

The First Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Compensation for all time lost from April 5 to May 22, 1986, and removal of any and all notations placed in Engineer D. E. Potter's personal record as a result of 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 employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

As a result of a notice dated April 7, 1986, investigation ultimately held on April 17, 1986, and by letter dated May 7, 1986, Claimant, an employee with a seniority date of August 28, 1974, was dismissed from service for violation of Carrier Rule G. Although initially withheld from service on April 5, 1986, Claimant was reinstated on May 22, 1986. This Claim seeks compensation for the lost time and removal of the record of disciplinary action.

On April 5, 1986, Claimant was scheduled to start duty at 2:00 a.m. Trainmaster F. R. Gulledge testified that he received a report originating from a van service that Claimant was late for work and that there was an alleged Rule G violation. Gulledge ascertained through the dispatcher that Claimant's train was stopped at Reno, Wyoming and instructed the dispatcher to hold the train at that location. At 4:50 a.m., Gulledge also contacted Special Agent G. Steeves. Steeves picked up Gulledge at 5:10 a.m. and both proceeded to Reno, arriving at approximately 6:15 a.m.

Gulledge testified that he entered the engine with Steeves and informed Claimant that he had a report that Claimant was late for work and that there was an alleged Rule G violation. Gulledge asked Claimant to stand up and breathe in his face. According to Gulledge, Claimant blew once on each side of his face and Gulledge detected no odor of alcohol. Gulledge then

asked Claimant to breathe a third time directly into Gulledge's face. Claimant complied. According to Gulledge, "At that time I did smell an odor of an alcoholic beverage." Gulledge further testified that he directed Claimant to breathe into Steeves' face and after doing so, "Mr. Steeves then turned, looked at me and nodded his head in an affirmative nature." Steeves testified that he had Claimant breathe in his face two times and that he also detected an odor of an alcoholic beverage. According to Claimant, after he breathed on Steeves, "Steeves kind of shrugged his shoulders" and responded "I smell something." Gulledge then advised Claimant that he was in violation of Rule G and that he was removed from service.

According to Gulledge, during the conversation Claimant stated "I suppose you want me to take a urine or a blood test." Gulledge testified that "I stated at that time that it would not be necessary." Steeves corroborated Gulledge's version of the conversation adding that Gulledge asked Claimant if he reported to work late and if he had been drinking, to which Claimant responded in the negative. Claimant testified that he asked for a blood test by stating "you are taking me in for the urine test and I want a blood test." According to Claimant, Gulledge stated "no, that's no longer necessary." Gulledge denied that Claimant asked to take a blood test. With respect to Claimant's question concerning submitting to a test, according to Gulledge, "I took it at -- interpreted it as a question and not a request." Steeves also denied that Claimant made an offer to take a test. He similarly viewed Claimant's inquiry as a question. However, consistent with Claimant's version of the conversation, Head Brakeman F. D. Esquibel testified that he specifically heard Claimant request a blood test after being informed by Gulledge that he was in violation of Rule G.

According to Steeves, Claimant was removed from service at 6:30 a.m. The train was tied down and the participants then proceeded to the Gillette Depot.

Gulledge acknowledged that he could have taken Claimant to a hospital for a blood test. Gulledge acknowledged further that due to the lack of a test, he did not know if Claimant's blood alcohol content was greater than 0.00 per cent. Gulledge testified that he did not take steps to impose the test:

"Because under Burlington Northern policy when an Officer of this Company observes an odor of an alcoholic beverage on an individual employee a test is not required ... — and a test will not be given."

Claimant testified that while in the Gillette Depot, Gulledge told him that "its a new policy ... just two Officers is all it takes." Steeves testified that he again detected the odor on Claimant's breath later at the Gillette Depot while Claimant was completing the necessary paperwork for the removal from service.

Gulledge further testified that at the time of the incident Claimant's eyes were "bloodshot and red." According to Steeves, Claimant's eyes "were very red." At the hearing in this matter, Gulledge and Steeves testified that Claimant's eyes still appeared to be bloodshot and acknowledged that factors such as lack of sleep could also cause bloodshot eyes.

Gulledge and Steeves also testified that at the time of the incident, aside from the asserted odor of alcohol and the bloodshot eyes, Claimant exhibited no other indicia of being under the influence. Gulledge testified that Claimant appeared no different than the manner in which Gulledge observed Claimant on prior occasions. Specifically, Claimant's "balance was okay. His coordination was okay." According to Steeves, other than the bloodshot eyes, "at that time there was no other -- nothing else, no other exceptions." Moreover, according to Gulledge and Steeves, Claimant "was very cooperative."

Gulledge also spoke to members of Claimant's crew. Gulledge testified that Head Brakeman Esquibel stated that he did not smell the odor of an alcoholic beverage on Claimant. According to Gulledge, Conductor T. E. Leu and Brakeman M. E. Deschene stated that they had not smelled Claimant that morning. Further, according to Gulledge, upon his questioning of the crew, none of the members indicated there was a problem with the manner in which Claimant was performing his duties operating the train.

Conductor Leu testified that on April 5, 1986, Claimant was two minutes late arriving at the site where the van was located. Upon getting into the van, Claimant read his orders and was responsive to questions asked by Leu. Leu noticed nothing unusual about Claimant. Leu testified that while in the van, Claimant was seated approximately two and one-half feet from him and Leu did not smell alcohol on Claimant's breath. Further, Leu testified that at approximately 8:10 a.m. while at the Gillette Depot, Claimant breathed directly into Leu's face and asked if he could smell alcohol. Leu testified that he could not. Leu further testified that he told Gulledge that he did not smell alcohol on Claimant's breath that morning.

Brakeman Deschene testified that he observed Claimant at 2:02 a.m. on April 5, 1986, and Claimant appeared normal. Further, while in the van, Deschene detected no alcohol on Claimant's breath. Like Leu, Deschene informed Gulledge of that fact. Deschene further testified that Claimant breathed in his face at the Gillette Depot and Deschene also did not detect an odor of alcohol.

Brakeman Esquibel testified that he also rode in the van with Claimant and detected no odor of alcohol on Claimant's breath. Like the other employees, Esquibel testified that he noticed nothing unusual about Claimant on April 5, 1986.

Engineer T. W. Brieske testified that Claimant relieved him at approximately 3:00 a.m. on April 5, 1986. According to Brieske, he and Claimant came in close physical proximity to one another as Claimant entered the engine

and they spoke about difficulties with the power. According to Brieske, Claimant appeared normal and he likewise detected no odor of alcohol on Claimant's breath. Brieske acknowledged that Claimant's eyes appeared bloodshot. However, according to Brieske, such is not unusual "in my line of work. It's an occurrence that happens quite a bit."

Engineer R. Gilkey testified that shortly after 8:00 a.m. on April 5, 1986, Claimant approached him in the Gillette Depot and breathed in his face. Gilkey also could not detect an odor of alcohol. Further, according to Gilkey, in the past he has seen Claimant on social occasions when Claimant was under the influence of alcohol and on those occasions Claimant appeared different than he did on April 5, 1986.

Clerk E. Durlin testified that between 7:30 a.m. and 8:00 a.m. on April 5, 1986, Claimant approached her in the Gillette Depot and breathed in her face. While detecting an odor from cigarettes, Durlin testified that she could not detect alcohol.

Claimant and his sister-in-law C. Potter testified that Claimant left the Gillette Depot and proceeded to the Gillette Police Department. At approximately 8:30 a.m., Claimant requested that the police administer a breath test. As testified by Claimant, C. Potter and as corroborated by a letter from the Gillette Police Department, the test could not be administered at that time and Claimant was informed that the equipment for conducting such a test was out of order. Claimant was then referred to the Campbell County Sheriff's Department. As shown by the testimony of Claimant and C. Potter and as corroborated by a notarized statement from the Sheriff's Department, after arriving at the Sheriff's Department at approximately 9:00 a.m., Claimant requested a blood alcohol test. Claimant was advised that the individual qualified to perform that test was unavailable. After waiting for a period of time, Claimant was ultimately advised to go to the hospital and he departed at approximately 10:15 a.m. The notarized statement from D. Robinson of the Sheriff's Department further stated "I did not detect alcohol odor on Mr. Potter's breath."

Campbell County Memorial Hospital Phlebotomist C. Carrillo testified that she drew blood from Claimant at approximately 12:10 p.m. on April 5, 1986, for a serum alcohol test. She further testified that she detected no odor of alcohol on Claimant.

The results of the serum alcohol test were "0". According to Campbell County Memorial Hospital Technician B. Rudolph (who is certified with Associate Clinical Pathologist Association), Claimant's test (which was run twice) actually demonstrated a negative amount on the test (-1.4) "which is actually less than '0'" - a fact Rudolph attributed to the calibrators on the testing apparatus. Due to differences in individual capacities to dissipate alcohol, Rudolph acknowledged that she could not specifically determine the amount of alcohol in Claimant's system at 6:30 a.m. Rudolph further acknowledged that if alcohol was in Claimant's system at 6:30 a.m. there was possibility that by 12:00 p.m. the alcohol would be completely gone. However, Rudolph testified that:

"I can pretty much guarantee you from the alcohols that I have run that if you were drunk at 6:30 in the morning at Noon your [sic] still not going to be completely clear. You may be sober enough to walk straight but your body is probably still going to retain some of that alcohol, detectable amounts."

When specifically asked about Claimant's negative test results, Rudolph testified as follows:

"Q. In your estimate - - that employee had no alcohol in his system at 6:30 A.M.?"

A. That is what I would guess. To be negative approximately what 6 1/2 hours later, 5 1/2 hours later you should still have some traces present."

Claimant repeatedly denied that he violated Rule G on April 5, 1986. Claimant testified that he consumed no alcohol beverages on April 4 or 5, 1986, prior to reporting to work or while on duty. Claimant testified that while on duty, he did consume three-fourth of a one quart thermos of coffee. Further, Claimant testified that he also smoked cigarettes that morning as well as chewed tobacco. Finally, Claimant testified that in his years of service, he had no prior discipline.

We have set forth the testimony in the above fashion from the lengthy transcript in order to document the evidence that exists which the Carrier argues is sufficiently substantial to deny this Claim. The sum total of the evidence in the record to support the Carrier's allegations that Claimant violated Rule G is Gulledge's testimony that upon entering the engine he smelled an alcoholic beverage on Claimant's breath (on the third try); Steeves' testimony that he also detected a similar odor at that time and later at the Gillette Depot; and both Gulledge's and Steeves' testimony that Claimant's eyes were bloodshot.

The evidence in the record to the contrary consists of Gulledge's and Steeves' testimony that Claimant exhibited no other indicia of being under the influence and that Claimant otherwise acted normal; Claimant's denials of consumption of alcohol; the direct testimony of employees Esquibel, Leu, Deschene, Brieske, Gilkey and Durlin that Claimant spoke to them at or near the critical time and in some instances breathed directly in their faces and no odor of alcohol was detected; the employees's testimony that they observed nothing erratic or unusual about Claimant's conduct or his functioning in the operation of the train; Claimant's immediate attempts to have a test administered; the negative results of the blood serum test performed at Campbell Memorial Hospital; and the testimony of Rudolph that based upon the negative test results, if Claimant had alcohol in his system at 6:30 a.m. that day, then some detectable traces would still have been present when the test was administered.

Considering the enormity and quality of the testimony and evidence adduced contrary to that offered by the Carrier, we cannot say that the Carrier has demonstrated the existence of substantial evidence to support the Rule G allegation. The Carrier proffered corroborated testimony that Claimant had the odor of alcohol on his breath. The bloodshot eyes testimony is not persuasive in that many factors can cause bloodshot eyes including lack of sleep. Indeed, the record indicates that prior to reporting for duty on April 5, 1986, Claimant only had a few hours sleep and even at the hearing, Claimant's eyes appeared bloodshot. Evidence supporting Claimant goes beyond the large number of corroborated denials of the odor of alcohol. Claimant additionally offered the lack of other indicia of alcohol consumption, and most persuasive, the negative results on the blood serum test which medical testimony interpreted as demonstrating a high probability of lack of alcohol presence at the time of the incident. In this regard, Claimant's actions are most compelling. Upon realizing that he was not going to be given a test by the Carrier and that the Carrier was going to rely upon the observations of Gulledge and Steeves, Claimant immediately set out to get a confirmatory test. He went to the Police Department immediately upon leaving the Gillette Depot, then to the Sheriff's Department and eventually to the hospital to get the test. Those actions and the immediate seeking of a test as exhibited by Claimant are not consistent with conduct of an individual who has consumed alcohol or otherwise violated Rule G.

Therefore, while no singular factor is sufficient on its own to rebut the Carrier's showing, when taken as a whole, the significant testimony of the employees that Claimant did not have an odor of alcohol on his breath; the lack of other indicia of being under the influence; the immediate seeking of a test by Claimant to confirm his innocence; the results of that test; and the medical testimony that Claimant probably did not have alcohol in his system earlier in the day at 6:30 a.m. must all stand to negate the testimony of the Carrier's witnesses that they detected the odor of an alcoholic beverage on Claimant's breath to a sufficient degree for us to conclude that substantial evidence of a Rule G violation has not been demonstrated by this record.

The parties have cited Rule G Awards supportive of their respective positions. However, each case must be examined on its individual facts. We recognize that in our limited review capacity our function is not to make credibility resolutions. We do not view our action herein as a discrediting of the testimony of the Carrier's witnesses. We have no doubt that Gulledge and Steeves thought they detected the odor of an alcoholic beverage on Claimant's breath and testified consistent with that conclusion. But that testimony must be weighed against the other evidence in the record to determine the existence of substantial evidence to support the Rule G allegation. The totality of the evidence in this case simply does not persuade us that the Carrier has sustained its burden.

In light of the above, whether Claimant specifically demanded a blood test or merely inquired about whether the Carrier was going to require that he take a test and whether the Carrier was obligated to follow procedures for the existing Rule G or its predecessor are immaterial to the resolution of this dispute. The threshold and determinative question is the existence of substantial evidence to support a conclusion that Claimant had alcohol in his system as asserted by the Carrier. Considering the totality of the evidence presented, we do not find the existence of the required showing.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of February 1989.