Award No. 5583
Docket No. 5312
2-EL-EW-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)

ERIE-LACKAWANNA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Assistant Communications Constructionman C. A. Toms was improperly dismissed from the service of the Carrier.

2. That accordingly, the Carrier be ordered to return the aforesaid employe to service with all seniority rights restored and all pay due him since he was discharged up to the date he is returned to service at the applicable Assistant Communications Constructionman's rate for each working day he has been improperly held from service; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment insurance and sickness benefits for the above described period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above described period; and all other benefits that would normally accrue to him had he been working in the above described period in order to make him whole.

EMPLOYES' STATEMENT OF FACTS: Assistant Communications Constructionman C. A. Toms, hereinafter referred to as the claimant, was ordered by the Erie Lackawanna Railroad Company, hereinafter referred to as the Carrier, to present himself for investigation account of alleged violation of Rule G of the Rules of the Operating Department, April 29, 1965.

The claimant was at the time an employe of the Communications Department under the jurisdiction of the Carrier's Maintenance of Way Department.

The Organization is not party to the rules of the Operating Department.

The letter addressed to the claimant ordering him to appear for investigation was signed by a Mr. W. D. Slater, Division Engineer, who is not a

extent that he is in a sluggish mental state and lacking physical coordination to the detriment of himself and his fellow employes is the primary issue of this case, and not whether a foreman, or a maintainer, or someone else at some other unknown and unidentified time took a drink.

16.

"Mr. Slater has no jurisdiction in this case as stated in paragraph 3 and 4."

Carrier covered this point above in Item 3. The record indicates that Division Engineer Slater assumed no jurisdiction in this case.

17.

"During this entire investigation Mr. A. E. Beasley, the company witness, was allowed to remain in the investigation, and he should only be in attendance when he is questioned. Mr. R. N. Harlow was never called as a company witness, when he was supposed to be the signer to a supplement letter to the investigation."

No objection was made at the hearing to having witnesses testify separately and, under the circumstances, must be considered having been waived. See Third Division Awards 9326 (Rose), 13674 (Weston), 14391 (Zumas). Further, the agreement does not provide for separation of witnesses at a hearing. The mere fact that Communications Supervisor was at the hearing does not necessitate his being used as a Carrier witness. Had the Organization representative desired to question Mr. Harlow, he was available. Obviously, the Employes felt that any testimony by Mr. Harlow would not aid in their defense of the charges against claimant. None of these actions prejudiced the claimant's rights or resulted in an unfair or partial hearing.

It must be as apparent to this Board as it is to Carrier that both the line of questioning of the Employe Representative and the foregoing issues objected to in his appeal of the dismissal decision is merely an attempt to cloud the issue with a multitude of extemporaneous issues in order to take the spotlight off the seriousness of claimant's violation.

CONCLUSION

There is ample evidence in the record that claimant used intoxicants when subject to duty and was in violation of Rule G. The penalty of dismissal was proper in light of the facts of record, and this Board should not usurp Management's decision in this case, and the Organization's claim should be denied in its entirety.

(Exhibits not reproduced.)

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 thereon.

In this discipline-dismissal case, Claimant, an Assistant Communication-Constructionman, was charged with violation of Rule G on account of being in an apparent intoxicated condition, in the camp cars at Wadsworth, Ohio, on the morning of April 21, 1965.

At the hearing, Communications Gang Foreman, L. L. Graff, testified that about 3:20 A. M. on the date in question, two persons, a man and a woman, assisted Claimant to the Camp Car and had to unlock the door for Claimant; that at 7:30 A. M. the same day Foreman Graff informed Claimant that he was unfit for work, and offered him the option of the day off without pay, or one day as a paid vacation; that, in his opinion, Claimant was unfit for duty from apparent intoxication; that Claimant went to bed fully clothed when he returned to the camp car; that Claimant was wallowing around, and his coordination was very bad; that Claimant on the morning of the 21st of April spoke fast and slightly slurred his words, but his words were coherent.

A. S. Beasley, Communications Constructionman, testified that Claimant wasn't his self, and that he could have been sick or something; that he could not judge whether or not Claimant was able to go to work that morning; that Claimant talked kind of loud, and his talk was not the same as always.

Claimant testified that he returned to the camp car about 1:05 A. M.; that his next door neighbors, a man and a woman named Lottie, stepped inside the car with him after the man unlocked the door; that during the evening of the 20th he played pool at a nearby grill and drank 5 or 6 beers; that he was able to go to work on the morning in question, and was not sick in any way.

The Rule involved herein, namely, Rule G, reads as follows:

> "The use of intoxicants or narcotics by employes subject to duty or their possession or use while on duty is prohibited and is sufficient cause for dismissal."

It is apparent from the record that Claimant was under the influence of intoxicants on the morning in question. He admitted that he drank 5 or 6 beers on the previous evening, and Foreman Graff, who had observed him return to camp car in the early morning hours, testified that at the time the men were preparing to go to work, "He was wallowing around, his coordination was very bad, and with all the safety bulletins that are sent out, I did not think it was wise to allow Mr. Toms to go to work with possible injury to himself and others." Thus, we feel that there is substantial evidence in the record to sustain a finding of guilt and, therefore, Carrier did not act in an arbitrary or capricious manner in exercising its disciplinary power in this instance.

However, the penalty of dismissal imposed against Claimant by Carrier, we feel, is excessive and unreasonable and, therefore, arbitrary so as to

constitute an abuse of Carrier's discretion in this regard. We arrive at this conclusion after taking into consideration the fact that Claimant consumed the beer intoxicants during the prior evening and did return to the camp car for rest and sleep. This, we feel, mitigates the seriousness of the proven offense. While we are in no way condoning Claimant's actions in this matter, we feel a less severe penalty is therefore warranted.

Therefore, taking into consideration Claimant's past record during his 25 years of employment by Carrier, during which time he sustained one previous suspension of 4 months for violation of Rule G, we conclude that a fair and reasonable penalty would be a one hundred eighty day suspension from service, and Claimant's dismissal from service is hereby set aside. Carrier is directed to return Claimant to service with full seniority and vacation rights unimpaired; however, Carrier shall be entitled to deduct any earnings that Claimant may have earned from the termination date of the one hundred eighty day suspension to the date of reinstatement.

AWARD

Claim partly sustained and partly denied in accordance with the foregoing findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1968.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 5583

The majority erred in this award. We agree wholeheartedly with the following sentence contained in the Findings:

> "Thus, we feel that there is **substantial evidence** in the record **to sustain a finding of guilt** and therefore **carrier did not act in an arbitrary or capricious manner** in exercising its disciplinary power in this instance." (Emphasis ours.)

However, in the Findings the majority goes on to state: "* * * we conclude that a fair and reasonable penalty would be a one hundred eighty day suspension from service, and claimant's dismissal from service is hereby set aside." — this, despite the fact that only 3 years prior to the instant violation of Rule G, the claimant was dismissed from service for the same violation and four months later restored to service on a leniency basis.

Many awards of this Division, as well as the other Divisions, were cited to the Referee wherein it is stated that it is the established policy that the Board will not substitute its judgment for that of the carrier and it is the duty of the Board to leave the carrier's findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of

discretion. Here, the majority stated that the carrier did not act in an arbitrary or capricious manner and yet set aside the judgment of the carrier.

Violation of Rule G is a very serious offense, and the claimant — despite being cautioned and dismissed from service and restored on a leniency basis before — again was guilty of such a violation. The majority agreed he was guilty; yet, for some unexplained and misguided reasoning, set aside the dismissal.

We strongly dissent to this award.

H. F. M. Braidwood
F. P. Butler
H. K. Hagerman
W. R. Harris
P. R. Humphreys

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