

AWARD NO. 45
CASE NO. 45

PUBLIC LAW BOARD NO. 3558

**PARTIES)
 TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
 SOUTHERN PACIFIC TRANSPORTATION COMPANY
 EASTERN LINES**

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when Track Laborer Vernon Hicks was unjustly dismissed from service on October 28, 1985 and did not receive a fair and impartial investigation.

2. Claimant Hicks shall now be reinstated to his former position with pay for all time lost, with all seniority, vacation rights and other rights accruing to him unimpaired, in addition to his personal record being cleared of the alleged charges of September 12, 1985, and to run concurrently until such time that Vernon Hicks is restored to service."
(MW-85-149-Hicks)

OPINION OF BOARD:

By letter dated October 7, 1985, Claimant, a Track Laborer with approximately eight years of service, was suspended pending investigation for alleged violation Rule M 243 and Rule G after a collision on September 12, 1985. After investigation held on October 23, 1985, and by letter dated October 28, 1985, Claimant was dismissed from service.

On September 12, 1985, while operating a Carrier vehicle (a two and one-half ton gang truck), Claimant moved the vehicle approximately ten feet and struck another vehicle that was standing still. Following the accident, on the same date, Claimant underwent a drug screen which tested positive for cocaine and marijuana. A repeat drug screen was given on September 17, 1985. However, the specimen bottle was empty when it reached the laboratory in California. According to the Carrier's Chief Medical Officer, Dr. H. E. Hyder, the cap on the specimen bottle was loose allowing the urine to leak out. Thereafter,

Claimant entered a drug rehabilitation program which was not successfully completed. Evidence submitted to the Carrier indicated that Claimant continued to test positive for drugs while in treatment.

With respect to the merits, we find substantial evidence in the record to support the Carrier's conclusion that Claimant violated Rule M 243 which states that "no motor vehicle is to be set in motion until it is known that the way is clear." Although testifying that he knew the way was clear, Claimant also testified that his line of vision was not impaired and the vehicle that he collided with "was small, right up under me, it was red." We agree with the Carrier that such a statement sufficiently shows that although stating to the contrary, Claimant, in fact, did not know that the way was clear prior to setting his vehicle in motion.

However, the charge against Claimant encompasses not only a violation of Rule M 243, but also alleges a violation of Rule G. On the basis of this record, we are unable to conclude that merely because Claimant tested positive after the initial drug screen, the Carrier has shown by substantial evidence that Rule G was violated. According to Dr. Hyder, the initial drug screen was a qualitative and not a quantitative test. Hence, the levels of drugs found in the specimen are not known. The Carrier's follow up test (which, Dr. Hyder testified was requested by the medical department in San Francisco) was invalid in light of the empty specimen bottle. Considering the totality of the circumstances, we are not satisfied that the results of the initial screen in this case can be the sole basis for determining a Rule G violation.

We have considered the Organization's argument that Claimant was denied a fair investigation by the Carrier's failure to call Supervisor R. O. Deal or Foreman W. Ashford to testify at the investigation. We have considered the Organization's offer of proof as to the subject matter of their testimony and we are of the opinion that the offered testimony was not sufficiently material to the allegations for us to conclude that the failure to call those witnesses deprived Claimant of a fair and impartial investigation or that Claimant's due process rights were otherwise violated. Any testimony that Deal or Ashford may have

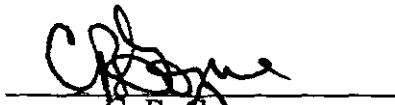
offered concerning the Rule G violation or the administering of the drug screen is immaterial since we have found the Rule G violation was not sufficiently supported in the record. Further, any testimony they may have offered concerning the Rule M 243 violation is also immaterial since Claimant has essentially admitted to the violation.

Therefore, under the circumstances, we believe that dismissal was too severe for the proven rule violation. We shall require that Claimant be returned to service with seniority and other benefits unimpaired but without compensation for time lost. Even though we are not satisfied that the Carrier has demonstrated a Rule G violation, in the formulation of the remedy and the conditions under which return to service shall be granted, we nevertheless will take into account the results of the positive drug screen and Claimant's subsequent record of entering but unsuccessfully completing a drug rehabilitation program. Return to service is therefore conditioned upon Claimant's successful completion of a return to service physical examination including testing for drugs and thereafter entering and completing an employee assistance program.

AWARD:

Claim sustained in accordance with opinion. Claimant shall be returned to service with seniority and other benefits unimpaired but without compensation for time lost. Return to service is conditioned upon successful completion of a return to service physical examination including testing for drugs and thereafter entering and completing an employee assistance program.


Edwin H. Benn, Chairman
and Neutral Member


C. B. Goyne
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
November 24, 1987