

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32484
Docket No. MW-32878
98-3-96-3-219**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. A. M. Olson for alleged violation of Rules 1.1, 1.1.2, 1.5, 1.6, 1.13, 1.15 of the Safety and General Rules for All Employees, Form 2629 Std. and Rule 2.1 of the Policy On Use of Alcohol and Drugs in connection with charges of alleged absence, reporting for work in an unfit condition, being under the influence of alcohol and/or illegal drugs, refusing to comply with instructions and threatening a supervisor and roadmaster on January 23 and/or 24, 1995 was arbitrary, capricious and an abuse of the Carrier's discretion (System File 140-13I2-951/95-11-49).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated '. . . with all seniority, vacation and benefit rights restored and compensated for all wage loss beginning, February 7, 1995 and continuing forward.'"**

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.

The Claimant was a B&B Truck Driver with approximately 16 years of established service when, on January 22, 1995, he was unable to sleep due to the lingering psychological affects of the imminent anniversary of an accident on the job which tragically claimed the life of one of his friends who was a fellow employee. The following day, and still facing the impact of the events described above, the Claimant called into Supervisor McFarlane and asked for a vacation day. However, because he did not give adequate notice, the request was denied. Despite the denial, the Claimant did not appear for work that day. Later that day, on or about 5:30 P.M., the Claimant called Supervisor McFarlane at his home and, once Supervisor McFarlane answered the telephone the Claimant proceeded to call McFarlane a "*." When Supervisor McFarlane asked why the Claimant would make such a statement the Claimant referred to the denial of the vacation day request. McFarlane replied that "rules were rules" to which the Claimant responded "* your rules." McFarlane again cited the rules regarding adequate notice for vacation request and the Claimant responded by calling Supervisor McFarlane a "* murderer" and hanging up on McFarlane.

The following day the Claimant drove fellows employees in his car pool and upon arriving at the job site he spoke to Supervisor McFarlane, apologizing for his conduct the evening before. However, when Supervisor McFarlane smelled alcohol on the Claimant's breath and determined that he was "glassy-eyed," observations confirmed by Assistant Director of Maintenance Hansen, he asked the Claimant to come into the office. Despite Supervisor McFarlane's request, the Claimant left the area. Supervisor McFarlane and Roadmaster Koerting followed the Claimant to a nearby convenience and, once encountering him, asked him to submit to a drug and alcohol test. The Claimant refused and, making reference to the accident that caused his friend's death, called McFarlane a "little *." The Claimant terminated the conversation by telling Supervisor McFarlane and Roadmaster Koerting that he would "kick your *" and he left the area.

* Expletive deleted.

Subsequently, when Assistant Director telephoned the Claimant to inform him that he was to appear for an Investigation into the matter, the Claimant, in slurred speaking manner told Hansen that he would "whip your *."

After Investigation, the Claimant was removed from service.

The Organization contends that the dismissal must be overturned on the merits, arguing that the Claimant was not under the influence of alcohol during the time in question and that he did not threaten Supervisor McFarlane and Roadmaster Koerting. In the alternative, the Organization asserts that even if the Claimant is guilty as charged he should not be dismissed because there are mitigating circumstances. The Carrier disagrees on both counts.

More specifically, the Organization points out the Claimant's two passengers that were with him on the day in question did not smell alcohol on his breath nor did they notice any aberrant behavior on the part of the Claimant. Moreover, the Organization points out that the Claimant could not have been under the influence while at work because he did not work the day in question. It also points out that the Carrier charged the Claimant with failing to report for work on the day in question, but that he did in fact do so. The Carrier on other hand reminds this Board that at least two of its representatives smelled alcohol on the Claimant's breath and that he was glassy-eyed. Thus, on this critical issue there is at best the competing testimony of four individuals whose relative credibility must be assessed. It is well settled that this Board will not upset the credibility assessments made below absent some evidence that those assessments are arbitrary or wholly without foundation. There is no such evidence in this record that might enable us to come to that conclusion. Accordingly, we find that the Claimant was in fact under the influence on the day in question. However, the record is clear that on the day before, when his request for a vacation day was denied, the Claimant failed to report. The final argument of the Organization on the merits is that the Claimant could not have threatened Supervisor McFarlane at the time in question because McFarlane followed the Claimant to the convenience store. In other words, had the Claimant in fact threatened McFarlane, McFarlane would not have

* Expletive deleted.

continued to interact with him. We disagree. McFarlane followed the Claimant despite the threat because he had an obligation to do so. But more importantly, even if we were to agree with the Organization on this point, it does not explain the Claimant's threats to Assistant Director Hansen and Roadmaster Koerting.

Ultimately, the Organization asks that we overturn the discharge because of mitigating circumstances. Among those are the approaching anniversary of the death of the Claimant's friend, the psychological impact of that event, his inability to sleep in light of the impending anniversary, and Supervisor's McFarlane's alleged arbitrary failure to permit the Claimant to take vacation time off. Thus, the Organization asks that we reinstate the Claimant with various conditions such as the prior recommendations of the Claimant's EAP counselor. In response, the Carrier asserts that reinstatement under those circumstance would be futile and inappropriate because the record shows that the Claimant was not cooperative with the efforts of the EAP counselors that might rehabilitate him.

We begin our consideration of these arguments with the observation that there can be little question that the anniversary of the death of the Claimant's friend was a traumatic prospect. This of course was heightened by the fact that the accident occurred on the job and that the Claimant was returning to the environment where the trauma took place, an essential element of post-traumatic stress disorder. However, the cases are legion that the argument for leniency is to be made to the Carrier and again, that its decision is not to be upset unless arbitrary or capricious. Under these circumstances we conclude that the Carrier's decision should not be overturned. We are persuaded by virtue of the fact that EAP assessments clearly demonstrate that the Claimant had not been cooperative with EAP effort and that his failure to embrace the efforts to rehabilitate him preceded and followed the trauma that has beset him so. Thus, we are unable to reverse the Carrier's dismissal of the Claimant.

AWARD

Claim denied.

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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 23rd day of February 1998.