

AWARD NO. 220
CASE NO. 307

SPECIAL BOARD OF ADJUSTMENT NO. 280

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when North of Texarkana Laborer L. Hampton was unjustly dismissed from service.

2. Claimant Hampton shall now be paid for all time lost commencing May 2, 1986, and on a continuing basis until such time as he is reinstated to duty, with seniority, vacation and all other benefits restored to him intact." (MW-86-30-CB-Hampton; 53-931)

OPINION OF BOARD:

Claimant was employed as a Laborer and was in the service of the Carrier since August 27, 1974. Claimant was withheld from service effective May 2, 1986 pending investigation for violation of Rule G resulting from a drug/alcohol screen taken by Claimant after his involvement while on duty as a passenger in an accident on April 24, 1986 near Stuttgart, Arkansas. After investigation eventually held on May 29, 1986, Claimant was dismissed from service by letter dated June 11, 1986.

The record reveals that three separate tests were performed on Claimant's urine sample taken after Claimant's consent was obtained. Based upon a laboratory demarcation point of 50 ng/ml, the initial screen (Enzyme Immuno Assay) and the confirmation test (Thin Layer Chromatography) were positive for cannabinoids indicating the presence of marijuana. The results of a Gas Chromatography/Mass Spectrometry test performed on the specimen showed the presence of cannabinoids in the amount of 135 ng/ml.

Initially, we must reject the Organization's argument that Claimant was denied a fair and impartial hearing since the Carrier's Division Engineer was the Charging Officer and

the officer writing the dismissal letter. As we stated in Award No. 218, we must determine on a case by case basis if Claimant's due process rights were prejudiced by the multiple roles played by the Carrier official in the process. This record does not provide sufficient basis to permit such a finding. Further appeals were taken up to and including the Carrier's Labor Relations Officer and the facts in this case are not the type that the multiple roles played by the Division Engineer can be considered as sufficiently prejudicial. Nor do we find that the Hearing Officer's presence when Claimant made a comment concerning the event to be sufficient grounds to find that Claimant was deprived of a fair and impartial investigation.

The Organization next asserts that a Rule G violation has not been shown since there is no evidence that Claimant was under the influence of a drug at the time of the incident. In order to assess the Organization's argument we note that in our review function we are limited to only pass upon the question of whether or not substantial evidence exists in the record to sustain the Carrier's conclusion that discipline was appropriate. We do not review the merits of the case on a de novo basis. See e.g., Third Division Award 26276.

Three factors exist in this case causing us to reject the Organization's position. First, the Carrier utilized three separate tests on the urine sample to determine that cannabinoids were present in Claimant's system and that the level was 135 ng/ml. Sufficient documentation of the test results appears in the record. There is nothing in the record to sufficiently refute the facts established by the tests or the conclusions drawn therefrom. Nor is there anything in the record to sufficiently cast doubt upon the reliability of the tests or the results. The assertion by the Organization that the tests were not administered in a fair and impartial manner in that some employees are not required to take similar tests is unsupported.

Second, the record shows that Claimant admitted to the Carrier's officers that he recently used the drug inasmuch as Claimant stated that in a few more days he would have

tested clean. Such an admission tends to substantiate the results of the tests utilized. Therefore, considering the test results and Claimant's admission, under a substantial evidence review standard, the Carrier's burden of establishing the validity of the test results in this case has been met.

Third, Rule G is broad in that it prohibits "[t]he use of ... intoxicants by employees subject to duty ... [and] possession of ... a drug, narcotic or other substance which affects alertness, coordination, reaction, response or safety" Thus, the Rule goes beyond the prohibition of being under influence only while on duty.

Therefore, keeping in mind that our review function is limited to a determination of the existence of substantial evidence in the record, we find that the results of the tests and the lack of evidence to refute those results or conclusions drawn from those results, coupled with Claimant's admissions and the wording of Rule G satisfies us that substantial evidence exists in this record to support the Carrier's conclusion that Claimant violated Rule G. We caution that this award should only be read for what it is - a determination based upon the particular set of facts presented in this case. No hard and fast rules are established. We are simply finding that the weighing and balancing of the factors present in this case coupled with our limited review function causes us to find that substantial evidence exists for the imposition of discipline.


The Organization next argues that it was improper for the Carrier to consider Claimant's personal record and such amounted to double jeopardy. However, it is well established that an employee's prior disciplinary record can be considered not for the purposes of determining whether the employee was guilty of the charges made by the Carrier, but for determining whether the amount of discipline imposed was arbitrary or capricious. Third Division Awards 26276; 26180. Therefore, it was not improper for the Carrier to consider Claimant's past record which included a previous dismissal on December 18, 1980 for violation of Rule 801 after pleading guilty to a narcotics charge of possession of a controlled substance with the intent to sell or deliver and Claimant's

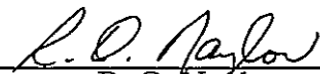
subsequent reinstatement to service on a leniency basis.

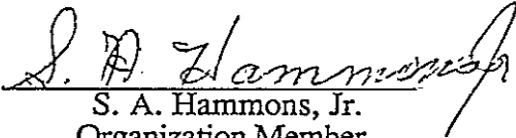
Finally, the Organization argues that the discipline was excessive. However, considering the prior disciplinary record and the nature of the conduct involved in this case, we cannot say that the decision to dismiss Claimant was either arbitrary, capricious or excessive.

AWARD:

Claim denied.


Edwin H. Benn, Chairman
and Neutral Member


R. O. Naylor
Carrier Member


S. A. Hammons, Jr.
Organization Member

Tyler, Texas
July 20, 1987