

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 200

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Railway) of Mr. M. Lewis, issued by letter dated April 25, 2012 in connection with alleged conduct unbecoming an employee concerning violation of Norfolk Southern Safety and General Conduct Rule G in that on Monday, February 20, 2012, he reported to a medical facility provided by the company for the purpose of receiving a return to work physical while under the influence of alcohol was harsh and excessive (Carrier's File MW-ROAN-12-06-LM-048).
2. As a consequence of the violation referred to in Part 1 above, Mr. Lewis shall be reinstated, paid for all lost time, with seniority and vacation rights unimpaired."

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on September 18, 1995 as a Track Laborer. On December 11, 2012 the Claimant entered the Carrier's Drug and Alcohol Rehabilitation Services (DARS) program which he completed on February 18, 2012. The Carrier then approved the Claimant for return to work pending a routine physical, which occurred on February 20, 2012 at Smyth County Community Hospital in Maricon, Virginia. The physical involves a drug and alcohol screening, and the Claimant's test for

alcohol revealed a high blood alcohol level in a series of two breathalyzer tests (0.145 on the first test, and 0.143 on the second test). The hospital reported this finding to the Carrier in accordance with the Carrier's policy on drugs and alcohol.

The Carrier charged the Claimant with a violation of rule G and held a formal investigation including a hearing on April 12, 2012. Rule G states in part that employees being "under the influence of alcohol...while on Company property or occupying facilities provided by the Company is prohibited" (see Carrier Brief, page 4). Following the hearing the Carrier found the Claimant guilty of violating Rule G and dismissed him from service on April 25, 2012.


The Carrier's view in this case is that the evidence is clear – it argues the Claimant was clearly under the influence of alcohol in violation of Rule G, and dismissal for violations of rule G are appropriate. In support of this argument, the Carrier notes Exhibits 4 and 5, which document the Claimant's two breathalyzer tests. Additionally, Supervisor Dyer testified that he was contacted by the technician who performed the tests at the hospital and was informed the Claimant could not drive himself home due to his blood alcohol levels (see Transcript, page 9). As if this were not enough, the Claimant confirmed the results of the test (see Transcript, page 12). The Carrier also contends that the Organization's objections revolving around its interpretation of Rule G are without merit. The Carrier argues that because Rule G includes the presence of an employee on "facilities provided by the Company," the Claimant is still clearly in violation even if he was not on duty or being paid at the time the events occurred. In support of this view the Carrier offers PLB 5940, Award 63, in which a Claimant in similar circumstances was dismissed and the action upheld because the Board was not persuaded by the Organization's claim that the Carrier's return to work physical did not qualify as a company-provided facility (see Carrier Brief, page 7 and Exhibit F).


The Organization argues that while it does not contest the results of the breathalyzer (see Organization Brief, page 6), Rule G does not apply because the Claimant was not on the Carrier's property or in a Carrier provided facility for the physical. The return to work physical and accompanying tests occurred at the Smyth County Hospital, which the Organization claims, using the dictionary definitions of "facility" and "provide", cannot technically meet the definition of a Carrier provided facility (see Organization Brief, page 7). Further, even if this technical interpretation is discounted, the Organization argues that the Claimant could not be dismissed because dismissal under Rule G requires the employee to be under the influence while on duty, and there is no dispute the Claimant was not on duty during the events of the instant case (see Organization Brief, page 10). The Organization disputes the Carrier's analysis of PLB 5940, Award 63 by arguing that the full context of the case demonstrates it is an outlier in which the Board's comments applied only because of unique, case-specific circumstances which do not apply in the instant case (see Organization Brief, page 13). Finally, the Organization claims that even if the Claimant is guilty, the principle of progressive discipline requires an action other than discharge, in part due to the Claimant's extensive seniority and clear discipline record (see Organization Brief, page 17).

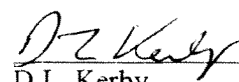
The Board finds there is no dispute that the Claimant was under the influence at his return to work physical. At issue before the Board is whether (1) Rule G specifically applies in this case because of the location of the physical and (2) if so, whether this violation of Rule G rises to a level that warrants dismissal. In regards to (1) we find that although the Claimant was not "on duty" he was indeed occupying a Carrier provided facility. The Organization cites a Merriam-Webster dictionary definition of the word "facility" for its analysis (see Organization Brief, page 7), but upon consulting with this source we find that the utilized definition is not listed as the first definition of the term. The first (and more common) definition of facility is "something that makes an action, operation, or course of conduct easier." The Carrier requires the physical as part of its routine return to work process, so it pays for the exam. In that sense, the physical is certainly Carrier provided. Taking the terms together then, the return to work physical is a Carrier provided facility using the everyday definition of the words.

Turning to the next issue (2), however, we find that dismissal is not required for all violations of rule G. Rule G as cited by the Carrier (see Carrier Brief, page 4) can include dismissal, but only when the employee reports for duty under the influence or uses a controlled substance while on duty. Rule G states that being under the influence while occupying a facility provided by the Carrier is prohibited, but does not state this will result in dismissal. In considering an appropriate action for this infraction of Rule G, we have weighed the seriousness of the offense versus the Claimant's extensive seniority (approximately 17 years) and disciplinary record (Either no previous record of discipline according to the Organization or one previous case according to the Carrier. There is disagreement in the record) (see Organization Brief, page 17). The Board concludes that dismissal is not warranted in this case. This reinstatement is contingent upon the Claimant's (1) successful completion of the Carrier's drug and alcohol rehabilitation program and (2) passing the Carrier's standard return to work exam procedures.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.