

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42987
Docket No. SG-43174
18-3-NRAB-00003-150426**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of J. D. Wooster, for reinstatement to service with compensation for all time lost, including overtime and skill pay, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it issued the harsh and excessive discipline of dismissal to the Claimant without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on May 28, 2014. Carrier’s File No. K06144756. General Chairman’s File No. 14-028-KCS-185. BRS File Case No. 15138-KCS.”

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.

After Investigation held May 28, 2014 and by letter dated June 3, 2014, the Claimant – an employee for three years and four months – was dismissed for possession of an illegal drug and/or controlled substance in violation of GCOR 1.5 (Drugs and Alcohol).

At the time this dispute arose, the Claimant was an Assistant Signalman headquartered at the Joint Agency – Kansas City, Missouri and domiciled in Grandview, Missouri.

The Claimant testified that on May 5, 2014, he was called by the Carrier to report for duty in Texas on May 6, 2014. Tr. 14. According to the Claimant, while driving his wife's car as the only occupant, he was arrested by the Kirbyville, Texas Police Department and charged with possession of a controlled substance. Tr. 15-16, 19. Further, according to the Claimant, he was told by the police that he was being charged based on medication found in a bottle. Tr. 19.

The Claimant testified that on May 6, 2014 and pursuant to Rule 1.6.4 (Notifications of Criminal Charges), he notified the Carrier of his arrest. Tr. 16.

Director of Human Resources M. Brazeal testified that on May 6, 2014, he learned of the Claimant's report that he had been arrested. Tr. 8. Brazeal contacted the Railroad Police and requested that they get the arrest report. Id. Further, according to Brazeal and as testified by the Claimant, Brazeal and another Carrier officer spoke with the Claimant on May 9, 2014 and advised the Claimant that he would be drug tested and held out of service pending the results of the drug test. Tr. 9, 16.

On May 19, 2014, Brazeal received a copy of the police officer's probable cause affidavit from the May 5, 2014 arrest. Tr. 9. In pertinent part, the probable cause affidavit stated (Carrier Investigation Exhibit 2):

“Upon my arrival ... [t]he driver appeared to be flustered when he was asked questions as to where he was coming from and where he was going.

Wooten [sic] first stated he was en route to Port Arthur, TX for a job with the railroad. Wooster then stated he was en route to Vidor, TX to stay at the Holiday INN. I then asked if there was anything in the vehicle I should be concerned about. Wooster stated he had a Glock model 22 in the right front passenger seat located beneath his cooler.

For Officer Safety precautions I asked Wooster to step out of the vehicle to ensure he did not have anymore weapons on his persons. Wooster then exclaimed he was not getting out of the car. Wooten did then eventually comply with my verbal command to step out of the vehicle. A Terry Frisk for weapons was then conducted. No other weapons were found on Wooster's persons.

Due to the fact Wooster appeared nervous and I had reason to believe and did believe there may be illegal contraband located inside said vehicle I asked for verbal consent to search said vehicle. Wooster then stated he was evoking his rights and I did not have permission to search. I then contacted a K-9 unit. The K-9 narcotics dog did then alert three times on said vehicle. Once on the right front passenger door, once on the left front passenger door and once on the trunk space of said vehicle.

At this time with the probable cause of the K-9 narcotics dog alert on said vehicle a search of said vehicle was then conducted. Upon searching said vehicle the following items were discovered inside said vehicle; a small green leafy substance located in the ashtray, an unusable amount of green leafy substance located inside the center console and an RX pill bottle located underneath the right front passenger seat. The RX bottle was prescribed for Hydrocodone. The bottle did not contain Hydrocodone. The bottle contained several Ibuprofens and two Alprazolam (Xanax). The identity of said pills was confirmed through Poison Control.

Wooster was then placed under arrest for Possession of Controlled Substance. Wooster was handcuffed behind back, double locked, read the Miranda Warning verbatim and secured in the rear of my patrol vehicle and seatbelt for safety. Wooster did state the pills were in fact Xanax and did admit to the being in possession of the unusable amount of Marijuana and the Xanax.

Wooster also stated he understood his rights and the reason he did not consent to a search was in fact because of the Xanax that was in his possession located in the vehicle he was operating. Wooster was then transported to the Jasper County Jail and left in the care and custody of Jail staff without incident.”

A notice of Investigation issued May 22, 2014 charging the Claimant with the allegation that “... you were in possession of an illegal drug and/or controlled substance.” As previously noted, the Investigation was held on May 28, 2014.

In addition to the charges in this case made by the Carrier against the Claimant for possession, the Claimant was separately charged by the Carrier by notice of Investigation of the same date (May 22, 2014) charging the Claimant with “... your failure to accurately report and respond to questions regarding criminal charges pending against you in regard to your May 5, 2014 arrest”, which, after Investigation also held May 28, 2014 also resulted in the Claimant’s dismissal on those charges by separate letter dated June 3, 2014. Claim was also filed over that dismissal and was progressed to the Board and decided in Third Division Award No. 42988.

During the hearing on the failure to accurately report charges (of which we can take notice because the two cases have been simultaneously decided by the Board), the Claimant testified that when he called in to the Carrier on May 6, 2014 to report that he had been arrested (Tr. 18):

Q: When you report – called in to report it, did you reveal the information about being in possession of a controlled substance of Xanax or Xanax and marijuana?

A: No, I did not.

Q: And why didn't you?

A: I admitted to there being Xanax in the vehicle that I was driving. I never assumed responsibility for it and there was never any time that I stated any other drugs in the car because I am not being charged with anything else besides the possession of Xanax."

It is not disputed that Xanax is one of the drugs found in the vehicle driven by the Claimant when he was arrested. See the probable cause affidavit and the Claimant's testimony quoted above. The Claimant took exception to the contents of the probable cause affidavit (which states that the Claimant admitted to the police officer that he was in possession of the Xanax as well as the marijuana). Tr. 17. Giving the Claimant the benefit of the doubt (because the alleged admissions by the Claimant found in the probable cause affidavit could not be cross-examined as the police officer who attested to the admissions did not testify), by the Claimant's own words from the hearing in the discipline leading to the failure to accurately report dismissal (Third Division Award No. 42988), Claimant testified as quoted above that "I admitted to there being Xanax in the vehicle that I was driving." Under the substantial evidence standard which binds the Board, the Claimant admitted as charged in this case that he was "... in possession of an illegal drug and/or controlled substance" – i.e., Xanax.

Rule 1.5 provides, in pertinent part:

"1.5 Drugs and Alcohol

* * *

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property."

On May 5, 2014, the Claimant was driving to his assigned work location per the Carrier's instructions and admittedly had Xanax in the car he was driving. The Claimant did not have a prescription for Xanax which makes it a drug falling under the prohibited substances covered by Rule 1.5. Under the substantial evidence standard, it does not matter whether the drug was in the car owned by the Claimant's wife. When arrested, Claimant was in control of that car driving to his work assignment as directed by the Carrier and he admitted to possession of the drug/controlled substance ("I admitted to there being Xanax in the vehicle that I was driving."). Substantial evidence therefore supports the Carrier's position that the Claimant engaged in the charged misconduct.

Dismissal was not arbitrary. The Claimant's conduct was serious and he does not appear to assume responsibility for actions.

The Organization's arguments do not change the result.

First, the Organization argues that the Carrier failed to hold the Investigation within ten days of its knowledge of the incident as required by Rule 47(a) ("The Investigation shall be held within ten (10) days from the date of the occurrence to be investigated, or from the date the signal supervisor or carrier officer having authority to order an Investigation has knowledge of such occurrence or from the date the employee has been held from service."). The Organization argues that the 10-day period began to run on May 6, 2014 when the Carrier was notified by the Claimant that he had been arrested, thereby making the May 28, 2014 hearing untimely. We disagree.

All that the Carrier knew on May 6, 2014 was that the Claimant had been arrested and charged with possession of a controlled substance. The Carrier did not have knowledge of the details of the arrest until it received the police officer's probable cause affidavit on May 19, 2014 which specified in detail the circumstances surrounding the Claimant's arrest. Indeed, from the Claimant's testimony, all he reported on May 6, 2014 was what he knew which was that he was arrested for possessing a controlled substance and he did not know at the time what the police were considering as a controlled substance. Tr. 16. For the Carrier to issue the notice of Investigation and holding the Investigation on such vague statements and prior to receipt of the details of the Claimant's arrest would have been premature.

The Carrier did not know the details of the Claimant's arrest, but only knew that drugs were allegedly involved. Notifying the Claimant that he had to take a drug test and that he would be withheld from service because drugs were involved was done before the Carrier had sufficient notice of the facts surrounding the arrest to begin the Investigation process – which did not happen until the May 19, 2014 receipt of the probable cause affidavit. The 10-day period for Rule 47(a) purposes began to run on May 19, 2014, making the Investigation on May 28, 2014 timely under that rule.

The fact that the Claimant was also sent for a drug test and was withheld from service in the May 9, 2014 phone call with Carrier officers does not start a running of the 10-day period to hold the Investigation. Focusing upon the May 9, 2014 withholding of the Claimant from service, the Organization argues that the 10-day period for holding the Investigation began to run on that date making the May 28, 2014 hearing untimely. However, on May 9, 2014, the Claimant was withheld from service as a safety-sensitive employee pending the results of the drug test and not because of the arrest. Tr. 9. The Claimant admits that the reason he was held out of service was because of the drug test.

Q: On May 9th when you were pulled out of service, what were you told at that time?

A: I was pulled out of service pending the results of the drug test.

The Claimant was not charged with testing positive on the drug test. Therefore, the events of May 9, 2014 when the Claimant was withheld from service because of the drug test did not start the 10-day time limit for holding the Investigation on the possession charge. That period did not begin until May 19, 2014 when the Carrier received the probable cause affidavit and learned the details of the arrest.

Second, the Organization also argues that the Claimant's wife who was the owner of the car and who would have also claimed ownership of the drugs in the car was improperly not allowed to testify at the Investigation. The proposed testimony from that individual does not change the result.

The Claimant was driving to his work location per the Carrier's instructions and was in control of the car in which the drugs were found. Under the substantial evidence standard which binds the Board, the Claimant was in possession of the drugs while driving to a work assignment as instructed. In any event, and while not binding upon the Board, under Texas law a similar set of facts would nevertheless result in a finding that the Claimant was in possession of the drugs. See *Tate v. Texas*, 500 S.W. 3d 410 (Texas Court of Criminal Appeals, 2016) where the driver of a car who was in the process of purchasing the car but the car was still owned by another individual and the car had occupants at the time of the traffic stop was held to be in possession of drugs found in the car even though the driver claimed the drugs were not his.

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 29th day of March 2018.