

**SPECIAL BOARD OF ADJUSTMENT 1048**

**CASE NO. 165**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-FTW-07-33-LM-350)

Statement of Claim:

Claim on behalf of B. D. Byers for reinstatement and compensation for any and all loss as a result of his dismissal from service following a formal investigation that concluded on October 11, 2007, in connection with his violation of Safety and General Conduct Rule G in that a prescription pill bottle with his name on it was found to contain a controlled substance and his conduct unbecoming an employee in his failure to notify the proper authority that he was taking a prescription drug that may cause drowsiness.

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

B. D. Byers, the Claimant herein, entered the Carrier's service on June 5, 1981 as a Laborer.

The instant matter concerns the propriety of the Carrier's decision to dismiss the Claimant for his failure to notify the proper authority that he was taking a prescription drug that may cause drowsiness and that his prescription pill bottle found at a work site contained Methamphetamine, a

controlled substance. The record reflects that on August 22, 2007<sup>1</sup> a Backhoe Operator found what appeared to be a prescription bottle lying on the ground. The bottle bore the Claimant's name on the label. The Backhoe operator surrendered the bottle to his Section Foreman, who in turn passed it on to the Track Supervisor and then to the Assistant Engineer. Ultimately, the bottle, together with its contents, was given to the Carrier's Medical Director who in turn placed the Claimant on medical hold on August 25<sup>th</sup>. On September 4<sup>th</sup>, the bottle together with its contents was given to the Carrier's Police and Special Services Division who in turn brought it to the New Haven Police Department for analysis. A laboratory test confirmed the presence of Methamphetamine as the substance contained in the prescription bottle. There was a warning label on the prescription bottle that use of the contents "may cause drowsiness. May cause dizziness." Following a formal investigation held on September 21<sup>st</sup> and concluded on October 11th, 2007, the Hearing Officer determined that the Claimant was guilty of the charges, and after considering the Claimant's prior service record, advised the Claimant by letter dated October 23, 2007 that he was dismissed from service.

## 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.

The Board's review of this case has focused on the question of whether there was adequate and credible proof in the record to substantiate the claim that the Claimant's actions rose to a Rule G violation. Following this review of the record, we initially find that there is adequate proof to substantiate the fact that the prescription bottle found on August 22<sup>nd</sup> belonged to the Claimant. There is also adequate proof in the record in the form of circumstantial evidence that the contents found in the prescription bottle, tested as Methamphetamine. However, while these established facts are evident from the record, the Board is not convinced that the record contains substantial evidence to support a Rule G violation on the Claimant's part.

Safety and General Rule G provides, in relevant part:

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<sup>1</sup> All dates referenced herein occurred in calendar year 2007 unless otherwise noted.

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 of combination of any of these, or who uses 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.

There is nothing in the record that demonstrates in any way that the Claimant had taken the drug while at work, or that he was under the influence of the drug while on Company property performing his duties and responsibilities. In this regard, a drug test performed on the Claimant tested negative. In addition, the record contains a letter from the Claimant's treating physician who noted, in relevant part:

[The Claimant] is currently on Clonazepam that he takes on a regular schedule with no medication six hours prior nor during his duty shift. It should also be noted that as of July 5, 2007 that he was stable that the medication was to continue his stability and that there was absolutely no side effects secondary to medication.

The Doctor's stated conclusions were undisputed.

The Claimant was also charged with conduct unbecoming an employee in that he failed to notify the Carrier of his July 13, 2007 prescription for Klonopin, a drug known to cause drowsiness in some subjects. Given the difficult road the Claimant and the Carrier have traveled in this matter, we are confident that the seriousness of this oversight has been impressed upon the Claimant. While the Claimant's failure to notify the Carrier is serious, we cannot find that it rose to a level warranting his termination. Accordingly, given the Claimant's long history and otherwise clean work record with this Carrier, and without setting a precedent for future cases which must stand on their own facts, on the basis of this record, the Board finds that he should be reinstated to his position as a Laborer, but *without back pay*. Finally, given the unique circumstances of this case, the Board directs that the Claimant's return to service is contingent upon his contact with the Drug and Alcohol Rehabilitation Services (DARS), in order to inquire about the effects of his medication on his ability to safely and efficiently perform his job, and to follow any instructions as directed by DARS.

CONCLUSION

The Claim is sustained consistent with the findings and conclusions noted above.

Dennis J. Campagna

Dennis J. Campagna  
Chairman and Neutral Member

  
T. Kreke  
Organization Member June 27, 2008

  
D.L. Kerby  
Carrier Member

Dated: May 31, 2008