

PUBLIC LAW BOARD NO. 5940

**PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY**

STATEMENT OF CLAIM:

Appeal of Police Officer Steven T. Aalto of dismissal from service with the Springfield Terminal Railway Police Department and payment for all time lost, including time spent at the hearing on May 26, 2004.

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that 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; and, the parties were given due notice of hearing thereon.

On May 4, 2004, Claimant was instructed to report for a return-to-work physical examination after being out of service for over a year due to what Claimant would subsequently offer in testimony at a company hearing, "an on-duty injury that was preceded by an off-duty injury," with the extent of injury reportedly being a broken leg. At the company examination Claimant was administered a breath alcohol test that showed him at 12:56 p.m. to have an alcohol concentration level of .054. A confirmatory test, performed 15 minutes later, showed a concentration level of .052.

Claimant was thereafter notified to report for a formal investigative hearing as a consequence of the above breath alcohol test findings being viewed by the Carrier to constitute a violation of General Rule G. The provisions of Rule GR-G read in part here pertinent as follows:

The use of alcoholic beverages, intoxicants, . . . by employees subject to duty, when on duty or on Company property is prohibited and is sufficient cause for dismissal.

Employees must not report for duty, or be on Company property under the influence of or use while on duty or have in their possession while on Company property, any drug, alcoholic beverage, . . . that will in any way adversely affect their alertness, coordination, reaction, response or safety.

As also brought out at the hearing, a "Drug and Alcohol Testing Policy" provides, among other things: "In order to provide and maintain a safe work environment,

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all employees and applicants will be subject to alcohol and/or drug testing." Further, a listing of circumstances stated in the policy where alcohol and/or drug testing is required, includes the following as concerns the case here at issue:

Examinations – Employees will be tested when required to undergo an examination in conjunction with their employment (Periodic, Return-to-Duty, after absence of 30 days or more, Fitness for Duty, Transfer."

Basically, it is the position of the Carrier that since it maintains a "zero tolerance" standard with regard to violations of Rule GR-G, that termination of Claimant from service is warranted as a result of a breathalyzer test revealing the presence of alcohol on his breath at a level of .05 on reporting for a return-to-work examination.

The Organization argues that discipline be set aside account the Carrier not having presented as a witness at the company hearing the individual who performed the breath test. The Board finds no merit in this contention. It was shown at the hearing that the test was performed by a Certified Breath Alcohol Technician, and no purpose would have been served by that technician being at the hearing in that a supervisory technician was present and responded to all questions advanced about the manner in which such tests are conducted. Moreover, an Alcohol Testing Form completed at the time of the test, and presented into evidence at the hearing, shows the test results and contains the signature of Claimant in acknowledgement of a statement that reads:

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are positive.

The Board is also not persuaded by Organization argument that Rule GR-G is not applicable to Claimant because he was not on duty, subject to duty, or on company property when the alleged violation occurred; the test results be voided since Claimant was not advised that he would be subject to a breath test upon reporting for a return-to-work examination; and, he was not aware of the Carrier Drug and Alcohol Testing Policy. When asked if it was his understanding that when you go for a return-to-work physical you would receive a drug and alcohol test, Claimant gave a response that stretches the bounds of credulity. He said it was his understanding that he would receive a drug test, urinalysis, but he did not believe he would also be given an alcohol test.

We also find reason to question the above contentions of the Organization in that

respect, Claimant was the subject of a disciplinary grievance appeal to this Board in Case No. 45 (Award No. 45). The dispute involved Claimant's dismissal from service for an alleged failure to contact the Chief of Police to schedule a return-to-duty physical and failure to timely follow instructions that he obtain clearance from the Employee Assistance Program Manager upon passing a physical examination. Although the Board found merit in procedural objections advanced by the Organization involving the content of instructions mailed Claimant, we found certain actions of Claimant to have been of an insubordinate nature, but not necessarily gross insubordination. Thus, while the Board held that Claimant's termination from service be set aside, we recognized that Claimant had not, in fact, reported for a return-to-work examination. The Board therefore directed Claimant report for a return-to-duty physical and alcohol/drug screen test within 10 to 15 calendar days of the date and release of the Award. That decision was made in recognition of the record as presented giving reason to believe that Claimant might well have a substance abuse problem. The Findings in the Award further stated: "If Claimant fails to report as directed for the physical examination and alcohol/drug screen, or he tests positive for the alcohol/drug screen, then the penalty of dismissal from all service will be deemed to have been sanctioned by this Board."

The Board also finds in study of the current case reason to further believe that Claimant need recognize that he well may have a substance abuse problem. It was his testimony that he could not believe he tested at a .05 level, offering that he had two beers with his lunch before he left home, which he said was between 10:00 a.m. and 10:30 a.m. Clinical tests have shown that when an average weight person consumes two 12 oz. beers that their Blood Alcohol Content (BAC) will measure .04 on a breathalyzer after the first hour, and that the body will eliminate .015 percent of alcohol each hour thereafter. It would therefore seem that if Claimant had consumed only two beers at 10:30 a.m., his BAC would have been well below a .054 percent, or the level he tested at 12:56 p.m. at the company examination.

In the light of the above considerations and overall study of the record the Board finds that the Carrier has met a necessary burden of proof for its decision to terminate Claimant from service. The claim will, therefore, be denied.

AWARD: Claim denied.


Robert E. Peterson
Chair & Neutral Member


Anthony F. Lomanto
Carrier Member


C. A. Iannone
Organization Member

North Billerica, MA
August 23, 2005