

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24880

Docket No. 44551

98-1-96-1-B-2114

The First Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Burlington Northern Railroad

STATEMENT OF CLAIM:

"The Organization requests that the claimant, M. J. Hissam, be reinstated to service with seniority unimpaired, the mark of censure in regard to this incident be removed from his personal record and that he be paid for any and all time lost in regard to this incident."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At issue in this dispute is Carrier's application of its policy regarding alleged violations of Operating Rule "G". Rule "G" (January 23, 1994) reads as follows:

"The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on

Company property, is prohibited. Employees must not report for duty under the influence of alcoholic beverages, intoxicant, narcotic, marijuana or other controlled substance or medication, including those prescribed by a doctor, that in any way may adversely affect their alertness, coordination, reaction, response or safety.”

Carrier's Policy regarding Rule G concerns reads in pertinent part as follows:

“3. Abnormal or unacceptable behavior

When a supervisor has reasonable suspicion an employee is under the influence of some substance due to their behavior, the supervisor must obtain the opinion of another supervisor. Two (2) supervisors must agree that testing is required. When they agree testing is required, the appropriate supervisor will direct the employee to provide a urine specimen for controlled substances testing. If a urine specimen has been collected and the employee requests a blood test, such request must be made in writing to the supervisor who will approve the blood specimen collection. The blood specimen will be collected after the employee has provided a urine specimen.

At least one (1) of the supervisors must have received at least three (3) hours of training in BNRR's 'Signs and symptoms of drug and alcohol use and impairment' which is certified Federal Railroad Administration's (FRA) training program.

4. Third party report.

Steps to follow when information is received from a third party source concerning an employee.

If the employee is on duty, two (2) supervisors (one [1] must have Burlington Northern Railroad's 'Signs and symptoms of drug and alcohol use and impairment' training) should observe the employee and determine if there is a Rule G violation or reasonable suspicion which requires a urine specimen collection. If the observation concludes there is no Rule G

violation or reasonable suspicion, the employee should be allowed to continue working. However, if observation indicates a possible Rule G violation, the supervisors should follow the procedures set forth in this section of the policy.

If the employee is not on duty at the time the information is received, the employee must be allowed to report for duty, the two (2) supervisors (one [1] must have BNR's 'Signs and symptoms of drug and alcohol use and impairment' training) must observe the employee. If the supervisors are satisfied the employee's condition is normal, no further action need be taken. However, if observation indicates a possible Rule G violation, the supervisors should follow the procedures set forth in this section of the policy."

On January 23, 1994, Claimant Mark Hissam, an Engineer, was called for 6:30 a.m. on duty to operate Train 16HH190 from Edgemont, South Dakota, to Alliance, Nebraska. After going on duty, Claimant was in the register room of the Edgemont depot, preparing to board Train 16HH190. While he was in the register room, Claimant was approached by his supervisor, Mr. Sadauskas. During the course of their conversation, Mr. Sadauskas told Claimant he smelled alcohol on Claimant's breath, and ordered Claimant to follow him to his office. The supervisor then told Claimant that he was being withheld from service pending an investigation.

Sadauskas then advised Claimant that Burlington Northern did not require any kind of test in regards to a supervisor's observation of the presence of alcohol, but that he could request one (Tp. 4, Q&A 24). Claimant requested such a test, and was transported by Mr. Sadauskas to the Southern Hills General Hospital for testing. At that facility, Claimant took a blood alcohol test and attempted, but was unable to provide a testable volume of urine for a urinalysis.

Following an investigation on February 4, 1994, Claimant was notified of his dismissal from Carrier's service, and the revocation of his Locomotive Engineer Certification. In a decision dated July 3, 1995, the FRA Locomotive Engineer Review Board overturned Carrier's revocation of Claimant's Locomotive Engineer Certification. In its decision, the Board held that Claimant was not shown to be in violation of §219.101 of the Code of Federal Regulations (49 C.F.R. 240). §219.101 states in pertinent part:

"(a) Prohibition -- Except as provided in §219.103 --

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;

(2) No employee may report for covered service while --

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 percent or more alcohol in the blood;

(iii) Under the influence of or impaired by any controlled substance...."

The Board found that Carrier had "failed to prove with clear and convincing evidence that [Claimant] was under the influence or impaired by alcohol as stated in §219.101(a) (2)(i)." In its decision, the Board noted that only the trainmaster (Mr. Sadauskas) testified that he smelled alcohol on Claimant's breath. The Board also pointed out that at the rate the body metabolizes alcohol (approximately one ounce per hour), it is possible that Claimant was not under the influence of alcohol he admitted consuming during the evening before he reported for duty. Finally, the Board declined to shift the burden to Claimant to prove his innocence but, rather noted that Carrier had failed to show that Claimant's blood alcohol level was, or exceeded .04 percent. However, the Board also acknowledged that, despite Carrier's failure to show violation of a federal regulation, Claimant "may have violated Carrier rules, particularly Rule G."

This case is a particularly troubling one. Claimant admitted having "a couple of beers" with his dinner, the night before he reported to duty. It is also unrefuted that he was arrested for DUI that night and released from the Fall River County Jail on his own recognizance. It is also unrefuted that he reported for work in the morning, fully expecting to serve as Engineer on Train 16HH190. The remainder of events is a bizarre muddle of bungled supervision and conflicting testimony. Mr. Sadauskas testified that he had no idea that Claimant was arriving "under the influence" for his 6:30 a.m. call (Tp. 30, Q&A 262, Tp. 42, Q&A 379). Yet Trainmaster T.D. Smith testified without contradiction that Sadauskas had called him at 6:45 a.m. and told him that he (Sadauskas) had been "tipped off" by a clerk at approximately 2:00 a.m. that Claimant "had been picked up for DUI." The clerk had apparently gotten that information from

the local police officer performing the arrest (Tp. 48, Q&A 439-440). Trainmaster Sadauskas also testified that his clerk had called him at 5:30 a.m. (Tp. 31, Q&A 271)

Moreover, once he confronted Claimant, Trainmaster Sadauskas utterly failed to comply in spirit or letter with Carrier's regulations concerning employees suspected of substance abuse. Carrier's regulations (*supra*) concerning supervisory responsibilities in instances of "abnormal or unacceptable behavior" or "third party report" are clearly and carefully written to protect the rights of an innocent employee, and to assure that the Carrier has an "air tight" case against any employee who is guilty of a Rule G violation. Those regulations state that in either situation, the supervisor must obtain the opinion of another supervisor. In addition, if both supervisors agree that testing is required, "the appropriate supervisor will direct the employee to provide a urine specimen for controlled substances testing." The regulations further provide that a blood test, if requested by the employee, "will be collected after the employee has provided a urine specimen."

Testimony on this record indicates that, not only did Trainmaster Sadauskas ignore the initial procedures clearly set forth by Carrier, but also, once at the testing site, decided to abort the urine test rather than wait for Claimant to consume sufficient liquids at the site to enable him to produce a satisfactory -- and possibly conclusive -- urine specimen. In view of Trainmaster Sadauskas' appalling mishandling of this matter, the Carrier has, indeed, failed to prove Claimant guilty of a Rule G violation. The Carrier has argued in its submission that Claimant was "subject to call," but nowhere else on the record is there any evidence that Claimant might have expected to be called to report to work before his call to operate Train 16HH190.

Notwithstanding the foregoing, the fact remains that Claimant was arrested for DUI, and that his blood test, which Claimant declined to produce at the hearing, but which later was received and belatedly produced by Carrier's medical department, showed a slight but positive result for ethanol. In addition, it is unrefuted that Claimant received a conditional return to service on September 23, 1987, following a Rule G violation and his subsequent participation in Carrier's EAP program.

The Board shares Carrier's concern for the safety and welfare of its employees and customers. Second violations of Rule G are normally undisputed grounds for dismissal. In this case, however, Carrier has not met its burden of persuasion regarding violation of Rule G, due in large part to the unexplainable conduct of Trainmaster

Sadauskas. Yet, Claimant's arrest for DUI, his blood test results, and his prior "conditional return to work" do not invcigh against a considerable assessment of discipline, albeit short of dismissal.

In the peculiar circumstances of this case, the Board finds that Claimant shall be returned to service following a second completion of Carrier's EAP program, and certification by the EAP counselor of Claimant's qualification to return to work. Upon his return, Claimant must pass all Carrier's attendant physical examinations. Further, he shall be subject to periodic random urinalysis testing at Carrier's discretion, for two years following his return to active service. Failure of Claimant to comply with any of the foregoing will automatically result in denial of this claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrter is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 5th day of February 1998.

