

PUBLIC LAW BOARD NO. 2366

AWARD NO. 20

CASE NO. 32

1343 MW

C-103-T-80

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM

- "(1) The dismissal of Trackman L. C. McCurdy for alleged violation of Rule G was without just and sufficient cause and on the basis of unproven charges (Case No. 1343 M of W).
- (2) Trackman L. C. McCurdy shall be reinstated with all rights unimpaired and compensated for all wage loss suffered."

OPINION OF BOARD

The Claimant was instructed to attend an investigation concerning an assertion that he was intoxicated while on duty. Subsequent to the investigation, the Carrier determined that he had violated "Rule G" and he was dismissed from the Carrier's service.

Prior to the incident under review, the Claimant had sustained an on-duty injury concerning which he was still undergoing treatment. On August 2, 1971, the Claimant was instructed to report to Kensington Station (a 30 minute train ride from the 12th Street Station) where someone would meet him and take him to the hospital. On the day in question, it took the Claimant approximately 3 hours to make the trip in question.

In the Track Supervisor's office, the Claimant was told to wait while the Carrier attempted to find someone

to take the Employee to the hospital and, according to the Clerk in the office, the Claimant "smelled of an alcoholic substance" and he was "not acting in a normal manner." When the Project Engineer was advised of those circumstances, a Special Agent was called and the Claimant was asked if he would submit to a breath test at the hospital. The Claimant agreed.

After arrival at the hospital, the Claimant refused to sign a hospital consent form allowing the breath test because he wanted Union representation. Carrier was unable to secure Union representation, and the Claimant persisted in his refusal to sign the consent form.

At the investigation, the Clerk in the Supervisor's office stated that "there was a distinct smell of alcohol on his (Claimant's) breath." When asked if the Claimant's speech was slurred and his movements impaired, the Clerk stated, "Yes, I believe they were." She also testified that the Claimant fell asleep while sitting in the waiting room.

The Project Engineer (Schultz) testified that he also shared the view that the Claimant was under the influence of alcohol, based on his movements, his glassy eyes and his breath, which prompted him to call the Special Agent to be present when the Claimant was asked to submit to a blood alcohol test. When Schultz made the initial request of the Claimant, the Claimant "turned around and walked away" because, according to the witness, the Claimant "...thought I had pulled him out of service." The Claimant then agreed to take the blood alcohol test when Schultz explained that he needed the test performed so he could make a decision as to the Employee's future.

The Claimant explains the delay in reaching Kensington by the assertion that he had left his wallet at home and he had to borrow a vehicle to return home to obtain same. He did not make that fact known to anyone at the time. Nonetheless, he did report to Kensington at about 11:00. He denies that he was under the influence of intoxicants or that he had consumed intoxicating beverage, but states that he was taking medication in the form of muscle relaxants which made him a bit drowsy. He also explains that his eyes are quite frequently red and irritated because of the nature of his work.

The Organization submits that the Carrier has failed to establish its case by a substantive preponderance of the evidence, and in support thereof, it argues that evidence limited to the odor of alcohol on an individual's breath is not sufficient to support a conclusion that the individual is under the influence of intoxicants. But,

this Board questions that the evidence is limited to that concept.

In addition to the evidence of an odor of alcohol upon the individual's breath, we have the absence for a three hour period, testimony of a slurred speech and erratic actions and apparent confusion.

The Carrier asserts that the mere act of refusing to allow a blood alcohol test implies guilt. The undersigned Neutral Member of the Board does not necessarily agree with that conclusion. However, the undersigned does agree that if there is evidence presented which tends to show that an individual has been consuming alcoholic beverages and is under the influence of said beverages, and the employee or individual is offered an opportunity to submit to a chemical test to determine the content of alcohol in the bloodstream, and the individual refuses, then certain inferences are permissible and may properly be drawn. Stated differently, the Employee was given an opportunity to substantiate his exculpatory statements which were made in the face of evidence that he was under the influence of intoxicants, and he refused that offer. Under those circumstances, evidence of the refusal to take the test has a significant bearing and is elevated above a mere refusal to take a test which may not, standing alone, and without other evidence, imply a guilt.

Under all of the circumstances of record, we are of the view that the Carrier substantiated its allegation against the Employee and we find no basis in the record to disturb the imposition of a dismissal.

#### FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

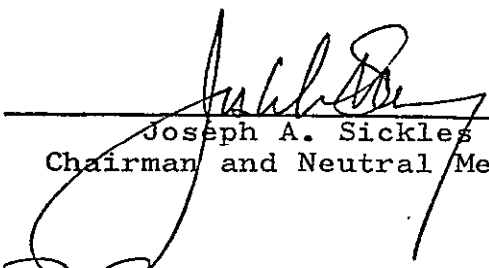
The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.


This Board has jurisdiction over the dispute involved herein.

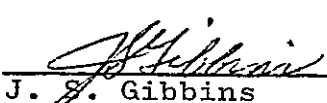
The parties to said dispute were given due and proper notice of hearing thereon.

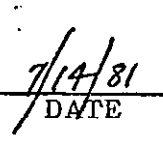
AWARD

Claim denied.

  
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Joseph A. Sickles  
Chairman and Neutral Member

  
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Hugh A. Harper  
Organization Member

  
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J. S. Gibbins  
Carrier Member

  
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7/14/81  
DATE