someone instructed him to jump into the trench while the other employee was still in it is implausible on its face and inconsistent with the other evidence.

The Board is not persuaded that the charge in the notice of Investigation was imprecise; they were sufficiently specific that Claimant should have had no difficulty knowing the incident with respect to which the Investigation was conducted. The use of the term "altercation" to describe the assault is a widely-used misdescription of a "fight"; there is no indication whatever that Claimant or the Organization were misled. The entry on Claimant's Service Record dated July 31, 1987, appears to be a clerical entry; there is no substantive information in the record to indicate that the Carrier had made a determination on the merits of the Rule G charge prior to the Hearing.

Assault on a fellow-employee is a serious offense; the potential for injury and for disruption to the workplace is self-evident. The Board is not persuaded that the penalty imposed on Claimant was arbitrary or excessive. The first Claim is denied.

The Addition to Rule G establishes a presumption of impairment by a prohibited substance when a urine test performed on an employee shows the presence of the substance in the employee's system. The Organization does not challenge in this proceeding that part of the Rule or the presumption of impairment which it contains. Claimant's conduct and the high level of THC found by the test support the presumption. The record contains nothing to rebut the presumption. The Board is persuaded of Claimant's violation of Rule G and its Addition, as charged.

Of the Organization's argument that the contractual ten days within which to conduct the Investigation ran from the date of the incident, since the Carrier asserted probable cause to test Claimant for drugs on that date, the Board is not persuaded. Probable cause is a suspicion standard, not sufficient by itself either to establish guilt or to cause the ten day period to begin to run. The Carrier knew that Claimant had acted erratically, but only the test results established a cause: use of a prohibited drug.

Of the Organization's final argument - that the Carrier failed to meet the three working day period within which to hold the Investigation because Claimant had been held out of service, the Board is also unpersuaded. July 29, 1987 was a Wednesday, July 30th was the first working day after the Carrier became aware and July 31st was the second. The third working day was Monday, August 3rd: the day on which the Investigation with respect to the second Claim was conducted. Even if the Organization's argument that the Hearing was required to be held within three working days is accepted, the facts do not support the Carrier's violation.


The second Claim is denied.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1990.