Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8901
Docket No. 8835
2-SOO-CM-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: ( Brotherhood Railway Carmen of the United States and Canada
( Soo Line Railroad Company

Dispute: Claim of Employes:

The following Carmen are claiming to have Investigation removed from their personal file and are claiming compensation for lost time of 30 days each:

Carman Gene Carrick from Sept. 29, 1978 to Oct. 28, 1978
Carman Benedigno Padilla from Oct. 4, 1978 to Nov. 2, 1978
Carman Ronald Konrad from Sept. 28, 1978 to Oct. 27, 1978

For being unjustly suspended from service due to an unfair hearing which was held on Aug. 31, 1978 at Yard Office, Soo Line R.R. - Schiller Park, Illinois to determine the facts and place your responsibility if any for violation of Rule G and the incident that transpired on Soo Line property on the evening of Aug. 18, and the morning of Aug. 19, 1978.

Rule 31 & 32, Shops Craft Agreement should be controlling.

Findings:

The Second 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 employe 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 therein.

This case involves Claimants Carrick, Konrad and Padilla, employed for various periods from six to eleven years, and arises out of their actions on the evening of August 18, 1979 and in the early morning of August 19, 1979. The charge that advised each of them to appear for an investigative hearing, into these actions, stated that it sought to "determine the facts and place your responsibility if any, for the violation of 'Rule G' and the incident that transpired on the Soo Line property on the evening of August 18, 1979 and the morning of August 19, 1978." This hearing was postponed to August 31, 1978. On September 22, 1978 Claimants were notified that they would be removed from service for 30 days as a result of this investigation.

The Organization alleged that Claimants did not receive a fair and impartial hearing because the charge against them was not sufficiently precise and specific to permit them to prepare an effective defense. It contended that exactly what "Rule G" is, was not specified and, also, that the word 'incident" did not give adequate notice of what alleged wrongdoing Claimants would have to defend against. The Organization further asserted that it was only when under the gun of the investigative hearing itself that it became apparent what actions were embraced by "incident", as well as what alleged rule violations were being derived from them, and that at this point Claimants could not be expected to effectively defend themselves against such late breaking allegations. Consequently, in light of such a lack of reasonable ability to defend against the infractions with which they were actually being charged Claimants were not accorded a fair and impartial investigation.

The Board finds, however, that "Rule G" is so commonly used in the Railroad industry to signify the use of intoxicating beverages that it is beyond any doubt that the Claimants understood that they were being charged with the use of intoxicating beverages once they saw the phrase "Rule G" in the charge. As stated in Award No. 20250, Third Division "... Rule G is by common usage, an all inclusive term for any rule dealing with use or possession of intoxicants." The Board is especially confident of this in view of the fact that each of the Claimants in this case had been employed, at the time of the charge, for more than five years by the railroad. In any event, each of the Claimants would have been given, in the course of his employment, a copy of the Safety Rules containing Rule G and must therefore, be presumed to know what the rule says or to have had the opportunity to readily find out in time to effectively defend, at the investigative hearing, against charges that he had violated the rule. Additionally, once it is known that compliance with Rule G is in question, i.e., that acting under the influence of intoxicating beverages is being alleged, an employee can reasonably be expected to perceive that other aspects of his behavior, at the same time, possibly growing out of the use of intoxicating beverages, is likely to come into question. This logical deduction is itself sufficient response to the Organization's contention that "incident" in the charge did not sufficiently alert Claimants to the allegations of other rule violations, e.g. Rule 19 and Rule 8, raised, at least implicitly, at the investigative hearing. To the effect that employees, once apprised of a charge relating to intoxication, should be prepared to defend against other behavior infractions possibly arising from intoxication on the date and at the time, in question, see Award No. 12156 First Division:

> "Award No. 5253 holds that 'upon trial the accused may be disciplined for any rule violation disclosed by the investigation'. This Referee would not be able to follow Award No. 5253 in a case where the facts of record disclosed that the notice of investigation set out a specific date, and at the investigation evidence was developed regarding some rule violation which took place at some entirely different time, rather than the time described in the notice. In that event there would be a serious question as to whether or not the disciplined employee had been given proper notice." (Emphasis supplied)

In any event, the Board finds, upon review of the record, that there is sufficient evidence to sustain the charge of the alleged Rule G violations and while there is also evidence of several other rule infractions on the part of Claimants it is not necessary to substantiate the proof of other infractions in order to find warranted the 30 day disciplinary suspensions meted out to each of these Claimants.

At the investigative hearing reference was made to reports rendered by special agents of the railroad, allegedly based on testimony taken by these agents from Claimants, respecting the incidents involved in this matter. The Organization contended that such reports were of no value respecting proving the charges, against Claimants, because the special agents who compiled them did not testify in regard to them at the investigative hearing itself, because they were compiled from memory by the special agents, without even the benefit of notes taken while the agents were querying Claimants, because the reports were not signed by Claimants and because Organization representatives were not present to assist and advise Claimants at the time that the interviews with the special agents on which the reports were based, occurred.

Suffice it to say, in response to these arguments, that the Board finds sufficient independent evidence, in the testimony taken from Claimants at the hearing itself, to sustain the charges of Rule G violations against the Claimants and the penalties assessed as a result. Admissions made in their verbal testimony, at the hearing, by various of the Claimants is enough to implicate all of the Claimants in Rule G violations. (It might also be mentioned that the obstinancy of Claimants respecting answering certain questions, regarding other rule violations stemming from the "incident" on the early morning of August 19th, as well as convenient memory lapses and a "heard nothing", "saw nothing" attitude about what transpired, as well as their inability to formulate a credible alternative explanation of what happened, varying from the one intimated against them at the hearing, could well be taken, in and of itself, even absent outside independent corroboration, as strong evidence of Claimants' violations of several pertinent rules. However, as stated above, we find it unnecessary to take this approach to substantiate violations of Rule G sufficient to justify the discipline administered in this case.)

The Organization took strong objection to the quotation, at page 5 of Carrier's submission, from a police report relating to a battery in which one of the Claimants was allegedly involved, against another of the Claimants' sister-in-law, on the morning of August 19, 1978, at or about the time, and at the place, involved in the charge in this matter. The Organization asserts that this represents an injection into this case, of new material not presented on the property or at the hearing and at no time presented to a representative the Organization. While it may well be that the weight of such material, toward proving the instant charge is dubious because, inter alia, of these reasons pointed out by the Organization as reflecting on the police report, from the perspective of a fair and impartial hearing, the Board, as already pointed out, finds it unnecessary, in these premises, in making its decision to rely on anything beyond independent evidence in the record, based on Claimants' own testimony of Rule G violations by Claimants.

Finally, the Organization contends that even as to the Rule G violations themselves, the employees were not on duty on the morning of August 19, 1978, that there was no proof that they were actually drinking when on duty, that no other railroad employees were involved in any of the incidents from which the charges against Claimants stem, and that no other railroad workers were even in the vicinity of an alleged altercation incident, involving Claimants, early on the morning of August 19th. In the first instance it may be said that there is direct testimony to the effect that at least some of the Claimants were imbibing intoxicating beverages while on duty, and that all of them were on railroad property while under the influence of intoxicating beverages they had consumed. But, in any event, there is quite a wide array of authority to the effect that being on duty and/or on railroad property regarding establishing a Rule G violation is not essential.

For example Award No. 8993, Third Division, involved a fight that took place while Claimant was both off duty and off the property. The Board there said:

> "We are not ready to hold that serious offense of an employee, although committed while off duty and off the property of an employer, may not be a proper basis of a charge, if proven, will support his dismissal."

Similarly in Award No. 14350, Third Division, which involved the dismissal of a Claimant who was under the influence of intoxicants, while off duty, but on Company property it was said:

> "There is substantial evidence to support the charge ... even though he was not actually on duty at the time. For this violation ... a penalty is in order."

Award No. 16770, First Division, which considered the case of an intoxicated, off duty employee, stated:

> "If, while off duty (an employee) conducts himself in such manner as to temporarily or permanently impair his ability to perform, the Carrier has the right under Rule G ... to dismiss him from the service. In the interest of the safety of property and people this right should be upheld."

Finally Award No. 17029, First Division emphatically enumerates the point:

> "This division has consistently taken the position that Rule G applies to off duty employees..." (See also Award No. 16818, First Division)

Thus the Board finds that Claimants were duly and precisely informed of the charges against them, received a fair and impartial hearing respecting them, that such charges were proven by substantial evidence based on Claimants' testimony at the hearing, and that the penalties of thirty days suspension assessed against Claimants, as a result were not arbitrary, capricious or unjust.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of February, 1982.