

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30045
Docket No. MW-29717
94-3-91-3-67

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company
(Eastern Lines)

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

1. The dismissal of Laborer-Driver F. P. Arrendondo for allegedly '... being under the influence of alcohol while ... working as Operator on MT-4 Tamping Hammer, at approximately 9:40 AM. Friday, September 22, 1989 ***' was without just and sufficient cause, arbitrary, on the basis on unproven charges and in violation of the Agreement (System File MW-90-17/488-77-A SPE).
2. As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated to his former position with all seniority, vacation rights and any other rights accruing to him unimpaired, his record shall be cleared of the charge 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 employee or employees involved in this dispute are respectively carrier and employee 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 in this case was an employee with almost eighteen years of seniority with an apparent clear discipline record. There is nothing in the case file to suggest otherwise. He was assigned as a Laborer-Driver on Track Gang 354 at Sanderson, Texas. On

September 22, 1989, at approximately 9:40 AM, while on duty and under pay, Claimant allegedly sustained a personal injury. As a result of this injury, Claimant was required to submit to a drug/alcohol urinalysis test. The result of the urinalysis indicated that Claimant had an alcohol level of 0.09%.

By letter dated October 10, 1989, Claimant was notified that he was being withheld from service pending a hearing which was scheduled for October 18, 1989, on a charge of possible violation of Rule G. By mutual consent of the parties, the hearing was postponed to and finally held on January 16, 1990, at which time Claimant was present, represented and testified on his own behalf. Following completion of the investigatory hearing, Claimant was notified by letter dated January 23, 1990, that he had been found guilty of violation of Rule G and was dismissed from Carrier's service.

During the on-property procedures, the Organization argued that the hearing was not fair and impartial because the Carrier's Medical Administrator did not personally appear and testify at the hearing; that Carrier failed to prove that the chain of custody of the specimen was not protected; that the Carrier failed to produce substantial evidence to support the charge; and that discipline by dismissal was "extremely harsh, unreasonable and extremely excessive." In an additional argument raised for the first time by the Organization on September 11, 1990, almost nine months after the hearing had been concluded, they contended that Carrier "has not shown where there was probable cause to have (Claimant) submit to a urinalysis" and additionally contended that Claimant needed "an interpreter to understand the English language" continuing the argument that Claimant "did not understand that he should have advised the doctor he was on medication when he gave his urine sample."

Before the Board, the Organization contended that Claimant "had advised the hospital where he gave his test specimen that he was under medication." It further contended that Claimant did not know that the medication which he was taking had an alcohol content of 21.75% and therefore he was not aware that he had "engaged in an activity which was prohibited by Carrier's rules" and he did not have "the intention of doing so." Additionally, the Organization argued that "there was absolutely no indication that the Claimant was under the influence of alcohol in the accepted sense of the word (underscore ours)". The Organization continued its argument that Carrier had an ulterior motive in dismissing Claimant which was "to mitigate the Carrier's liability in a potential claim pursuant to the Federal Employers' Liability Act."

For its part, the Carrier argued, both on the property and before the Board, that the specimen which was properly taken and properly secured during the entire proceeding clearly established that Claimant had an alcohol level of 0.09% and was therefore in violation of Rule G. It contended that the absence of the Medical Administrator at the investigatory hearing did not impact adversely on Claimant's right to a fair and impartial hearing because the Medical Administrator submitted for inclusion in the hearing record a complete detailed account of the specimen handling and the specimen determination. Carrier also argued, without further explanation or amplification, that "neither of these medications (Claimant's) contain narcotics or alcohol." The Carrier then in a quantum leap of speculation, continued its argument by stating that inasmuch as Claimant had admitted to consuming three beers on the night of September 21, "It is obvious from the significant amount of alcohol present in his urine that he had consumed more than three beers or that they had been consumed later than the previous night."

Rule G as written on this Carrier reads as follows:

"RULE G. The use of alcoholic beverages or intoxicants by employees subject to duty, or their possession, use, or being under the influence thereof while on duty or on Company property, is prohibited.

Employees shall not report for duty under the influence of, or use while on duty or on Company property any drug, medication or other substance, including those prescribed by a doctor, that will in any way adversely affect their alertness, coordination, reaction, response or safety. Questionable cases involving prescribed medication shall be referred to a Company Medical Officer.

The illegal use, possession or sale while on or off duty of a drug, narcotic, or other substance which affects alertness, coordination, reaction, response or safety, is prohibited."

The chain or custody argument and the contention relative to the absence of the Carrier's Medical Administrator from the investigatory hearing will be our first areas of consideration. There is nothing in this case to indicate or even suggest that the specimen in question was mishandled in any way. The Claimant initialled the appropriate form indicating that he acknowledged that the specimen was his own and that it was correctly labeled and sealed in his presence. The label on the specimen contained Claimant's own Social Security number and he voiced no complaint or objection either at the medical facility or at the time of the hearing relative to the procedures of obtaining or securing the

specimen. The chronology of handling, the types of tests to which the specimen was subjected and the results of those tests were clearly set out in the laboratory reports as well as in the Medical Administrator's written report which was made a part of the hearing transcript. At the hearing, Claimant and his representative were apprised of the reason for the absence of the Medical Administrator; they were informed that the Hearing Officer had "two telephone numbers if there are further questions concerning this drug screen" and they acquiesced in the decision to proceed with the Medical Administrator's statement included in the hearing record. The representative acknowledged "in order to not delay these proceedings any further, we will proceed with it." The arguments in this regard are therefore rejected.

As for the Organization's belated argument relative to Claimant's alleged difficulty with the English language, we note in the hearing record that an interpreter was used and that Claimant's own testimony established the fact that he had advised the personnel at the facility where the specimen was taken that he was on medication. That contention too is denied.

As for the Organization's argument that there was no indication that Claimant was under the influence of alcohol "in the accepted sense of the word", the Board does not understand that there are certain restricted accepted senses of the words "under the influence of alcohol." Clearly, in this case, the results of the laboratory tests prove that Claimant was on this date under the influence of alcohol. Any argument to the contrary is denied.

As for Carrier's unfounded speculation relative to Claimant obviously consuming more than three beers on the night before the date in question or on the date of the incident, we must ask, obvious to whom? There is not one scintilla of evidence or proof in the record of this case to give even a hint of legitimacy to Carrier's speculation. It is summarily dismissed.

Rule G as quoted, supra, is clear, unambiguous and wide ranging. It covers the situation which is involved in this case. The Rule clearly requires that employees who are on medication, including those prescribed by a physician, must know what they are ingesting. The employee has a responsibility to himself, to his fellow workers and to the Carrier to know whether or not the medication he is taking will put him in possible violation of the provisions of Rule G. Claimant candidly acknowledged that he was acquainted with the requirements of Rule G. The Board is convinced on the basis of the record in this case that Claimant had consumed a medication which clearly contained a substantial percentage of alcohol. He was in violation of Rule G. The Board is not convinced, however, that on the basis of this record, dismissal was

an appropriate assessment of discipline. Rather than the excessive discipline of dismissal, it is the Board's conclusion that Claimant should be returned to the seniority roster, with seniority unimpaired, subject of course to Claimant's ability to successfully pass any and all physical and other job related examinations which are normally and customarily required of employees of his craft and class. The time he has been out of service will serve as a suspension for his violation of Rule G.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.