

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation (Amtrak)
(Northeast Corridor)

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

(1) The dismissal of Trackman T. Wilson for alleged violation of Rule 'G' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-1900).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be returned to service with seniority and all other rights unimpaired 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 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 waived right of appearance at hearing thereon.

In 1986, Claimant was charged with violating Rule G and, in resolution of those charges, entered into a Rule G Waiver Agreement. Therein he waived his right to an Investigation/Trial under the applicable agreement, admitted he violated Rule G as charged, agreed to complete initial treatment, and acknowledged that he would be dismissed from service unless he adhered to the aftercare plan prescribed by the EAP counselor. The prescribed aftercare plan included Claimant's abstinence from alcohol and periodic, scheduled testing for alcohol. On the basis of the Waiver Agreement and under its terms, Claimant was returned to service.

On the morning of May 20, 1987, at approximately 9:00 A.M., Claimant reported to the Carrier's medical office to take his second, prescheduled, quarterly test for alcohol. The Organization asserts that an initial breathalyzer test was conducted at 10:30 A.M. and that the results were negative, but that a second and third test were conducted. The Carrier asserts that only two tests were conducted, the first of which was conducted at 11:13 A.M., which registered positive at .041 and the second, at 11:40 A.M., which registered .034.

The Carrier asserts that Claimant initially denied, but later admitted that he had consumed beer the evening before the test and a couple of drinks of whiskey the morning he reported for the test. The Organization asserts that Claimant consistently denied drinking.

Claimant disputed the breathalyzer test results and requested a blood test. The Carrier thereupon took Claimant to a nearby hospital, where, after a delay not explained in the record, he was given a blood test at 1:30 P.M., the result of which was negative for alcohol.

On the basis of the positive breathalyzer test for alcohol, the Carrier withheld Claimant from service and subsequently dismissed him for failing to adhere to the EAP aftercare plan. The Carrier failed and refused to conduct an investigation, arguing that the Claimant had, by his conduct, "invoked his dismissal in accordance with the [Rule G. Waiver Agreement]."

The Organization protested the Carrier's action. On the property, the Organization argued that the manner in which the tests were conducted and the conflicting reports on the presence of alcohol prevent the Carrier from terminating the Claimant without benefit of the fair and impartial Trial required by Rule 68 of the Agreement and from determining that the Claimant was in violation of the Rule G Waiver Agreement. It also challenged the competency of the breathalyzer operator. The Organization asserted that the Carrier had failed to meet its burden of proof.

The Carrier asserted on the property that the breathalyzer operator was competent and that the tests were valid. It asserted that the negative result of the blood test is explained by the metabolism of alcohol in Claimant's system during the time between administration of the breathalyzer tests and the blood test.

Before the Board, the Carrier asserts that the Organization's deviation from its initial position during the course of the processing of the Claim constitutes a substantial alteration of the Claim, warranting its dismissal. It urges that the Organization's initial protest was confined to the "conflicting reports" which prevented the Carrier from terminating the Claimant without benefit of a fair and impartial Trial and not the assertion that any dismissal requires a Hearing. The Carrier also asserts that the Organization withheld its allegations regarding the particular test through the processing of the Claim until shortly before the case was presented to the Board.

With respect to the merits of the Claim, the Carrier asserts that Claimant waived his right to hearing for the 1986 violation and, when he violated the terms of the Rule G Waiver Agreement, the violation triggered the automatic and self-executing consequence of dismissal. It urges, therefore, that his dismissal did not violate Rule 68. The Carrier asserts that the evidence is clear that the Claimant did violate the Waiver Agreement, in that he tested positive on two valid, properly administered tests and that the later, negative test is explained by the time delay. The Carrier asserts that maintaining a drug and alcohol-free work environment is of the highest importance to safety. It asserts that the Carrier extended to the Claimant a maximum opportunity for rehabilitation, but that the Claimant failed to live up to his commitment to comply with the terms of his rehabilitation and has, therefore, forfeited his employment and claim for reinstatement.

The Organization's position before the Board is that the Carrier's action was improper because it did not convene a fair and impartial Trial, as required by Rule 68, to contest the self-executing agreement. It urges that the Waiver Agreement executed as a result of Claimant's 1986 Rule G violation did not specifically waive hearing for future violations; and it urges that neither did the Organization, which was not a party to the Waiver Agreement, waive its right to such a Hearing.

With respect to the merits of the claim, the Organization asserts that, in any event, Claimant complied with the Waiver Agreement, including the terms of his aftercare. It urges that the Claimant was not required to test negative on the breathalyzer test, but only not to be under the influence - that is, to have less alcohol in his system than the .040 level prescribed by Federal Railroad Administration Regulations. It urges that two of the three breathalyzer tests and the confirmatory blood test demonstrated a level lower than the FRA limit.

The Carrier's right to enforce Rule G to prohibit employees from reporting for duty or being on duty under the influence of alcohol or from using alcohol on duty is well established, as is its right to require employees who admit violation of Rule G, to waive Hearing, undergo treatment and comply with aftercare plans as a condition of reinstatement. Also well established is the Carrier's right, as part of a self-executing reinstatement and waiver agreement, to make dismissal, without further disciplinary proceedings, the penalty for future violations.

The Board is not persuaded by the Carrier's argument that the Organization's claim must be dismissed because it was substantially amended during processing on the property. The Organization protested from the outset the Carrier's action as taken in the absence of an investigatory hearing. While the Organization's initial response is susceptible of a narrower reading, to challenge only the testing methods, there is no basis to consider the claim in a narrow or legalistic manner. The language was sufficient to place the Carrier reasonably on notice as to the nature of the Organization's protest.

The same is not the case with the Organization's argument that Claimant's waiver cannot modify the Agreement and that the Claimant remained entitled to an investigatory hearing as a necessary part of the policing the Agreement. That argument was not raised on the property and is presented for the first time before the Board. Numerous Awards of the Board hold that such arguments may not be considered; and the Board will not do so.

The language of the Rule G Waiver Agreement is clear, and prior Awards confirm the interpretation of the language of the Waiver Agreement, that, once a violation of the Agreement is established, dismissal is automatic. See, e. g. Case Nos. 26 and 31 of PLB 3991. In Case No. 31, that Board suggested that "...while an evidentiary hearing to determine if the waiver had been violated might be desirable, that issue was best left to the parties to negotiate." In those cases, that Board found that there was sufficient probative evidence in the record that the Waiver Agreement had been violated to sustain the Carrier's action.

The Board concludes that where, as here, the Rule G Waiver Agreement was self-executing and where there is substantial probative evidence on the record as a whole that the Waiver Agreement was violated, the Carrier's failure to conduct an investigatory hearing does not violate the applicable agreement. The Board notes, in this regard, that the Claimant obtained substantial and immediate benefit from the Waiver Agreement: he obtained both his job and assistance in controlling his problem. Compliance with the aftercare plan was a condition of retaining his position.

A review of the record reveals abundant evidence that the Claimant violated his obligations under the Waiver Agreement: he showed up for testing, in a duty status, smelling of alcohol; and he twice tested positive for alcohol. The Board finds the tests to have been appropriate and properly administered. The negative results of the blood test conducted three hours after the breathalyzer are not inconsistent with the levels of alcohol found by the breathalyzer tests. Conversely, the positive test results are inconsistent with a determination that the Claimant did not use alcohol while on or subject to duty.

The Board is not persuaded by the Organization's argument that the Claimant was not obligated to remain abstinent in order to comply with the aftercare plan, but only to avoid being found "under the influence." Recovery and aftercare through the Carrier's EAP includes abstinence from alcohol and testing to confirm that abstinence. A positive test result, at any clinically significant level, significantly interferes with Claimant's recovery and violates the aftercare plan. Clearly the test results establish violation of the aftercare plan. Indeed, the Board notes that the 10:13 A.M. breathalyzer test was in excess of even the FRA "under the influence" level.

In the face of the self-executing Waiver Agreement and the substantial evidence supporting the Carrier's determination that Claimant had violated its terms, the Board is persuaded that the Carrier's action dismissing Claimant did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.