

PUBLIC LAW BOARD NO. 6763

CASE NO. 12

Parties to Dispute:

**TRANSPORT WORKERS UNION OF AMERICA, RAILROAD
DIVISION/BROTHERHOOD OF RAILWAY CARMEN**

AND

NORFOLK SOUTHERN RAILWAY COMPANY

**(Carrier File CM-ELK-08-01)
(TWU No. NY-2008-59)**

Statement of Claim:

Claim on behalf of Carman Raymond McClorrine to be reinstated to service and to be made whole after being dismissed by letter dated September 10, 2008.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

This case involves the propriety of the Carrier's decision to dismiss the Claimant for being in violation of General Rule G. Mr. R. L. McClorrine, Claimant herein, was employed as a carman at Carrier's Elkhart Car Shop. On July 24, 2008, he tested positive on breath alcohol tests given him at approximately 9:05 a.m. and 9:22 a.m.

As a result of the above a formal investigation was held on August 21, 2008, in order to:

...determine your responsibility, if any, in connection with your being in violation of General Rule G of the Norfolk Southern Book of Safety and General Conduct Rules in that you tested positive on follow-up breath alcohol tests given you at approximately 9:05 AM and 9:22 AM on July 24, 2008, while on duty while assigned as a carman on the first shift (7:00 AM - 3:00 PM) at Elkhart Car Shop, Elkhart, Indiana.

As a result of the findings of the formal investigation held on August 21, 2008, the Claimant was found guilty as charged and was dismissed from all service with the Carrier by letter dated September 10, 2008.

The Organization has taken exception to the discipline assessed. This dispute was handled in the usual and customary manner on the property up to and including the Carrier's highest officer designated to handle such matters and was subsequently discussed in conference between the parties without resolution and was further declined. It is now before this Board for final and binding adjudication. The Board met on July 27, 2009 in order to discuss and review the salient parts of this case.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record. Consistent with this task, the function of this Board, particularly in discipline cases, is to carefully review the record in order to ascertain whether the Controlling Agreement has been complied with, that the Claimant was afforded due process, that there was substantial evidence to support a finding of just and sufficient cause for the discipline imposed, and that the action taken by the Carrier was not arbitrary, capricious or discriminatory.

There is evidence in the record, and the Organization does not dispute that the Claimant tested positive at .076 on a breath alcohol test conducted on July 22, 2008. A confirmatory test conducted approximately 17 minutes following the first test confirmed the first positive test. Whereas there is

no dispute as to the credibility of the testing mechanism, the Board concludes that there is substantial evidence in the record to support the charge at issue. This leaves the question as to the appropriate penalty.

Rule G provides as follows:

An employee who reports for duty under the influence of alcohol or other intoxicant, cannabis in any form, an amphetamine, a narcotic drug, a hallucinogenic drug, any controlled substance (as defined by federal law), or a derivative or combination of any of these, or who uses any of the foregoing while on duty, will be dismissed. Possession of any of the foregoing while on duty, or possession, use, or being under the influence of any of the foregoing while on Company property or occupying facilities provided by the Company is prohibited. (emphasis added)

The purpose of Rule G was described in PLB 995, Award 25, where Arbitrator Shapiro noted:

Those who undertake to serve in public transportation are obliged by statute, regulations, morality, and humanity to provide to the best of their ability to furnish safe and efficient movement of people and goods entrusted to their care. They must be constantly on the alert against dangers and hazards which may cause injury and damage. The employment of hundreds of thousands of railroad workers are dependent upon the public's faith in the fact that all reasonable measures of effectuate this objective have been and are adhered to by all concerned. "Rule G" or rules comparable thereto have been in force on all properties of railroads since long beyond the memories of any of us. Because of its essential relationship to the needs outlined above, it has never been seriously challenged or questioned by representatives of employees for whom they speak. There cannot be any doubt that the average person having imbibed in or used alcohol or debilitating drugs is, for a meaningful period of time thereafter, bereft of the faculties necessary to perform consistent with the above discussed desired ends.

In the instant matter, the Carrier seeks the Claimant's termination. It is well accepted that a Carrier's determination as to penalty will not be disturbed unless it is shown to be arbitrary, capricious or discriminatory. Following our careful review of the record of this case, we conclude that the penalty imposed by the Carrier, dismissal in all capacities, should not be disturbed. In so concluding, we find significant the fact that the Claimant was previously dismissed for excessive absenteeism which, by his own admission, was directly attributable to his abuse of alcohol. He was permitted to enter DARS and reinstated to service upon successful completion of the DARS program. As part of the handling on the property in the instant case the Board reviewed a letter

signed and agreed to by the Organization that memorialized the full and final settlement of the previous dismissal case involving the Claimant (CM-ELKH-05-01). Such settlement letter specifically provided that the Claimant was to be returned to work on a "last chance" leniency basis. "Last chance" means just that – one last opportunity to demonstrate that an employee is capable of performing his/her work in a safe and satisfactory manner, in compliance with the Carrier's reasonable Rules and Regulations. In light of the foregoing, we find Rule G to be eminently reasonable and also find and conclude that the Claimant was unable to satisfy the criteria of his last chance agreement. Accordingly, we find no basis to overturn the penalty imposed.

CONCLUSION

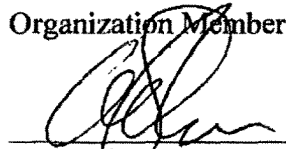
The Claim is denied.

Dennis J. Campagna

Dennis J. Campagna
Chairman and Neutral Member



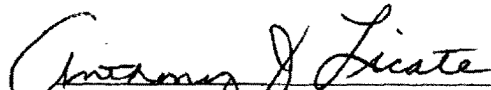
Fred Fink
Organization Member



Alexander M. Novacovic
Organization Member



Edward Jacobs, Jr.
Carrier Member



Anthony J. Licata
Carrier Member

Dated August 31, 2009