NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 72
and)
) Award No. 50
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: January 25, 2006

STATEMENT OF CLAIM:

1. The dismissal of Trackman R. L. Wilkins for his alleged failure to submit to a drug test on August 1, 2004, was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File T04-30/1414972).

2. As a consequence of the violation referred to in Part (1) above, Trackman R. L. Wilkins shall now be allowed the remedy prescribed in Rule 21(f).

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On August 3, 2004, Carrier notified Claimant to appear for an investigation on August 30, 2004. The notice alleged that Claimant violated Carrier's Drug and Alcohol Policy and Operating Rule 1.6(3) (insubordination) when he allegedly refused to permit drug/alcohol testing on August 1, 2004. The hearing was postponed to and held on October 19, 2004. On November 5, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The Organization has argued a number of procedural violations of Agreement Rule 21. Most do not require discussion beyond noting that we have considered them and find that they do not -provide a basis for overturning the discipline. One argument calls for further comment.

The charges at issue in the instant case arose out of the same incident that led to additional charges at issue in Case No. 70. Around the same time, Carrier preferred a third set of charges against Claimant related to the same incident that are before this Board in Case No. 71. Carrier conducted three investigations on October 19, 2004, and on November 5, 2004, issued three notices of discipline, each finding Claimant guilty and each dismissing him from service. The Organization contends that this method of proceeding violated Claimant's due process rights under the Agreement by placing him in double (or perhaps triple) jeopardy and by unfairly "piling on". We do not agree.

The charges that led to Case No. 71, alleged that Claimant falsified an on duty injury report. Although the evidence presented at the investigation that led to Case No. 71 overlapped with the evidence presented at the investigation that led to the instant claim, the charges resulted from two different incidents: Claimant's actions on August 1 and his subsequent filing of an on duty injury claim. Clearly, Carrier was justified in treating them as separate investigations. The charges that led to Case No. 70 arose out of the same incident as the charges that led to the instant claim and the transcripts of the two investigations largely duplicated each other. It would have been more efficient to have consolidated the two sets of charges in a single investigation. However, we do not see how the splitting of the charges into two separate investigations prejudiced Claimant. Moreover, there is no provision of the Agreement that required Carrier to consolidate the charges into a single investigation.

We turn to the question of whether Carrier proved the charges by substantial evidence. The primary witness against Claimant was the Manager Track Projects. He testified that, on August 1, 2004, he detected an odor of alcohol on Claimant's breath. He also observed Claimant walk around the blind side and pass in front of the undercutter without getting the operator's attention. He observed that at the beginning of the shift Claimant was sweating profusely. He had Claimant take off his glasses and observed that Claimant's eyes were glassy and his pupils dilated. Such observations provided reasonable suspicion that Claimant was under the influence of alcohol and justified requiring Claimant to submit to an alcohol test.

The MTP also testified that he instructed Claimant to remain where they were, 15 to 20 feet off the track, to await an alcohol test. However, according the the MTP, Claimant remounted the undercutter, rode it a short distance, dismounted and let the property. The MTP searched for Claimant for about 45 minutes but was unable to locate Claimant. He then called Risk Management which dispatched a Special Agent but, because the Special Agent was a considerable distance away from the site, Risk Management also notified the local police. The police located Claimant behind a convenience store. According to the MTP, Claimant again refused to submit to an alcohol test and then claimed that he was experiencing considerable pain in his abdomen. An ambulance was dispatched and Claimant was taken to the hospital. According to the MTP, Claimant again refused an alcohol test at the hospital.

Claimant testified that the MTP never instructed him to take an alcohol test and never instructed him to wait by the side of the track. According to Claimant, he dismounted the undercutter because he was feeling ill and wanted to sit down to see if the ill feeling would pass.

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When his symptoms worsened, Claimant told the undercutter operator that he was going home and asked the operator to inform the MTP. Claimant denied drinking or otherwise being under the influence of alcohol on duty.

This case thus presents a clear conflict in the testimony of Claimant and the MTP. As an appellate body that does not observe the witnesses, we are in a comparatively poor position to assess their relative credibility. As a general matter, we defer to credibility determinations made on the property. In the instant case, the testimony of the MTP was credited over the testimony of Claimant. There is no reason apparent in the record to believe that the MTP was mistaken or fabricated his testimony. The MTP was new to the gang, had no prior relationship with Claimant and no other apparent bias or reason to falsify. Under these circumstances we see no reason to deny the credibility determination made on the property the deference to which it is usually entitled. Accordingly, we find that Carrier proved the charges by substantial evidence.

We turn to the penalty assessed. Our role is limited to determining whether the penalty of dismissal was arbitrary, capricious or excessive. Insubordination and refusal to take an alcohol test are very serious offenses. In the instant case they are aggravated by Claimant's having left the property without permission and by evidence that Claimant threatened the MTP with physical violence. Furthermore, Claimant reused to take the test on three separate occasions. We recognize that Claimant had 28 years of service but we cannot say that the penalty imposed was arbitrary, capricious or excessive. *See, e.g.*, SBA 279, Case Nos. 849 & 850; PLB 6621, Case No. 43.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member
4-4-06

D. D. Bartholomay,
Employee Member 4-4-06

Dated at Chicago, Illinois, March 30, 2006