

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31801
Docket No. MW-32303
96-3-95-3-134**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

- (1) The dismissal of Foreman L. S. Thomas for alleged violation of Rule G was arbitrary and unwarranted (System File S-P-503-W/MWB 93-10-22C).**
- (2) As a consequence of the above-stated violation, Claimant L. S. Thomas shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered including, but not limited to, health and welfare benefits, vacation and personal leave qualification."**

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 were given due notice of hearing thereon.

On May 12, 1993, Claimant worked his regular shift and one hour of overtime. After completing his assigned duties, Claimant ate dinner and, by his own admission, consumed a few beers. After dinner, Claimant received permission to drive a Carrier vehicle, to Vancouver, Washington, to obtain a replacement part for the tie gang extractor. While driving a Carrier vehicle, Claimant was stopped by the Washington State Police for speeding. A field sobriety test was administered and Claimant registered a blood alcohol level of .183. Claimant was arrested for driving under the influence of alcohol.

On May 17, 1993, Claimant was notified to appear for an Investigation on May 21, 1993, concerning his alleged violation of Rule G. Following two postponements, the Investigation was held on June 4, 1993. On June 15, 1993, Claimant was advised that he had been found guilty of violating Rule G and was dismissed from service.

The Organization maintains that Claimant was not given a fair Hearing because the State Police Officer who stopped Claimant and administered the sobriety test did not testify as a witness. Furthermore, the Organization contends that the dismissal should be overturned because Carrier failed to provide Claimant's representative with a copy of the Investigation transcript and exhibits.

The Organization contends that Carrier failed to prove the alleged violation. The Organization argues that Claimant was off duty at the time he consumed the beers and was not under pay at the time he was stopped by the Washington State Police. Consequently, in the Organization's view, Rule G did not apply.

The Organization also argues that dismissal was not warranted. The Organization recognizes that this was Claimant's second Rule G violation in a ten year period, but argues that following his first violation, Claimant was misdiagnosed. The Organization observes that Claimant was diagnosed as having no significant alcohol problem when, in fact, he had an alcohol dependency. Furthermore, the Organization contends, the Roadmaster testified that Claimant was the best Foreman who ever worked for him. Under these circumstances, the Organization maintains that the penalty of dismissal was excessive.

Carrier argues that it afforded Claimant a fair Hearing and that it proved the Rule G violation by substantial evidence. Carrier further maintains that dismissal was proper because this was Claimant's second Rule G violation in a ten year period.

The Board reviewed the record carefully. We are not persuaded by the Organization's procedural arguments. The State Police Officer was not a Carrier employee and Carrier did not have the ability to compel his testimony. There is no indication that the hearsay testimony concerning Claimant's blood alcohol level was unreliable. Indeed, it was corroborated by Claimant's own admission that he had consumed "a few beers." Furthermore, we find no evidence that the alleged failure to provide Claimant's representative with a copy of the transcript prejudiced Claimant's rights of appeal in any way.

Turning to the merits, we find that Carrier proved the Rule G violation by substantial evidence. At the time Claimant was found to have a blood alcohol level of .183, he was operating a Carrier-owned vehicle on an errand for Carrier's benefit. Rule G clearly applies to this situation.

The Organization's contention that Carrier misdiagnosed Claimant following his first Rule G violation is besides the point. The key point is that this was Claimant's second Rule G violation within the ten year period. Although Claimant may otherwise have been a very good Foreman, our role as an appellate body is limited to determining whether the punishment imposed was arbitrary, capricious or excessive. We do not review the penalty de novo. Whether we may have imposed a lesser penalty in the first instance is simply not relevant. This being Claimant's second Rule G violation within a ten year period, we are unable to say that his dismissal was arbitrary, capricious or excessive.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.