

Award No. 9
Case No. 10

Public Law Board No. 3995

PARTIES United Transportation Union
TO
DISPUTE: and
Southern Pacific Transportation Company

STATEMENT
OF
CLAIM: Claim in behalf of J. K. Cobb for all time lost at the pro rata rate from June 13, 1985, date of suspension, until such time as claimant is permitted to exercise his seniority with vacation and all other rights unimpaired.

FINDINGS: Claimant, a switchman helper with about 7 1/2 years service and a good record, was dismissed from Carrier's service on June 21, 1985 for use of alcoholic beverages or intoxicants while subject to duty, "and being under the influence thereof while on duty and on company property" on June 3, 1985.

At 3:20 a.m. on June 3, 1985, a switch was run through and equipment derailed. It was found that the switch had been improperly lined by claimant. He admitted the error, waived investigation of that offense and received a three-day suspension for his negligence.

That same morning, after the derailment occurred,

claimant was taken to a local hospital for an alcohol and drug screen test. Ten days later, on June 13, claimant was removed from service pending formal investigation because his urine specimen was reported to be positive for ethanol.

A hearing was held on due notice in the matter on June 18, 1985. There is no evidence of any reversible procedural error on Carrier's part.

Nor does the record contain independent proof -- apart from the urinalysis report -- that claimant possessed or was under the influence of alcohol at the times in question. Not only members of his crew but Assistant Trainmaster-Agent Hobbs as well testified that claimant did not appear to be under the influence of intoxicants, his speech was not slurred, his coordination and eyes appeared to be normal and the odor of alcohol was not detected on his person. It is a compelling consideration that Mr. Hobbs, the supervising official of switchmen in Dallas on June 3, 1985, brought claimant to the hospital for the tests in question and during the trip sat with him in the front seat of Mr. Hobbs' Skylark. Mr. Hobbs was in an excellent position to observe claimant during that ride and to evaluate his condition.

Claimant denied using an intoxicant while subject to duty on June 2, 1985 or while on duty during his tour the following morning. He testified that he did not report to work under the influence of any type of intoxicant when his tour began at 11:59 p.m. June 2.

The only reason mentioned for having claimant submit to the urinalysis was his error in lining the switch at

3:20 a.m. on June 3rd. He had never been disciplined for a Rule G violation or indeed any other misconduct and there is no indication that he drank alcohol beverages to a great extent at any time.

In this posture of the record, where the only evidence upon which claimant's dismissal is based is the urinalysis, it is important that direct evidence be produced as to how the package containing the urine sample was protected during its trip from the Dallas hospital to the laboratory in San Francisco where the sample was analyzed. It is of particular importance that testimony be presented by the hospital and laboratory as to what procedures were followed to make certain that no mix-up in samples occurred and that the analysis would still be reliable after the passage of time between taking the test and the actual analysis.

Even though its presentation may involve expense, such evidence is essential particularly where, as here, the employee under charges has a fine record and there is no testimony by any person who observed him that he appeared to have been drinking while subject to duty. In its absence, this Board cannot validly hold that the charge against claimant is supported by substantial credible evidence.

The propriety of the discipline for failure to line the switch properly and for responsibility for the derailment is not before us.

In the light of the foregoing discussion, we will sustain the claim. In reaching this decision, we have been unimpressed by Carrier's contention that the claim must be denied until claimant avails himself of the Employee Assistance Program. Without the additional proof indicated, there is no basis in this record

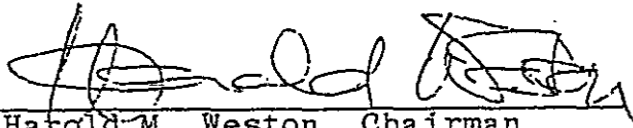
at least, for requiring claimant to take that course.

Particularly in the specific circumstances of this case, where Carrier's decision was based on a positive urinalysis result and was not in bad faith, the Chairman of this Board would ordinarily have allowed Carrier to deduct claimant's outside earnings in computing time lost. That point has been sharply contested by Petitioner and it has cited numerous awards in support of its position. On the other hand, in the field of labor relations, deduction of outside earnings in computing back pay is a common practice and the Chairman is not in accord with many of the awards cited. In the absence of an unambiguous contract provision to the contrary, referees and arbitrators frequently fashion the remedy, reinstating employees without any back pay in many cases and reducing suspension periods in others.

At any rate, in the present case, outside deductions cannot be deducted since Carrier has committed itself to Rule 94 which specifically provides that where discharge is found to be unjust, the employee shall be returned to service "and paid for wages lost".

AWARD: Claim sustained with seniority rights unimpaired and with payment for wages lost. To be effective within 30 days.

Adopted at Houston, Texas, 9-12, 1986.


Harold M. Weston, Chairman


Carrier Member


Employee Member