

PUBLIC LAW BOARD NO. 2960

AWARD NO. 38

CASE NO. 55

PARTIES TO THE 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. E. Kelley for alleged violation of Rule G was without just and sufficient cause and on the basis of unproven and disproven charges. (Organization's File 4D-2027; Carrier's File D-11-13-349)

(2) Trackman T. E. Kelley 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.

The Claimant was notified on June 18, 1981, to attend an investigation on 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."

Rule G and Rule G (Addition) read 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."

The hearing was held June 26, 1981. The Claimant was dismissed July 3, 1981.

The investigation revealed that on June 17, 1981, the Claimant was assigned as a Trackman on 4-R rail gang working in the vicinity of Arlington, Nebraska. As the Claimant's gang arrived for work on the Company bus that day they were met by Carrier's Special Agents who searched all the employees for contraband drugs. The Claimant, who was sitting in the front seat of the bus next to former employee Rodriguez, was one of the first to be searched.

The Carrier bases its claim that the discharge was justified on three assertions of fact: (1) They contend that a bag of hashish and four marijuana cigarettes were found on and under the seat that the Claimant and Rodriguez occupied and that these belonged to the Claimant; (2) that the Claimant, while standing in line to empty his pockets, was observed dropping a small pipe to the ground which contained a residue of THC - the active ingredient in marijuana; (3) that a prescription bottle (Triprolidine Pseudoephedrine) was found in the Claimant's knapsack and contained pills other than what was marked on the prescription and these pills were a controlled substance.

The Carrier also discredits the Claimant's defense. Rodriquez, who testified that the marijuana, hashish and pipe were his, lacked credibility, according to the Carrier. They note that Rodriquez was also involved in the mass search of the track gang but chose to resign rather than submit to a Company investigation. Having done so, the witness had nothing to lose -- according to the Carrier-- by claiming that the hashish, marijuana and pipe were his. It is noted by the Carrier that Rodriquez did not declare these items as being his at the time of the search. The testimony clearly shows that the Claimant's witness was lying about the pipe being his and it was reasonable to believe that he was also lying about the hashish.

The Union notes that Rodriquez admitted that the paraphernalia found on the bus, including the pipe, belonged to him. In view thereof, it is the Union's opinion that the Carrier's decision to dismiss the Claimant was based on conjecture. They suggest that not one iota of direct and substantial evidence was submitted to establish a violation of Rule G. In fact, the evidence presented at the investigation clearly established that the Claimant was not in possession of any drugs which were contrary to the meaning and intent of Rule G. Moreover, the Claimant was unaware of the plastic bag left on the bus. In respect to the pills, they were prescribed to him for a war injury to his ear.

In respect to the portion of the charges relating to the possession of hashish and marijuana on the bus, it is the conclusion of the Board that the Carrier has not produced substantial evidence. None

of the Carrier witnesses on the bus saw the Claimant with this material in his possession. They simply found the material on and under the seat after Rodriguez and Kelley left the bus. In fact, Special Agent Peters admitted that the marijuana cigarettes could have been kicked under the seat by someone else and admitted that they could not tell who they belonged to.

The Board also concludes that the pills were not shown to be an illegal stimulant. The Carrier based the discharge in this respect on a lab report which showed there was no Triprolidine detected and that there was an amine present. In view that the prescription was for Triprolidine Pseudoephedrine, the lack of Triprolidine does suggest that it was different than what was in the bottle. Indeed, there is a document in the record submitted by the Carrier which shows that all amines are controlled substances. However, notice is taken of the fact that all compounds in the general amine group are not controlled substances. In fact, over-the-counter drugs contain "amines." While the lack of Triprolidine gives rise to speculation that the substance tested wasn't the same as prescribed, it is more significant that no other compounds were discovered. Had the compound in the bottle been different than what the prescription stated, and in particular if it were a controlled substance--the test would, in most probability, indicate the presence of other compounds. It is also noted that Claimant Kelley testified without contradiction that he had advised his foreman, previous to the incident, that he possessed and was taking such a prescription.

This leaves the Carrier's case to rest on the charges related to the pipe. The Carrier's case, in this respect, was based primarily on the testimony of Special Agent Elfner.

The testimony established that after Rodriquez and two other employees left the bus they approached the table and were asked to empty their pockets. It was established by the testimony of several witnesses--both Carrier and Union--including Special Agent Kunz, that Rodriquez was in front and to the left of Kelley. It was also noted that there was some confusion among area witnesses as to how close Kelley and Rodriquez were, however, there is no doubt left after reading the transcript that they were close. Elfner testified that he was five to six feet in back of Kelley and to the right. Elfner further testified that Kelley went into his front pants pocket with his left hand and as Kelley's hand came out of his pocket, Elfner saw an object drop to the ground and saw him make a couple of motions with his left foot trying to cover it up. Elfner then picked the pipe up, put it in the bag with the contents of Kelley's other pockets. Both Elfner and Kelley testified that Kelley immediately protested that the pipe was not his. When asked on direct if he had a clear view of Kelley holding the pipe as he took it out of his hand and dropped it, he stated:

"I was, my view would have been somewhat restricted as far as actually seeing it in his hand, but when he made the movement into his pocket and came out the object fell down and landed on the ground at his left foot."

The Union makes special note of Rodriquez' testimony. Rodriquez not only claimed that the hashish and marijuana found on the bus were his, but that it was he who dropped the pipe. He testified

he took it out of his right pocket--the one closest to Kelley--dropped it behind on his own right side and tried to cover it up. He said these actions were undetected by those Carrier officials facing him. He also stated that he didn't claim it as his at the time because he didn't know Kelley was being charged. He heard some loud talk between Kelley and the Special Agent but didn't know the pipe was being pinned on Kelley. It also is significant that another pipe was found on Rodriquez' pack.

It is axiomatic that the burden is on the Carrier to prove an employee guilty by way of substantial evidence. It has also been held that once the Carrier establishes a prima facie case, the burden then shifts to the Employees to overcome that evidence. In this case, while there is some doubt about Elfner's testimony, based on his partially obstructed view, the Board can accept this as prima facie evidence of Kelley's guilt in connection with the possession of the pipe. However, on the other hand, the Board believes that the Employees successfully rebutted the prima facie nature of the evidence and further it is found that the Carrier failed to overcome this defense.

The Union's defense primarily related to the testimony of Rodriquez that the pipe was his and that he dropped it. This testimony is plausible in that Elfner testified his view was partially obstructed because he was behind and partially to the right of Kelley. Kelley supposedly took the pipe out of his left front pocket with his left hand and Rodriquez took the pipe out of his right front pocket with his right hand and dropped it slightly behind him. Because of the

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position, Elfner did not see the pipe in Kelley's hand and only saw it drop as Kelley made the movement out of his pocket. Therefore, it is plausible that Rodriquez dropped the pipe at the same approximate time as Kelley was also removing items from his pocket. The transcript leaves the distinct impression that everyone was emptying their pockets at the same time. Moreover, it is not unlikely if Rodriquez dropped the pipe in the direction of Kelley that Kelley would try to kick it away.

There are other factors of evidence in the transcript which bolster the Claimant's defense. These factors standing alone wouldn't overcome the prima facie nature of the case but are additive to the Organization's defense based on Rodriquez' testimony. One such factor is the general confusion among Carrier witnesses regarding the position of Carrier officials at the inspection relative to that of Kelley and Rodriquez. Not only was there contradiction among the witnesses as to everyone's relative position but some witnesses seemed to change their story regarding everyone's position on recall. If the Carrier expects to sustain their burden of proof, there must be more precise corroboration between witnesses.

The Carrier sought to overcome Rodriquez' testimony by attacking his credibility. However, just because Rodriquez admitted a crime does not automatically and per se make his testimony meaningless or incredible. The Carrier says the fact he resigned means he hasn't anything to lose and this affects his credibility. This is not necessarily true. There was no evidence of a special relationship between Kelley and Rodriquez which would be a motivation to lie.

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Moreover, meaningful weight must be given to his testimony because his testimony was an admission against interest. In this respect, it could be said he had a great deal to lose by testifying as he did. Presumably, he resigned rather than face an investigation for the facts could establish his guilt, thus affecting his ability to gain employment and the possibility of criminal prosecution. He was under no duty to testify but yet after resigning he, of his own free will, came back and made an admission of unlawful actions, i.e. the possession of marijuana, hashish and the pipe with traces of marijuana in it. If someone is going to take the risk of admitting unlawful acts, this bolsters his credibility in the context of this case. Moreover, his testimony about possession of the drugs coincides with the possession of the pipe. It is likely he would have a pipe or pipes if he also --as he admitted--had the marijuana and hashish.

Certainly the Hearing Officer has the right to resolve conflicts and assess credibility. This is not the Board's function. However, the Board is bound by such a deference only where those resolutions are supported by substantial evidence. In this case, the decision to discredit Rodriguez' testimony, was not supported by substantial evidence. Therefore, it is concluded that the Rodriguez testimony, in conjunction with the facts and circumstances of this case, served to convince the Board that the Carrier failed to rebut the adequate defense put forth by the Employees.

AWARD: Claim sustained. Carrier directed to reinstate the Claimant and pay him for all time lost consistent with the Agreement.

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GIL VERNON

Gil Vernon, Chairman

H. G. Harper

H. G. Harper, Employee Member

J. D. Crawford

J. D. Crawford, Carrier Member

Date: October 12, 1923