

PUBLIC LAW BOARD NO. 2960

AWARD NO. 26

CASE NO. 41

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman T. A. Rouse for alleged violation of Rule G was without just and sufficient cause. (Organization's File 4D-2019; Carrier's File D-11-3-348)

(2) Trackman T. A. Rouse shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in this dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On June 19, 1981, the Claimant was directed to attend a hearing to be held June 26, 1981. The hearing was held in connection with the following charge:

"Your responsibility for violation of Rule G and Rule G (Addition) of the General Regulations and Safety Rules while on duty near Arlington, Nebraska on June 17, 1981."

The hearing was held as scheduled and on July 3, 1981, the Carrier dismissed the Claimant for violation of Rule G. Rule G reads in pertinent parts as follows:

"Except as otherwise provided below, employees are prohibited from reporting for duty or being on duty or on Company property while under the influence of, or having in their possession while on duty or on Company property, (1) any drug the possession of which is prohibited by law; (2) any drug belonging to the generic categories of narcotics, depressants, stimulants, tranquilizers, hallucinogens, or anti-depressants; (3) any drug assigned a registration number by the Federal Bureau of Narcotics and Dangerous Drugs not included in category (2); or (4) any liquid containing alcohol."

Charges were preferred in connection with the Carrier's discovery of two capsules which were in the Claimant's possession. The capsules were discovered during a search of all employees of the Claimant's gang. During the search of the Claimant, an inspection was made of a hard cigarette pack (Marlboro Brand). At the bottom of the pack, two capsules were found. There is no dispute in the record that the capsules were found on the Claimant.

Special Agent J. L. Paul testified that he was asked to test the capsules for controlled substance. He testified that when he first observed the capsules that they appeared that they had been opened and tampered with as the ends of the capsules were crushed. Other testimony indicated that when capsules are gripped in order to be pulled apart, the ends sometimes get dented or crushed. This was the condition Special Agent Paul testified that the capsules were in when they were delivered to him. He also testified that he performed a "mandelin-reagent" test and that the test proved positive for controlled substance. The controlled substance was determined to be methadrine, a stimulant. In light of this and in light of the fact that the capsules were in the control of the

Claimant, it is the Board's conclusion that the Carrier's established a prima facie case.

The Claimant's defense at the hearing was that the capsules were diet capsules purchased by his wife through the mail via a magazine advertisement. He testified as to having no knowledge of the capsules containing methadrine. He was under the impression that the capsules only contained caffeine and he was taking them only to curb his appetite in connection with a doctor's recommendation to lose weight. The Organization also questions the accuracy of the test claiming that it merely indicates that there is a stimulant present in the compound. To be conclusive as to the exact name of the stimulant, another test would have to be used.

It is the Board's conclusion that the Claimant's defense failed to overcome to prima facie case established by the Carrier. The Board concluded that there is substantial evidence to support the charge due to the results of the test and the Claimant's lack of credibility due to inconsistent stories about the capsules. The Company doesn't really dispute that the capsules found in the possession of the Claimant were similar if not identical to the type sold in the magazine. They rely primarily on the testimony which indicates that the capsules appeared to be open prior to the time they were confiscated and that they tested positive for a controlled substance. The critical question is whether the Claimant was responsible for placing the controlled substance in the capsules or whether he was aware that the capsules contained a controlled substance. It is the finding of the Board that there is substantial evidence to support the Carrier's conclusion that he was aware of the contents of the capsules. The basic reason for this conclusion is the

Claimant's lack of credibility. It is apparent that the hearing officer failed to grant the Claimant's testimony, that he was unaware of the contents of the capsules, much weight. There is substantial evidence for the finding of the hearing officer in as much as there were inconsistencies in the Claimant's defense. At the hearing, Inspector of Police Paul Kunze testified that when he asked Rouse what the pills were, he said, "He didn't know, he didn't put them there, he didn't know how they got there." Testimony indicated that later on in the day, Mr. Rouse was questioned further and according to Kunze's testimony Rouse changed his story. Kunze testified as follows:

"He was asked about the pills again. At that time he stated that they were his pills and that they were caffeine to be used as a, I believe, diet stimulant--not stimulant--to curb his appetite."

It has been said before that failure to offer a defense at the time of confrontation or the ofference of inconsistent defenses at various steps of investigation process is substantial evidence of guilt particularly combined with physical or other evidence. Regarding the Organization's argument regarding the accuracy of the test, there is no evidence in the record to refute Kunze's testimony that the madelin-reagent test does not react positively to caffeine. While it may be true that the test cannot determine the exact nature of a stimulant, there is not reason to believe in this record that the test does not accurately identify the presence of an illegal stimulant. It may be possible that the test is not accurate enough to identify or distinguish one illegal stimulant from the other; however, the Board is satisfied, based on this record, that the test does accurately identify the presence of an illegal stimulant.

There is no doubt, in this case, that the capsules were within the control of the Claimant, there is little doubt that they contained an illegal substance, and there is reason to believe that the Claimant was aware of the contents of the capsules. This all adds up to substantial evidence. While there may be some arguable weaknesses in the evidence, it should be noted that the Carrier need not prove the charges beyond a reasonable doubt. It is well established under the Railway Labor Act that the Carrier need only establish substantial evidence for their findings. The proceedings before the Board are not ~~de novo~~ and disputes appealed to it are not to be considered on the basis on how the Board would have ruled on the evidence if we were the initial trier of fact. Instead, the Board must look at the record as a whole to determine if it is supported by substantial evidence. In this case, it is our conclusion that the charges were supported by substantial evidence.

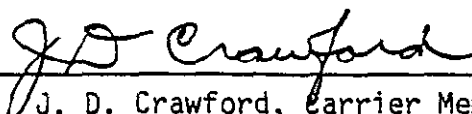
It is clear that there is a basis in the record to find that the Claimant was guilty of Rule G. Rule G violations are universally viewed in the Railroad industry as serious offenses. This is an industry where danger is usually imminent due to the nature of the work itself and the presence of heavy moving equipment. As a result, Discharge for Rule G has often been upheld. There is no basis in this record for disturbing the Carrier's decision.

AWARD

Claim denied.



Gil Vernon, Chairman



J. D. Crawford, Carrier Member



H. G. Harper, Employee member

F.B. 15-1983