

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company

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

(1) The dismissal of Machine Operator C. C. Davenport for alleged violation of Rule 'G' on April 11, 1988 was without just and sufficient cause, on the basis of unproven charges and arbitrary (System File MW-88-54-CB/472-24-A).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated with seniority, vacation and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be paid 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.

Claimant had been employed by Carrier for approximately nine years at the time of his dismissal with an unblemished disciplinary record. On April 11, 1988, while operating a ballast regulator he was involved in an accident. Following the accident he was required to submit to a drug screen test, which he agreed to do after an initial protest. Claimant was accompanied to a local hospital in Jonesboro, Arkansas, by a Carrier officer, his Roadmaster.

At the hospital Claimant's first sample in a bottle labeled with his name, was rejected because he had put his finger in it. A second specimen in a different bottle was submitted and the first bottle was deposited in a trash container. The second sample was labeled and certified by an RN as well as an LPN and also Claimant signed off as to its handling. The sample was sent to Pharmachem Laboratories in California the following day. Subsequently, on April 19, 1988, Carrier received a report which indicated that Claimant's test was positive for cannabinoids (100 ng/ml) and also for cocaine metabolite (1000 ng/ml). He was removed from service, charged with possible violation of Rule G and accorded an Investigation which was held on April 28, 1988. By letter dated April 29, 1988, Claimant was found to be guilty of the charges and dismissed from Carrier's service.

At the Investigation Carrier's sole witness was the Roadmaster who had accompanied Claimant to the hospital for the drug screen. He indicated, as Claimant's supervisor, that he had seen no physical evidence on April 11, 1988, of Claimant being under the influence of drugs, nor had he observed this in the past. He did verify the handling of the urine specimens at the hospital and the integrity of the chain of custody at that stage. He knew nothing more with respect to the testing protocols used by the testing laboratory except that it was a drug screen. He presented to the Hearing Officer the document relied on by Carrier in its decision, the form returned by the California laboratory, which contained the findings indicated above, but nothing more. Carrier presented no evidence whatever as to the testing procedure used or who the technician was and there was no evidence whatever of a confirming test by any other method. Subsequent to the dismissal, by letter dated August 30, 1988, (as part of the normal handling of the dispute on the property) Carrier alluded to an alleged occurrence in which Claimant contacted an Employee Assistance Counselor on July 19, 1988, and a week later signed treatment forms for admission to the hospital on August 1, 1988, but never entered the hospital.

The Organization notes that Claimant consistently not only denied that he was under the influence of any drugs on the day in question, but testified that he had never used any drugs and offered to take a lie detector to validate this assertion. The Organization argues initially that there was no probable cause for testing Claimant and that there was nothing in the record to establish Claimant's responsibility for the accident on April 11, much less a relationship to any impairment as a result of drug use. Most significantly, the Organization insists that the dismissal was improper since according to the record Carrier relied on an unverified chain of custody, purported results of an unknown test and no confirmation of those results. It is also argued that the results of the unknown test used are inherently unreliable standing alone.

Carrier takes the position that the violation in this case is particularly serious in view of Claimant's job operating a piece of heavy equipment. Further there was no question, as Carrier views it, that Claimant had a fair Investigation and was properly found guilty of the charges. His guilt, from Carrier's point of view, is verified by his subsequently contacting the Employee Assistance Counselor.

The Board is keenly aware of the implications of drug use in this industry, in particular, and of the efforts being made to eliminate the safety hazards inherent in that problem, both as they affect employees and the public. It is also clear that dismissal for drug use involves moral turpitude and could stigmatize an individual for life, jeopardizing all future employment. Thus, the standards of proof required to dismiss an employee for substance abuse are high. In this dispute the record, insofar as the burden of proof by Carrier, is woefully inadequate to establish Claimant's guilt. Wholly aside from the questions raised with respect to the integrity of the chain of custody, the basic test results are in serious doubt. While it is obviously not required that the technician performing the test be present at the investigation (see for example Second Division Award 11126) there must be adequate documentation of the results as well as minimal information with respect to the protocols and the personnel involved. In this dispute the documentation is meager and provides no information as to the tests used or any confirmation of the findings; both of those elements are elementary requirements for any valid conclusions. On this score alone, Carrier has not met its burden of proof to validate its conclusion regarding Claimant and the ultimate penalty of dismissal.

There are a host of other issues raised in the arguments made by the parties which need not be dealt with in view of the conclusion reached supra. It must be noted that Carrier made an effort in its Submission to supply the Board with material relevant to the testing procedure; this was too little too late and obviously had no bearing on the decision made based on the investigation and evidence of record in that Hearing.

Based on the entire record, and the reasoning expressed supra, the Claimant will be reinstated to his former position, subject to medical clearance, with seniority and all other rights unimpaired. He will be made whole for all wage loss suffered, less earnings in other employment.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dyer - Executive Secretary

Dated at Chicago, Illinois, this 30 day of April 1991.