Award No. 38
Case No. 40

Special Board of Adjustment No. 956

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

New Jersey Transit Rail Operations, Inc.

STATEMENT OF CLAIM:

(a) The dismissal of B&B Mechanic J. Toomey was without just and sufficient cause, as a result of an accident of NJTRO Vehicle EBC056 on Monday, August 10, 1987, and was based on unproven charges, and handled in an arbitrary and capricious manner, granting the Claimant neither a fair or an impartial hearing.

(b) Claimant Toomey shall be reinstated without loss of compensation, including overtime, and with full seniority rights, vacation rights, and any of the other benefits and privileges that were enjoyed by the Claimant prior to his dismissal.

FINDINGS:

Claimant, a B&B mechanic with eleven years service, was dismissed on the basis of Carrier's findings that on August 10, 1987, (1) he was issued a summons for not having in his possession a driver's license, although he was operating a Company off-track vehicle at the time; (2) he lost control of the vehicle and did

not operate it in a safe manner; and (3) he violated Rule G because of his "arrogant refusal" to supply Carrier with a pure urine specimen and because he "prevented a timely precise reading of his alcohol consumption."

Claimant was not scheduled to operate the vehicle when he reported to work on the day in question. However, when the driver was injured on the job, claimant was asked to bring the truck back to headquarters. It is undisputed that he had a valid operator's license but did not have it with him that day. While he should carry the license with him, it was not a dischargeable offense in these circumstances for him to have not had it in his possession when the truck was involved in an accident at 2:57 p.m. as he was on the trip to headquarters.

As to the second finding - unsafe operation of the vehicle - there is circumstantial evidence that claimant was at fault in involving the truck in a serious accident on a dry and clear day in a 25 mph zone. Skid marks of over 15 feet were found indicating that the truck veered approximately 15 feet before striking and destroying a utility pole; it then skid some 40 feet before it was stopped at a retaining wall. The truck, a relatively new vehicle, was destroyed. Fortunately, claimant appears to have escaped physical injury.

Claimant's version is that he was driving about 20 to 25 mph when he observed an oncoming car "over the yellow line" and that he "swerved out of the way, hitting the pole."

No testimony by any witness to the accident has been presented by Carrier. A hearsay statement by Assistant Supervisor

Jones as to remarks by an unidentified truck driver is not worthy of comment. If anything, a statement of that irresponsible nature could adversely affect the credibility of Carrier's position.

However, the circumstantial evidence mentioned above is relevant. It provides a valid basis for at least finding that claimant was operating the truck at an unsafe speed. That he damaged the pole and destroyed the vehicle in the accident is clear.

As to the Rule G charge, there is no proof that claimant was inebriated, in possesison of alcohol or had consumed it while subject to duty. A Carrier witness, Company police officer Moran, who arrived at the scene of the accident an hour after it had occurred, testified that he did not observe or smell any type of alcohol and claimant did not appear to be under the influence of any type of substance.

It was not error, however, for Carrier to seek to test claimant for alcohol use when it was aware of the nature of the accident and claimant's prior use of a controlled substance. According to a letter from Dr. Agostino, a Company physician, when claimant provided a urine sample late in the afternoon on the day of the accident, it proved to be adulterated and was of no testing value. Claimant could not provide another sample although he remained at the doctor's office until its 9 p.m. closing time.

Claimant was later that evening given another urine test, this time at a nearby hospital. It also was judged adulterated by water and rejected. When he finally, at 11:30 p.m., submitted

a sample acceptable for testing, it was negative but considered invalidated because of untimeliness.

We are not persuaded that these urine test events provide a sound basis for termination of employment. Claimant was available and arrangements could reasonably have been made to have a male attendant present while the specimen was produced. Moroever, Dr. Agostino's nurse, who supervised the first test, did not appear as a witness although the Company requested that she be produced and it was entitled to cross-examine her if the Company desired to rely on events in its doctor's office.

On the basis of the circumstantial evidence referred to above - the skid marks, weather conditions and property damage - a substantial basis exists, in our judgment, for Carrier's conclusion that claimant failed to use due care in operating Carrier's vehicle on August 10, 1987. It was appropriate for Carrier to take into consideration, in assessing discipline, claimant's prior record (which includes a dismissal for substance abuse).

A lengthy suspension without pay is warranted. The record, considered in its entirety, does not provide an adequate basis, however, for such extreme disicpline as dismissal.

AWARD: Claimant reinstated, with seniority rights unimpaired, but without back pay. To be effective within 30 days.

Adopted at Newark, New Jersey, June 23, 1988.

Harold M. Weston, Chairman

Carrier Member

Employee Member

SPECIAL BOARD OF ADJUSTMENT NO. 956
AWARD 38
DISSENT TO CASE NO. 40

Confronted by the unfortunate burden imposed by this decision and the onerous task of re-instating an employee twice terminated for good cause, the Carrier must unequivically dissent.

Simply stated, the award is not supported by the very logic put forward to justify claimant's re-instatement.

The decision re-instates a guilty man; its logic is uncommon in that it does not spring from the facts as proven and established. The effect of this decision is hardly singular, the implications will be felt by many. In essence, this arbitrator has imposed an entirely unacceptable solution on a historically clear problem. While the Carrier would never presume to dictate the terms of an award, it is the reasoning of this decision itself which demands a different result. Mr. Toomey's reinstatement to service without backpay, is wrong and it is a wrong with potentially harmful consequences for the Carrier and its employees.

In the findings, this Neutral correctly upholds the essential charges assessed against the claimant but obviates his accountably for each rule violation as illustrated below:

"It is undisputed that he had a valid operator's license, but did not have it with him that day...While he should carry the license with him, it was not a dischargeable offense..."

Again as to the second finding, "--unsafe operation of the vehicle--there is circumstantial evidence that claimant was at fault in involving the truck in a serious accident on a dry and clear day in a 25 mph zone...no testimony by any witness to the accident has been presented by the Carrier."

Lastly, this arbitrator acknowledges, "It was not error, however, for Carrier to seek to test claimant for alcohol use when it was aware of the nature of the accident and claimant's prior use of a controlled substance." However, after establishing that two urine specimens submitted by Mr. Toomey were in fact adulerated by Mr. Toomey, the arbitrator faults the Carrier for not supervising the claimant "while the specimen was produced."

Thus, this arbitrator finds that the adulteration was not the issue--he does not doubt it, but neither does he fault Mr. Toomey for his cunning in accomplishing his decption. The result is to reward a clever employee for manipulating the test's integrity, concluding "We are not persuaded that these urine test events provide a sound basis for termination of employment."

Thus, retrospectively, this arbitrator has imposed a new condition on compliance with Rule G. The employee is only accountable if having subverted the test once successfully, they are visually observed on the second attempt.

It is clear that in addressing each charge, the arbitrator establishes its validity. Having established the merit, this arbitrator then diminishes the weight of each--noting that each rule violation in and of itself does not present cause for termination. The Carrier in its written brief and oral presentation argued that it was the totality of circumstances--the obvious and reckless disregard for regulations, the blatant repeated, and successful adulteration of the urine tests, which called for the appropriate remedy--dismissal.

Perhaps in a more perfect world or in a purely academic world this arbitrator's conclusion might pass unchallenged. But in the industrial realm and on this finite property this award takes on real meaning; its consequence undermines actual rules, regulations and the morale of the employees of this railroad. It does not serve this industry that an award like this is issued

which defines adherence to Rule G only by the degree of enforcement procedures.

In this decision, this Neutral simply fails to provide the strong, definitive clarity which these times and this industry demand. If this employee, dismissed once for substance abuse and returned under terms contingent on a change in his pattern of behavior, cannot successfully be terminated for an equally serious rule violation, than this forum itself has failed. The Board itself must grapple with its obligation to be responsible, particularly in issues which pertain to enforcement of Rule G violations.

The Carrier notes that this decision undermines its efforts to provide a safe and reliable work place for all our employees. For if Mr. Toomey once fired for previous offensive conduct can risk such manipulation of the testing system, then who would not? Mr. Toomey, aware of his past termination and the lenient terms of his initial return had an obligation to avoid the least appearance of impropriety. He failed this obligation and unfortunately has been rewarded for his failure.

For the reasons stated above, Carrier dissents.

J.S. Baker
Director Labor Relations

June 30, 1988
Date

956-38

ORGANIZATION MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT

SPECIAL BOARD OF ADJUSTMENT NO. 956
AWARD NO. 38

It is obvious that it is the Carrier Member's Dissent in this case which is invalid and not the Award. The reasons for dissenting are clearly self-serving and completely ignore the well established principle of "innocent until proven guilty".

The Carrier Member states that the "decision re-instates a guilty man". However, it was clearly established that the Carrier failed to prove by direct evidence that the Claimant was in fact guilty of any dismissible charge. The Carrier relied upon suspicion and circumstantial evidence to dismiss the Claimant, which the Board correctly held to be insufficient to establish guilt.

In his journal on November 11, 1850, Henry Thoreau wrote, "Some circumstantial evidence is very strong, as when you find trout in milk". However, the case at hand was not so clear-cut, and therefore, in order to uphold its dismissal decision, the Carrier had to prove by direct positive evidence that such decision was justified, which it clearly failed to do in this instance. To fault the Majority's decision for the Carrier's own failure to establish guilt is improper.

As was held in Third Division Award No. 24412:

> "This Division has a well established rule that in discipline cases the Carrier must prove by direct, positive, material and relevant evidence that the Claimant was guilty of the charges preferred against him. We find that the Carrier failed to do so in this case, and such failure to prove the charge makes the discipline unwarranted."

With just a brief review of the trial transcript one can see the obvious bias of the appointed hearing/charging officer when ignoring the basic principles for a fair and impartial hearing in refusing to call all pertinent witnesses to the hearing, which could have shed more light on this case. Instead, this Carrier officer merely included various statements from individuals under the Carrier's control, which prevented the Claimant the opportunity for cross-examination.

As was noted in Third Division Award No. 9517:

> "For two centuries in America it has been recognized that the right of testing the truth of any statement by cross examination is a vital feature of any investigation devoted to truth development. No safeguard for testing the value of human statements is comparable to that furnished by cross examination and no statement should be used as testimony until it has been subjected to that test or the test waived. It is a device for the discovery of truth. A witness on direct examination may disclose but a part of the necessary facts. The opposing party has the right to probe for the remainder. Qualifying, illuminating, and often discrediting answers are secured by this process."

Of the two witnesses that were present at the hearing, not one was able to testify to the Claimant's alleged violation of Rule G or any other rule. In fact Carrier's Police Officer K. Moran stated just the opposite:

> "K. Moran: I spoke to Mr. Toomey and to my experience, I did not observe or smell any type of alcohol, and he did not appear to be under the influence of any type of substance. That's why a sobriety test was not given him at the scene."

Clearly, from the above testimony, there was no reason to suspect a Rule G violation. In fact, if any "new condition" was imposed on the compliance with Rule G, it was when the Carrier chose to test the Claimant without due cause. Such testing has been determined improper in a long line of recent arbitral and legal decisions on this subject.

The Carrier Member's Dissent has professed the belief that this Board should ignore the requirements for a fair and impartial hearing, as was written and agreed upon in the governing rules, and that discipline need not be supported by direct evidence developed on the property. Clearly, given the long history of decisions contrary to this belief, the Board's decision was completely accurate and on point.

The Carrier further revealed its displeasure when stating that the decision presented the "onerous task of re-instating an employee twice terminated...". The Organization Member believes this to be the true basis for the dissent. The Carrier once before terminated the Claimant, but that action was also reversed by decision of this same Board. When the Carrier was made aware of the Claimant's involvement in an accident with a company vehicle, it hastily developed a case in which to again terminate this employee, relying on the prior discipline to vindicate its actions. However, in so jumping the gun, the Carrier's case was fatally erred.

As was held by Arbitrator Jacob Seidenberg in Award No. 15 of Public Law Board No. 2019:

> "This apparently was a managerial judgment which was not well founded. It is, however, not inscribed in the tablets of Sinai that all managerial judgments will be sound and correct and the Carrier may ignore its contractual obligations in an effort to correct an erroneous and poorly conceived managerial decision."

Further, the Carrier Member tries to paint a gloomy picture showing the Claimant wrecklessly endangering the Carrier and its employees upon his reinstatement. Such dramatics clearly have no bearing or proper place in this forum. The Carrier wrongfully dismissed the Claimant, and the Board was correct in reversing this decision and reinstating the Claimant to his former position. The suggestion that this Award will undermine the Carrier's ability to provide a safe and reliable work place for its employees is nothing more than misleading conjecture.

For the reasons stated above, the decision of the Board was and is proper, notwithstanding the Carrier Member's Dissent.

William E. LaRue

William E. LaRue
Employee Member - SBA 956