

Joseph Lazar, Referee

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO) and
DISPUTE) BURLINGTON NORTHERN RAILROAD COMPANY

Claim of R. L. Sharp for reinstatement to service with payment for all time lost beginning January 28, 1986, until reinstated to the service of the Carrier, with all rights intact and that the charges be removed from his service record.

By letter dated November 24, 1986, the Claimant was dismissed from the service of the Company. The letter stated:

At this investigation, no documented evidence was presented on your part to show that you have complied with the requirements of the program. Therefore, you are hereby dismissed from the service of the company."

Rule G reads as follows:

"Employees must not report for duty, perform service or enter Company property with a blood alcohol content greater than 0.00 percent and are prohibited from the use, possession or sale of alcoholic beverages while on duty. Employees must not report for duty, perform service or enter Company property under the influence or of illegal controlled substances and are prohibited from their use, possession or sale while on duty or on Company property. For purposes of this rule any employee testing positive for a controlled substance or its metabolites in urine is presumed to be under the influence of such a drug. Employees must not report for duty or perform service under the influence or impaired by prescription drugs, medications or other substances that may in any way adversely affect their alertness, coordination, reaction, response or safety. Employees operating Company vehicles at all times, at any time are subject to this rule."

The transcript of investigation shows the following testimony by Mr. Jimmy R. Stanley, Assistant Special Agent in Charge, North Kansas City:

"Q. Did you become aware of an unusual incident in January of this year involving Mr. Richard L. Sharp?

A. Yes, I did.

Q. Could you describe this incident?

A. On January 28th, I received a call from Mr. Sharp who was Foreman at Lenexa and he started telling me several things that he observed in the area and things just didn't sound right to me. This is covered by my report dated January 30, 1986.

Q. Would you like to enter that as an Exhibit?

A. Yes, I would.

Q. We will enter this as Carrier Exhibit "B". (Pause) Would you read that Carrier Exhibit "B" into the record?

A. Yes, Sir. "On January 28, 1986, at 2:15 p.m., received a call from Richard Lee Sharp, BN Section Foreman at Lenexa, Kansas. Mr. Sharp stated while he was working near the south end of the Pittsburg Pass in Lenexa this date, he had located a substance he thought to possibly be cocaine and had found some cigarette packages which contained a clear substance. He further stated, he had found small piles of rocks and paper towels with rocks on the towels that he felt were markers for something hidden in

the ballast. He advised he had contacted the local police on this and the first officer to contact him took a sample of the white substance found on the ballast. He advised he then noted two subjects in the bushes in the area that appeared to be watching him. He then thought he had stumbled upon a drug stash and was afraid he might be shot. Mr. Sharp then recontacted the police and he advised the second officer to contact him would not do anything.

"At the Lenexa Depot contacted Agent Harold Enochs. Mr. Enochs advised Mr. Sharp had come to the depot to call our office and he advised Mr. Sharp was acting strange at that time. Attempted to contact Roadmaster Charles McLean, but he could not be located.

"At the south end of the Pittsburg Pass contacted Mr. Sharp. He was working in the area with his section gang. Talked with Mr. Sharp and he stated or repeated the information he gave over the telephone. That Mr. Sharp did not appear normal, his hands were shaking, eyes were slightly dilated and he had a red rim around his nostrils and appeared to have very dry lips. Mr. Sharp also kept sniffing. He, further, did not talk in complete sentences and gave an impression of paranoia. Mr. Sharp then took me to the area along the tracks that he had recently been, that had recently been graded and explained that someone had graded the area and he did not know who or why, but claimed they had uncovered some of the white substance he thought was cocaine. He, further, pointed out various items on the ballast such rags, plastic drinking bottles and other marks or debris in the ballast and indicated these were marks for something being hidden in the ballast. He dug a few holes in the ballast under these markers and nothing was found. He also examined an empty pack of cigarettes from the right-of-way and explained he could feel something in the package, but upon opening this package found only a few shreds of tobacco. He then pointed to one of the bottom corners and claimed he could see a substance in that area. Checked this area of the package and found nothing. The white substance he thought to be cocaine appears to be lumps of soda ash. From all the subject's statements, actions and appearance and due to the fact that no odor of alcohol was detected on this subject, Mr. Sharp was suspected of being under the influence of drugs.

"Again, attempted to contact Roadmaster Charles McLean but no contact was made. Contacted Assistant Terminal Superintendent Leo Carlson and Roadmaster Mike Newman at Kansas City and both were advised of the above information. They requested this employee be brought to the Murray Yard for an interview and possible drug test.

"Mr. Sharp was taken to Kansas City and we met with Mr. Carlson and Mr. Newman. In their presence, Mr. Sharp advised he had somoked some cocaine the night before and that he had sniffed cocaine that morning. He, further, repeated some of the information on what he had observed at Lenexa. He, further, mentioned that he had made the calls to the Police Department from a business across the street and thought this was a part of an undercover operation. He stated the office was filled with Agents of the FBI and CIA and Secret Service and they were watching him very closely while he was in the office.

"Mr. Sharp was taken to the North Kansas City Industrial Clinic, but the offices were closed. At that time, we could not contact Mr. Carlson and Mr. Newman stated he should be taken to the North Kansas City Hospital for the tests. As Mr. Carlson could not be contacted, was unable to obtain a Company specimen bottle for the urine sample to be sent to the American Institute for testing. The sample for the urine test was taken at the hospital and they were to make the test there and notify the Industrial Clinic of the results. The proper forms were signed at the hospital for this test.

"Mr. Sharp was checked and found to have no drugs on his person. Mr. Sharp wtated he would not give the name of his supplier of the drugs but advised there was no connection with the railroad. He advised he did not know of anyone else using drugs on the railroad. Mr. Sharp was removed from service by Roadmaster Mike Newman. Mr. Newman and Special Agent J. V. McCroskie took Mr. Sharp to Lenexa, Kansas, where Assistant Section Foreman M. Hawkins took Mr. Sharp to his residence in Olathe, Kansas.

"On January 29, 1986, this office was notified of the results of the urine test from the North Kansas City Hospital. The test showed the urine sample to contain the following:

"Cocaine, caffeine, Benzoylecgonine (which is a product of cocaine), Symmpathomimetic-amine (drug used in some cough syrups)

"Superintendent J. W. Tolbert contacted this office on January 30, 1986, and advised he had received information that Richard Lee Sharp had been admitted to the Shawnee Mission Hospital for treatment". (Tr., pp. 7-10).

Exhibit "C" to the transcript of investigation shows the test results of Claimant's urine sample as including "Caffeine, Cocaine and metabolites, including benzoylecgonine. Pseudoephedrine/ephedrine."

Following the above testimony, Claimant was asked, "Mr. Sharp, do you have any questions?" He responded:

"I don't really know what questions I should ask or, so, so I just say no questions at this time. I know I called to come down, I realized I had a problem, possibly hallucinating at that time and I guess I was really seeking help when I called him." (Tr., p. 11).

The transcript of investigation shows the following testimony by Mr. R. C. Wagoner, General Roadmaster, Springfield Region, Springfield Division, Springfield, Missouri:

"Q. At the time of this incident were there any special agreements in effect between the Brotherhood of Maintenance of Way Employees and the Company regarding Rule G violations?

A. Yes, Sir, there was a policy in effect at the time.

Q. What does that agreement state about handling cases such as this?

A. Reading from Part E of Exhibit "D":

....
"Once an employee has been relieved from service, the employee must contact the Company's Employee Assistance Program Counselor as soon as practicable but within five days. If the employee contacts the Employee Assistance Counselor and accepts counseling, he will be paid for the full tour of duty as a result of the removal from service. If it is determined that inpatient treatment is required, a medical leave will be granted.

"If the employee does comply with the requirements outlined above, and the Employee Assistance Program Counselor determines that the employee is not in need of counseling, or that outpatient counseling is appropriate, the employee shall be returned to service. If the employee complies, there shall be no claim progressed for any time lost as a result of the removal from service other than as provided above.

"If the employee does not comply with this policy and does not accept counseling, the Company's discipline policy will apply and in accordance with the provisions of the current agreement the employee and/or the employee's representative may request a formal investigation." (Tr., pp. 13-14).

"Q. What does Carrier Exhibit "F" state?

A. This letter is to me dated October the 1st, 1986:

"Dear Mr. Wagoner:

"Mr. Richard L. Sharp, former Track Foreman, Lenexa, Kansas, Employee #908271 was dismissed for violation of Rule G. He entered an in-patient treatment program on February 2nd, 1986 and was discharged March the 4th, 1986. Since his discharge date the Employee Assistance Program has been unable to contact him by written correspondence or telephone.

"Mr. Sharp has not fulfilled the commitments of his Contract with the Employee Assistance Program.

"Should more information be required, please feel free to contact me." Signed: EAP Coordinator. (Tr., pp. 16-17).

The transcript of investigation shows the following testimony by Claimant:

"Q. Was Mr. Newman correct when he stated that you were under the influence of cocaine on January 28th?

A. Yes, Sir." (Tr., p. 20).

"Q. On January 28th, 1986, at Lenexa, Kansas, were you under the influence of cocaine?

A. I had that morning before work (pause). I thank that's the basic reason why I called him cause I realized that I'd gone too far." (Tr., p. 21).

Q. When you got out of the treatment program, did you make any attempt to contact (EAP Coordinator)?

A. No, I ... attended my after-care meetings which I remember they was required for so many weeks afterwards. I've been attending AA and NA meetings, uh, as outpatient at various locations around, but other than that I haven't talked to him or had any contact with him since then.

Q. Since you were released from the treatment program, did you join Alcoholics Anonymous for a similar support group.

A. I attended 'em. I don't know if you join 'em, quite a bit of meetings, attended meetings.

Q. For how long?

A. I'm still attending.

Q. How frequently do you attend?

A. Couple a times a week. There's a AA meeting across the street from where I live and two other locations in town and I go to those once in a while just to change.

Q. Do you have any written documentation to show that you have been attending these meetings?

A. No, they're not required or there's nothing there but closed meetings.

Q. Did you ever obtain a sponsor?

A. No, Sir, I didn't remember the requirements of a sponsor. I could of got a sponsor I suppose with them, I mean I attended a couple a AA meetings with, I'm not sure what his last name is in AA you never mention last name, just P.J. and I went with him and he give me a first step book and he seemed concerned to me, I mean I coulda got him if he'd been with AA for quite a few years. The hospital got him to take me out to some outside meetings.

Q. Did you ever receive any letters from (EAP Coordinator)?

A. No, Sir. Once I got out of the hospital, I never received anything.

Q. Do you recall signing any documents in (EAP Coordinator's) presence when he visited you in the hospital?

A. No, I really don't. I signed papers in there and goin' in and I don 't recollect signing any, I know I have no copies of anything I signed.

Q. Did you then understand that as a provision of returning to work that you would have to contact (EAP Coordinator)?

A. No, I couldn't remember that I had to contact him either. I don't know if there is a written agreement, uh, you know, what you were supposed to go through like that. I have no copy and I had no recollection (nervous laugh) of.. (Pause)...". Tr., pp. 23-24).

Examination of the record shows, beyond question, that on the morning of January 28th, 1986, claimant's behavior was not normal, he admitted to the use of cocaine, he tested positive for cocaine, and he was under the influence of cocaine. The record shows substantial probative evidence in support of Carrier's determination that Claimant violated Rule G. Dismissal for violation of Rule G is not excessive discipline.

The Rule G Bypass Program offered Claimant an opportunity to rehabilitate himself. He received the valuable and costly benefits of in-patient hospital treatment, and would have been restored to his position by the Carrier if he had complied with the requirements of the counselling program. Unfortunately, the evidence of record shows that the Employee Assistance Program has been unable to contact Claimant by written correspondence or telephone, and Claimant admits that he made no attempt to contact the EAP Coordinator and failed to obtain a sponsor. Although he admits to signing papers in connection

with the Rule G Bypass Program, his testimony is that he has no recollection of the contents of the papers and he does not remember the requirements of the Program although he states that he did go to AA meetings. On the basis of the evidence of record, there is substantial probative evidence to support the Carrier's determination that Claimant failed to comply with the requirements of the Program.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The Claim is denied.

Joseph Lazar
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

DATED: September 23, 1987