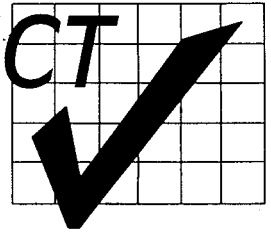

OFF-DUTY MISCONDUCT

Part II--Alcohol & Drug Use



As with the first article (Spring '94) covering off-duty misconduct, we start with the proposition that the off-duty behavior of employees is irrelevant as long as they are available for work when assigned and are able to perform their duties. With respect to off-duty drug and alcohol use, as with other forms of off-duty conduct, an employer may properly discipline an employee if such conduct harms the employer's reputation or causes an effect on its business, if the conduct renders the employee unable to perform his duties or report for work, or if the employee's behavior leads to the reluctance of other employees to work with him. In other words, there must still be a *nexus*, or connection, between the off-duty conduct and the employer's business operations.

A major distinguishing factor between alcohol- and drug-related off-duty misconduct and other types of misconduct is the fact that in many drug or alcohol cases, the discipline involves an alleged violation of the universal railroad operating rule commonly known as "Rule G." Rule G typically prohibits the use or possession of drugs or alcohol while on duty, while subject to duty, or while on company property. Many employers have gone a step further to prohibit the use of illegal or illicit substances at *any* time, whether on or off duty.

Thus, in addition to making sure the carrier bears its burden of proof in establishing a nexus between the off-duty behavior and its business, the union rep defending against an off-duty misconduct charge in a case involving drugs or alcohol must often contend with a charge that the employee violated Rule G.

Because alcohol is a legal substance, employers seldom if ever bring misconduct charges against employees solely based on its off-duty use. An exception might be where an employee is frequently absent from work due to chronic alcoholism, but the resulting charge then is usually excessive absenteeism or failure to protect an assignment, not off-duty misconduct. Rather, misconduct charges are most frequently brought where the use of alcohol is associated with the violation of other laws, such as in the case of an employee who is arrested while off-duty and charged with drunk driving.

Alcoholic beverages and automobiles have existed for so many years that cases of alcohol-related traffic offenses committed by off-duty employees are hardly a matter of first impression. Although the public's view of drunk driving has become much more critical than it may have been three or four decades ago, the arbitral principles which apply to such conduct have changed little. Thus, the union's response to such a charge by an employer may employ the same reasoning used for at least a half-century.

A key difference between alcohol and drug-related off-duty misconduct and other types of misconduct is that discipline often involves an alleged violation of the universal railroad operating rule commonly known as Rule G.

In Third Division Award No. 6821 (1954), the Claimant was not in service at the time an alleged drunken driving incident occurred--indeed, he had previously been dismissed because of failure to protect his assignment. While awaiting reinstatement, the Claimant was involved in the drunk driving incident. As a result, he was dismissed for violating Rule G. Following principles that exist even to the present, the Board held as follows:

"The salient point in this controversy is that on July 29, 1951, Claimant held no assignment nor was he liable to service with the Carrier on that date or on the following date for the record is clear that he was not cleared by company physicians for service as a clerk until August 11, 1951. Consequently, no matter to what extent he may have indulged in the consumption of alcoholic beverage on July 29, 1951, it could not have impaired his ability to serve the Carrier. As said in Award 5748 and other awards of this Division, it is an unreasonable exercise of authority for Carrier to attempt to prevent the use of intoxicating liquor by its employes when off-duty and off the Carrier's property. So long as the consumption of intoxicants while off-duty and off the property does not affect the employe's ability to perform service Carrier cannot be heard to complain. In the instant case there is considerable conflict as to whether the Claimant was convicted of driving while drunk and the transcript of the Court's record submitted as an Exhibit is somewhat confusing on the point. In any event, however, it appears that the sole basis upon which the Claimant was dismissed was for violation of Rule "G" based on the incident of July 29, 1951. For reasons indicated above, on the record here presented that would not constitute "just cause." It follows that the claim should be sustained."

In an even earlier case adjudicated by Fourth Division Award No. 264 (1945), the accused was charged with "...irregularities and arrest..." in connection with police charges that he was operating an automobile "while in an intoxicated condition, no driver's license and no Federal sticker." On appeal, the district court dismissed the case and released the Claimant from custody.

The Carrier's Rule G stated simply, "The use of intoxicants is prohibited," and the Claimant was dismissed for "misconduct and wilful violation of Company rules."

The Board found as follows, in pertinent part:

"The dismissal of charges against him by the District Court would appear to have effectively removed from the record here any tangible evidence of the employe's intoxication at the time in question. The further fact

that he was not on duty at the time, but enjoying one of his rest days, as provided in the agreement, and that he subsequently reported for his regular tour of duty without evidence of intoxication clearly establishes that he had not violated any of the company's rules with reference to the use of intoxicating liquors. A reasonable construction of this rule would limit its application either to such times as the employe was on duty or, if absent from duty, when the use of intoxicants would interfere with the performance of his duties subsequently. Neither situation is involved here. Under such circumstances, it would appear that his dismissal was unjustified."

Union representatives should be aware, however, that arbitrators sometimes take a different view of off-duty misconduct involving alcohol. In many cases, there is a readily identifiable nexus between the misconduct and the employer's business operations. Such is the case with locomotive engineers, who must now be certified or licensed under the regulations of the Federal Railroad Administration. As part of the certification process, employes are required to furnish driving records and instances involving alcohol or drugs may be held against an employe to deny certification. It follows that the denial of certification may result in the employe's inability to perform his railroad duties and disciplinary proceedings may result.

Disciplinary proceedings may also be brought against, for instance, an employe who is required to have a driver's license in connection with his or her railroad duties and loses such license in an off-duty incident. Such occupations might include messengers, drivers, crew haulers, commissary workers, mechanics, wrecker crews, patrolmen, and a host of others positions represented by TCU. In these situations, about the best a rep can do is argue that the employe may be disqualified from the position (thereby triggering whatever options the agreement provides to disqualified employes) but should not be disciplined.

The off-duty use, sale or possession of illicit drugs presents an entirely different set of problems for the union rep and the accused. Whether or not such conduct is specifically prohibited by Rule G, it is against the law. But beyond the legalities, the matter of drug use both in the workplace and during off-duty hours has been the focus of a public outcry in recent years, caused in part by the several highly publicized railroad accidents involving drugs in recent years.

While different drugs produce different pharmacological effects on users, arbitrators tend to view all drugs similarly and in a different light than alcohol. This is so for several reasons. First, alcohol has been the subject of years of study, and the analysis of its effects has been refined to a degree of relative precision. For instance, studies

have indicated that although some factors affect metabolism (such as an empty stomach), alcohol produces effects in almost direct correlation to the amount consumed and the user's weight, and criteria have been established for measuring blood alcohol levels to determine the degree of impairment. Alcohol also dissipates at a fairly predictable rate. For this reason, airline pilots and other safety-sensitive occupations are prohibited from using alcohol within a certain number of hours before going on duty. These "bottle to throttle" rules have become a standard in preventing on-the-job alcohol impairment, yet inarguably impact on the private, off-duty hours of the employes.

But while scientific research has conclusively proven that the effect of alcohol diminishes within hours, there are no such conclusive results regarding the use of illicit drugs. To the contrary, some drug studies have indicated that illicit drugs may have a cumulative effect, and that months or years of use may significantly affect an employe's ability to function even after many hours or days of abstinence from use.

There also exists the very powerful stigma attached to the illegal use or sale of drugs. Arbitrators who once reinstated drug-using employes with full back pay because the Carrier failed to prove its charges or failed to establish a nexus, now are reluctant to unconditionally reinstate such employes because such would offend the public conscience and possibly endanger patrons or fellow employes. Compare, for instance, the following two cases, separated in time by some 16 years.

In the first case, decided by Third Division Award No. 21553 (1977), the Claimant was arrested and charged by police with "possession of marijuana for personal use" and "possession of narcotic paraphernalia," for which he was convicted in municipal court. The Carrier charged the Claimant with a violation of "Rule G and the Rules and Instructions of the Maintenance of Way Department," found him guilty solely by reason of his arrest and conviction, and he was dismissed. Subsequently, the Claimant appealed his civil conviction and both charges were *Nolle Prossed* on motion of the Assistant District Attorney. When the Carrier was apprised of this, they offered to reinstate this Claimant without back pay on a leniency basis, which the Claimant refused.

The Board held as follows:

"The evidence adduced at the August 9, 1974 investigation reveals that Claimant was dismissed from service solely as a result of his conviction in the Mobile City Municipal Court on the charge of possession of marijuana for personal use and possession of narcotic paraphernalia. No evidence, other than his conviction, was introduced to substantiate the allegation that Claimant had violated General Rule G. It is undisputed that the charges against Claimant were subsequently *Nolle*

Prossed when his case was appealed to the Circuit Court of Mobile County.

"It is the considered opinion of this Board that when Carrier elected to dismiss Claimant from service solely based on his conviction in Municipal Court, with full knowledge that Claimant had appealed his conviction to a higher court, they thereby assumed the consequences that his conviction might eventually be overturned by a higher court. In fact, Claimant's charges were subsequently *Nolle Prossed*. It matters not that Carrier acted in good faith when they dismissed Claimant effective July 24, 1974. Someone must bear the consequences of this precipitous action and this Board believes it should be the Carrier, not the Claimant. There is simply no evidence in the record to establish that Claimant was indeed guilty of violating General Rule G. Accordingly, he must be restored to service and paid for all time lost consistent with Rule 27 (b)."

(See also sustaining Third Division Award No. 22222, which adjudicated a case in which the Claimant was dismissed by his railroad employer following police charges of reckless driving, disorderly conduct, resisting arrest and malicious damage to city property.)

In the second case, decided by Third Division Award No. 29819 (1993), the Claimant was arrested while off-duty and charged by the police with possession with intent to distribute cocaine, possession of drug paraphernalia, possession of Xanax and maintaining a common nuisance. The civil charges were subsequently placed on an inactive docket and were ultimately dropped.

The Claimant was charged by the Carrier with "...conduct unbecoming an employe." At the hearing and during handling on the property, the Carrier committed a host of procedural errors, such as failing to introduce any evidence at the hearing other than a "press release" issued by the police (all other evidence was introduced well after the hearing). In addition, the Carrier failed to issue discipline within time limits, instead choosing to "suspend" the Claimant "indefinitely."

The Board held as follows:

"Claimant's arrest and the evidence adduced pursuant to the search of his residence proved substantial evidence of his drug abuse as well as provided grounds for the Carrier's concern that his continued presence might interfere with the orderly conduct of its business. The police report also indicated that Claimant had various drug paraphernalia for his own personal use with one homemade pipe having his name on it. In addition, there were partially smoked marijuana cigarettes and another device containing burned cocaine residue.

"With respect to the dismissal of the criminal case against Claimant by virtue of *nol pros*, Third Division Award 26780 is noteworthy.

'The fact that criminal charges brought against Claimant were ultimately terminated upon entry of *nolle prosequi* also cannot change the result. The standard of proof in criminal proceedings and proceedings before this Board are substantially different. Fourth Division Award 4412. Further, our examination of the record evidence satisfies us that the Carrier has met its burden in this proceeding irrespective of the outcome of the criminal proceeding, which we note, was merely a determination that Claimant would not be criminally prosecuted further rather than a determination that Claimant was not guilty.'

"It is undisputed that the Carrier has the right to discipline employees for offenses which occur during an employee's off-duty time, particularly when such conduct can adversely affect the working climate for other employees. As stated in Second Division Award 8001:

'The question raised by Petitioner's defense has been decided by the Board in numerous cases. It is well established that a company may discipline an employee for off-duty violations, especially those involving drugs and abuses of alcohol, and that such violations need not show damages....'

"A similar view was expressed in Third Division Award 24728:

'The use of drugs, or the dealing in drugs, is considered a serious offense in the railroad industry, usually resulting in dismissal. See Second Division Awards 8205, 8237, Award 8 of Public Law Board No. 1324, and Third Division Awards 24356, 23264, 22530 and 22547. See also Second Division Award 8001, and Third Division Awards 23410 and 24608.'

"In addition, the Board finds the foregoing record meets the standards of the substantial evidence rule which were succinctly stated in a First Division Award 12952. as follows:

'It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability.'

"The Board notes Claimant was suspended from the service on December 19, 1990, and on July 5, 1991, by agreement with the District Chairman, was granted the opportunity to return to service with the understanding that he enter and successfully complete Carrier's drug/alcohol rehabilitation program. Claimant rejected the opportunity of returning to service.

"Based upon the record before us, we direct that Claimant again be offered reinstatement to the service, consistent with his seniority standing, with all contractual rights unimpaired, but without compensation for time lost as a result of his suspension. Claimant's reinstatement shall be contingent upon him entering and successfully completing Carrier's drug/alcohol rehabilitation program."

A common thread in all types of off-duty misconduct cases involving court proceedings is that a Carrier is within its rights to bring charges against an employe irrespective of the outcome of any civil charges. This principle frequently arises in off-duty cases involving drugs or alcohol where the employe, on advice of counsel, enters a guilty plea (plea bargains) in the court case but maintains innocence in the hearing held with respect to railroad disciplinary charges.

Maintaining one's innocence is certainly the first order of business in a railroad disciplinary proceeding, as is holding the carrier to its burden of proving guilt as charged. But as a union rep you should be aware that arbitrators have upheld discipline in misconduct cases where carriers have introduced no evidence whatsoever other than a court record indicating a plea of guilty.

In one such case, the Board stated its position unequivocally regarding the Carrier's burden of proof vis-a-vis a plea of guilty in criminal court. Please note that a guilty plea is not considered in the same vein as a conviction (which may be reversed on appeal) after a plea of not guilty. Fourth Division Award No. 4647 reads as follows, in pertinent part:

"The Organization's final point alleges a lack of probative evidence to support the charge. Again we cannot agree. Claimant admitted in his investigation, that a

plea of guilty was entered on his behalf. This plea resulted from negotiations between the State and Claimant through his Attorney. Such pleas, made in open court, ought not be allowed to be repudiated in a subsequent railroad disciplinary investigation on the basis of a misconceived notion that the charged employe never personally testified in open court or otherwise admitted to any culpability in the matter. Nor should such pleas be dismissed as expedient alternatives to avoid potential long term incarcerations for felonious conduct. We know of no rule, or other prohibition, barring their consideration as evidence as to the truth of the matter under investigation in railroad discipline cases."

In conclusion, *while TCU neither condones nor approves of drug or alcohol use which may in any way affect an employe's on-duty performance, we must ensure that any employe accused of off-duty misconduct is given due process.* In off-duty cases involving alcohol or drugs, this means you should steadfastly assert that there must be a connection between the alleged behavior and carrier's business, because by far the most important reason given by arbitrators for overturning discipline and awarding back pay is that the employer failed to establish a nexus to the workplace. The Carrier must also be held to the highest possible evidentiary standards, because of the stigma associated with such charges. Finally, you should ensure that any employe charged with off-duty misconduct involving alcohol or drugs is apprised of any EAP programs, discipline by-pass agreements, or rehabilitation agreements which may be available.

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