Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28873
THIRD DIVISION Docket No. MS-29041
91-3-89-3-467

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Calvin R. Preston
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(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"(1) The dismissal of Railroader C.R. Preston for alleged '...violation of Rule GR-G of Guilford Transportation Industries-Rail Division, as contained in Rules Governing Transportation and the Employees Safety Rules book.' on August 7, 1989 was without just and sufficient cause, arbitrary, capricious and on the basis of unproven charges and in violation of the Agreement.

(2) The Carrier violated the Agreement when it failed to afford this Claimant his right to a timely appeal and its failure to provide a copy of the transcript as set forth in Section VI. 'Discipline.'

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Mr. C.R. Preston shall be returned to his position with all seniority and benefits unimpaired 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 were given due notice of hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute and filed a Submission with the Division.

On July 11, 1989, Claimant was working as a member of a 3-man maintenance crew under the direct supervision of a Track Foreman. The crew was engaged in guard rail maintenance work at a point on Carrier's Northern Main Line. At about 1200 hours, Claimant sustained a personal injury when the wrench that he was using slipped and struck him on the leg. After discussion with the Track Foreman, no medical attention was given to Claimant and no report of the incident was made. Claimant continued the performance of his maintenance duties for the remainder of his tour of duty.

On July 12, 1989, when Claimant reported for duty, he reported the incident to the Track Supervisor and requested medical attention. Thereupon, the Track Supervisor took Claimant to a medical facility for examination and treatment. A formal injury report was filed on July 12, 1989. While at the medical facility receiving an examination of and treatment for the injury, Claimant voluntarily signed a form giving his consent for drug/alcohol screening. A urine specimen was taken for testing purposes. The medical examination resulted in Claimant being instructed by the physician to stay off his bruised leg for two (2) days. After consultation between the physician and the Track Supervisor, it was agreed that Claimant could perform "light duty" for two (2) days. Thereafter, the Track Supervisor used Claimant to assist with the Supervisor's patrol duties for the following two (2) days after which Claimant returned to his regular maintenance crew duties. There was no work time lost as a result of the injury.

On Friday, July 14, 1989, the laboratory which performed the specimen examination reported that Claimant had tested positive for phenobarbital - a barbiturate. On Monday, July 17, 1989, Claimant was withheld from service and instructed to appear for a Hearing on July 25, 1989, on a charge of violation of Rule GR-G ". . . . As indicated by the results of your failure to pass drug and alcohol screeen at North Billerica, Mass. on Wednesday, July 12, 1989." The Hearing was held as scheduled at which Claimant was present and represented. Subsequently, by letter dated August 7, 1989, Claimant was notified that he was dismissed from Carrier's service. Following an appeal of the dismissal on the property and because a satisfactory resolution of the dispute could not be reached during the on-property handling, the case has come to this Board for final adjudication.

During the presentation to this Board, Claimant has advanced several procedural and/or merit arguments. Claimant contends that (1) there was no stenographic transcript made of the hearing; (2) he was not timely provided with a copy of the hearing transcript; (3) he was not accorded a timely appeal conference following notice of his dismissal; (4) the hearing transcript was incomplete; (5) there was no proof to support the integrity of the chain of custody of the specimen taken; and (6) there was no basis in fact for his dismissal but, in any event, such action was arbitrary, capricious and excessive.

Carrier, on the other hand, raises a jurisdictional argument relative to the authority of the Third Division of this Board to hear this case. Carrier also argued that Rule VI. Discipline, has been fully complied with and that there is sufficient proof in the record - including Claimant's own admissions - to support the charge.

This same jurisdictional argument has been advanced by this Carrier on several occasions. Basically, the Carrier contends that inasmuch as they call their employees "Railroaders" and because these "Railroaders" . . . "can and do qualify to perform a variety of functions and may be required on any given day to do any work for which qualified", their employees do not fit the craft and class definitions and distinctions which are set forth in Section 3, First of the Railway Labor Act, as amended, and Circular No. 1 of this Board as being subject to the jurisdiction of the Third Division of this Board.

This argument has been examined by the Board on other occasions. Where, as here, the Claimant was easily identifiable as a maintenance-of-way employee, this grievance is appropriately before the Third Division regardless of what Carrier chooses to call the Claimant. See First Division Award 24019, and Third Division Awards 28726 and 28767.

Even though Carrier characterizes Claimant's contentions as "petty procedural pablum", we believe that there is sufficient justification and reason to address these contentions.

First, we have an argument concerning the fact that no stenographer was present at the Hearing. Rule VI. Discipline, states in pertinent part as follows:

"A stenographic transcript of the Hearing will be taken . . ."

This contention has been addressed by Award No. 3 of Public Law Board 4623. That Award supported the employees position and, under like circumstances, would be controlling here. However, there is a basic difference in this case. That is, here there was no objection made at the Hearing relative to the use of the tape recorder as opposed to the presence of a stenographer. In this case, the Claimant participated in the proceeding without objection. He can not now be heard to complain relative to the absence of a stenographer.

Next we have the argument concerning the alleged failure to furnish a copy of the Hearing transcript. The pertinent Rule language states:

> "A stenographic transcript of the hearing will be taken and a copy will be furnished to the accused, or his representative."

The record reflects that a copy of the Hearing transcript was, in fact, furnished to the Claimant during the on-property handling of this dispute. There has been no showing that Claimant was in any way disadvantaged by the fact that he received the transcript copy at the time of the Appeal Hearing.

The next contention is that Claimant was not accorded a timely Appeal Hearing. Here the pertinent Rule language is:

> "In case of suspension or dismissal a conference on appeal will be given within ten (10) days."

Carrier counters this contention by stating that the "parties have mutually relaxed that requirement" and cites to the Board, for the first time in the handling of this dispute, several letters which purportedly support their contention that the 10-day requirement of the Rule has not been adhered to. The Rule language involved herein is clear and unambiguous. It contains a specific time limit within which an appeal conference "will be given." Carrier's practice to the contrary cannot change the clear and unambiguous language of the negotiated rule. If the parties to the Agreement want to change this clear and unambiguous language, they must do so in the same manner as this language came into being, i.e., by negotiation and/or written understanding. However, here again, Claimant, in effect, slept on his rights by his apparent failure to make a timely objection to the untimely scheduling of the Appeal Hearing. We will not, under these circumstances, overturn this discipline case solely on the basis of this procedural error.

The contention relative to a alleged incomplete Hearing transcript is denied for the reason that, while there are some gaps in the printed transcript, none of them interfere with an understanding of the testimony which was transcribed. Claimant has not directed us to any significant omission of testimony.

The argument relative to the chain of custody of the specimen is also denied. The chain of custody of the specimen is not dispositive of the issues in this case, whereas Claimant's own testimony is.

This brings us to the merits of this case which will be the basis of our decision.

Here we have an employee who, while off duty, ingested an unknown substance of unknown origin in an attempt to calm his nerves following a non-railroad incident at his home. When Claimant voluntarily completed the drug/alcohol screening permission form at the medical facility on July 12, 1989, he started to indicate on the form the fact that he had taken some type of prescription drugs during the 30-day period preceding the test, but then marked it out on the form and specified "none." His testimony at the Hearing clearly indicates that he knew he should have reported the drug which he took at the time of the off-duty incident, but didn't report it because he didn't know what it was.

The language of Rule GR-G is clear and easily understandable. It specifically provides that before medications are taken, the effect of such medications must be known by the employee taking them. In this situation, Claimant ingested an outdated prescription drug which was not prescribed for him and he didn't even know what the drug was. This is a careless act which violates the language and intent of Rule GR-G.

On the other side of this coin, we have here an employee of more than 15 years who has no record of any prior discipline or work failures. According to the Track Foreman and the Track Supervisor Claimant "is a tough railroad worker"; "a good worker, hard worker and a knowledgeable person"; a person who "has always been a good worker and a good employee"; a person who has

never been known to use alcohol or drugs; who has never been a problem employee; who doesn't complain; who worked his full tour on the day of the injury and even after the injury "was a big help" during his period of "light duty."

While it is not the general function of this Board to substitute our judgment for that of the Carrier in discipline matters, we are convinced that the assessment of discipline by dismissal in this case is capricious and excessive. Therefore, Claimant should be returned to service with seniority and all other rights unimpaired, but without compensation for the period of time during which he has been out of service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.