Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33143
Docket No. MW-33383
99-3-96-3-896

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. W. A. Reckley for alleged violation of Rule G and Rule 21 on October 11, 1995 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File SPG-D-9481/12 (96-59) CSX].

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all seniority and benefits unimpaired, his record shall be cleared of the charges 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 were given due notice of hearing thereon.

Before the Claimant was dismissed from the Carrier's service on November 20, 1995, he had been employed by the Carrier for 25 years. In October 1995, the Claimant held seniority as a Heavy Equipment Operator.

On October 11, 1995, the Claimant was assigned to a System Production Gang in Keyser, West Virginia. While the Claimant was working as an Equipment Operator, Roadmaster Shaffer and Supervisor Williams smelled the odor of alcohol on his breath and observed that his eyes were bloodshot and he was sweating profusely. After the Supervisors questioned the Claimant, he was removed from service.

On October 20, 1995, the Carrier notified the Claimant that an Investigation was scheduled for October 26, 1995 based upon the charge that he violated Rule G and Rule 21. Rule G, in relevant part, provides:

> "Employees reporting for duty, on duty, on CSXT property, or occupying facilities provided by CSXT are prohibited from having in their possession, using, or being under the influence of alcoholic beverages or intoxicants.
>
> Employees shall neither report for duty nor perform service while under the influence of, nor use while on duty or on CSXT property, any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employees' alertness, coordination, reaction, response, or safety."

Rule 21, in relevant part, provides:

> "Employees shall neither report for duty nor perform service while under the influence of, nor use while on duty or on CSXT property, any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employes' alertness, coordination, reaction, response, or safety."

The Investigation commenced on October 26, 1996, but due to the unavailability of witnesses to be called by the Organization, it was adjourned. The Investigation was

reconvened on November 2, 1995, at which time the Claimant and Organization were present.

On November 20, 1995 the Carrier sent a letter to the Claimant in which it was stated that based upon the Investigation, there was sufficient evidence to prove that on October 11, 1995 the Claimant violated Operating Rule G and Safety Rule 21. The Carrier noted in its November 20 letter that the Claimant had been offered assistance through the Employee Assistance Program in the form of a Rule G bypass, but he "refused this course of action." Consequently, the Carrier dismissed the Claimant from the service of the Carrier.

The central query to be addressed is whether there is substantial evidence in the record to prove that the Claimant reported for duty, or was on duty and used or was under the influence of alcoholic beverages or intoxicants in violation of Rule G. After carefully examining the record, the Board concludes that the Claimant violated Rule G.

Both Shaffer and Williams provided testimony that they smelled alcohol on the Claimant's breath. On October 11, 1995 Shaffer said that he walked by the Claimant, who was talking to a Conductor at West Keyser Tower. Shaffer and the Claimant exchanged greetings. Shaffer said that when the Claimant greeted him with "hello David" he smelled the odor of alcohol on his breath. Shaffer said that at the time, the Claimant was "talking fast to the Conductor" which was a departure from his usual "laid back, soft spoken [and] quiet" manner.

After Shaffer notified Williams of the situation, Williams drove to Keyser followed by Shaffer. Upon arriving at Keyser, Williams told the Claimant to come with him to Shaffer's office. While informing the Claimant that it had been reported to him "that there was a smell of alcohol on him," Williams said that he "distinctly smelled alcohol on the man." Williams described his appearance as "real sweaty and his eyes [were] bloodshot looking . . . [and] puffy." Williams said that the Claimant's actions were "different than the person he was familiar with - the more happy go lucky person."

With Williams present and from where he [Shaffer] was sitting in his office, Shaffer said that the Claimant's eyes looked "red" and were "possibly bloodshot." Shaffer continued with his testimony by stating the Claimant was "sweating heavily while he was sitting in the chair adjacent to . . . Williams."

The Claimant's characteristics of "being under the influence of alcoholic beverages" in violation of Rule G are so common that the testimony of witnesses who are in the Claimant's presence on the occasion which form the basis of such a charge carries great weight. Although such observations are subjective, the symptoms of intoxication are well established and are present in this case. Thus, both Shaffer and Williams provided testimony with respect to the distinctive smell of alcohol on the Claimant's breath, the rapid speech of the Claimant which was not customary, the bloodshot eyes and that he was sweating heavily.

A co-worker, Timekeeper Cary Gregory, who was briefly in the presence of the Claimant and had a conversation with him on October 11, "did not put the sniff on him." As a result, he did not "smell any alcohol on the Claimant."

It is significant, however, that the Timekeeper acknowledged the Claimant's eyes were bloodshot on October 11, which is consistent with the testimony of Shaffer and Williams. But at the Hearing, he testified that the Claimant's eyes were not bloodshot.

On October 11, both Shaffer and Williams informed the Claimant that he was in violation of Rule G and would be removed from service immediately. When Shaffer and Williams advised him that he had the option of taking a blood alcohol test, the Claimant said "there'd be no use for that it would show up in the blood. You're wasting your and my time both."

The Claimant admitted that he told Shaffer and Williams that there was no need to take an alcohol test, because the alcohol would show up anyway. The Claimant sought to explain the statement at the Hearing by testifying that he had "drank a beer" and he "didn't know how long it'd stay with you or nothing like that."

The record establishes that the Claimant consumed more than a beer the previous night. During the week of the episode in question, the Claimant provided transportation to Machine Operator E. H. Galik. During the meeting in his office on October 11, according to Shaffer, the Claimant changed his story three times with respect to the amount of alcohol he consumed the previous night with Galik. At first he told Shaffer that he had three beers, which was changed to two or three beers; and finally he admitted that he had four cans of beer and some wine.

At the Investigation, the Claimant admitted that he and Galik "just sat in the parking lot" and drank beer, during the evening of October 10. He said that he had "3 or 4 beers and a glass of wine. . . . I had about a half cup of wine." He added that he drank a "couple of beers." The Claimant also expanded on the wine which he consumed. At first he said "about a glass," which was followed by his testimony that it was a "half a glass of homemade wine" which "a guy had . . . from Alabama." With the assistance of leading questions by the Organization representative at the Hearing, the wine that he drank was not only in a six ounce cup, but it was "half full."

Drinking alcoholic beverages in the motel parking lot during the night of October 10 constitutes a violation of Rule G and Rule 21 which prohibit possession or use of alcoholic beverages while occupying facilities provided by the Carrier. In light of the record, the Board takes constructive notice that the consumption of alcoholic beverages the night of October 10 affected the Claimant's "alertness, coordination, reaction, response or safety," as provided in Rule 21.

The Board finds that when the Claimant reported for duty on October 11, he was under the influence of alcoholic beverages or intoxicants. The classic symptoms of intoxication that were observed by Shaffer and Williams at about noon on October 11 had a causal connection to the consumption of alcoholic beverages or intoxicants during the previous night.

It is undisputed that the Claimant told Shaffer and Williams that he was not interested in the Employee's Assistance Program (EAP) because he had been through rehabilitation twice and it did not do "any good." The Claimant acknowledged that he made the statement. He said the kind of people you run into do not want to help themselves; they were just trying to "reduce their jail time."

At about 2:00 or 2:30 P.M. on October 11, the Claimant changed his mind about taking a blood alcohol test. Thus the test was not administered until 6:30 P.M., when "the nurse showed up." The record establishes that the test was negative for alcohol.

However, the test does not alter the observations by both Shaffer and Williams that some six and one-half hours earlier the Claimant had the usual characteristics of being under the influence of alcoholic beverages or intoxicants. In light of the substantial evidence in the record, the reasonable inference to be drawn is that the

Claimant was under the influence of alcoholic beverages or intoxicants in violation of Rule G at about noon on October 11.

Several matters were raised by the Organization that must be addressed before concluding this decision. The Organization contends that the Carrier's Notice of Investigation dated October 20 was not received in sufficient time to prepare for the Investigation on October 26, 1995. However, at the Hearing the Organization acknowledged that it was ready to proceed and the Hearing should not have been recessed and reconvened on November 2, 1995.

The claim of the Organization with respect to additional time to prepare for the Investigation is in conflict with its claim that it was ready to proceed once the Investigation began on October 26. The Board finds no merit in this procedural argument by the Organization.

The Organization also claims that two witnesses, who would support the Claimant's version of the small amount of alcoholic beverages consumed by the Claimant, and when he went to sleep on the night of October 10, were advised by the Carrier that should they appear at the Investigation their absence at work would be considered unauthorized. This assertion by the Organization was refuted by Williams.

Furthermore, a statement which was purportedly written by Fred Tessler, one of the witnesses who was not at the Investigation, but was read by the Organization Representative, refers to the events on the night of October 10 without any mention of the claim by the Organization that their presence at the Hearing would be considered unauthorized absences from work. Clearly, the record does not support the Organization's claim that the appearance of the witnesses for the Claimant, other than Galik, would be considered unauthorized absences from work. In any event, it should be underscored that "[I]t is not the duty or obligation of the Carrier to produce witnesses in Claimant's behalf. . . ." Third Division Award 13482.

After thoroughly reviewing the record, the Board finds no grounds to modify the discipline assessed. The Claimant, unfortunately, has had numerous warnings and suspensions for being absent without leave during his 25 years of service with the Carrier. Such discipline has not served to rehabilitate the Claimant.

Before concluding, it should be noted that the Claimant elected to proceed with the formal Hearing based upon the violation of Rule G in lieu of exercising the option to participate in the Employee Assistance Program under the Rule's bypass provisions of the Agreement. Having exercised such an option, the Claimant understood the risk that there may be substantial evidence in the record to support the Carrier's charges against him.

The Board finds no grounds to disturb the dismissal of the Claimant from service. The Carrier's decision is upheld.

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 25th day of March 1999.