

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company unjustly withheld Carman Homer Coleman from service starting April 9, 1975, and following investigation dismissed him from service effective April 18, 1975.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Coleman for all lost wages beginning April 9, 1975 until he is reinstated with his seniority and vacation rights unimpaired and that any loss he might sustain account his loss of insurance on his dependents and himself during this period be reimbursed.

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.

The Claimant, an employe with 27 years of service with the Carrier, was dismissed by the Carrier on April 18, 1975, for his "responsibility in connection with being on Company property in an intoxicating condition, threatening Car Foreman J. Gallamore and Trainmaster W. C. Chitwood, with bodily harm, at Carroll Street Tower, Lesperance Street Yard, St. Louis, Missouri, at approximately 10:45 p.m., April 9, 1975."

It was established that the Claimant had come on to the Carrier's property on his day off. There was no contradiction to his testimony that he was coming on the property for the purpose of obtaining money from his personal locker.

The Organization claims that the Claimant did not receive a fair and impartial investigation under Rule 32(a) in that the interrogating officer was the same Carrier representative who, on the same day following the investigative hearing, dismissed the employe. The Board does not agree. Abundant precedent exists to show that there is no necessary procedural fault in having the same officer conduct a hearing and then sign papers as a supervisory officer. The record shows no other indications of procedural shortcomings.

From the record, the Board accepts the Carrier's position that the Claimant was on the property in an intoxicated state, as observed by a number of Carrier employes, and that, in this state, he became physically engaged with two supervisory employes, although the degree of the altercation is somewhat uncertain.

This Board respects the basic principle not to substitute its own judgment for the Carrier's judgment in disciplinary matters, when factual background is substantiated and proper procedure followed, with few exceptions. Such possible exceptions are well set forth in Award No. 6196 (Quinn), which states in part:

"This Board does not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion. A Carrier's disciplinary decision is unreasonable, arbitrary, capricious or discriminatory when ... /there follows a listing of circumstances/ ... or when the degree of discipline is not reasonably related to the seriousness of the proven offense."

While the dismissal notice makes no specific reference thereto, page 15 of the Carrier's submission refers to a violation of Rule G. Rule G contemplates three specific conditions: (1) use of intoxicants by employes "subject to duty"; (2) being under the influence of intoxicants while on duty; (3) use or possession of intoxicants while on duty.

It is of direct relevance to the severity of the discipline, in the view of this Board, that none of these three conditions applied to the Claimant. Although found to be intoxicated and on the Carrier's property, he was neither subject to duty that day nor found using or in possession of intoxicants.

The encounter with supervisory employes put the Claimant in jeopardy, but here the charge of the Carrier is "threatening" with bodily harm, and no more -- not necessarily a dismissable offense, though in certain on-duty circumstances it could well be.

The conduct of the Claimant was improper, and potentially could have led to the endangerment of others and/or damage to property. Disciplinary action is well justified. But the Carrier has failed to demonstrate the strict applicability of Rule G or that the offense was otherwise sufficiently severe to warrant dismissal.

This Board specifically distinguishes the particular circumstances of this case from many others cited by the Carrier in that there was no actual or even proximate on-duty status, and the encounter between the Claimant and the supervisory employes, while not to be ignored, seemed to be mainly a by-product of keeping the Claimant under control and removing him from the property -- rather than a deliberate assault.

A W A R D

1. Claim sustained as to reinstatement with seniority and vacation rights unimpaired.
2. Claim denied as to compensation for lost wages or insurance.

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 5th day of April, 1977.

CARRIER MEMBERS' DISSSENT TO AWARD 7278, DOCKET 7106

(Referee Herbert L. Marx)

We respectfully submit that this award is invalid on its face because it is expressly predicated on the patently false finding that Rule G on Carrier's property merely prohibits the use of intoxicants by employees who are either on duty or "subject to duty". After noting that this Board may modify Carrier's decision "when the degree of discipline is not reasonably related to the seriousness of the proven offense", the Findings state:

". . . Carrier's submission refers to a violation of Rule G. Rule G contemplates three specific conditions: (1) use of intoxicants by employes 'subject to duty'; (2) being under the influence of intoxicants while on duty; (3) use or possession of intoxicants while on duty.

"It is of direct relevance to the severity of the discipline, in the view of this Board, that none of these three conditions applied to the Claimant. Although found to be intoxicated and on the Carrier's property, he was neither subject to duty that day nor found using or in possession of intoxicants.

"* * *

"The conduct of the Claimant was improper, and potentially could have led to the endangerment of others and/or damage to property. Disciplinary action is well justified. But the Carrier has failed to demonstrate the strict applicability of Rule G" (Underlining added.)

The obvious fallacy in all of this is that Rule G on this Carrier's property is not restricted to employees "subject to duty". This Rule G (like the Rule G contained in many standard codes, including Standard Code of Association of American Railroads, as revised November 15, 1938), contains this sweeping restriction against the use of intoxicants:

"The use of intoxicants or narcotics is prohibited."

This rule does not restrict its prohibition against use of intoxicants to employees "subject to duty" and this Board has repeatedly held that such a rule is violated by and is enforceable against an employee who comes onto Carrier's property while under the influence of intoxicants. The rule obviously prohibits being drunk from the use of intoxicants while on the Carrier's property, the offense admittedly committed by Claimant; therefore, Carrier has demonstrated "strict applicability" of this rule to Claimant and the Referee's finding to the contrary is absolutely arbitrary.

The Referee exceeded his jurisdiction in attempting to decide this case on the basis of a Rule G that was taken from some undisclosed book of rules or contrived in the Referee's own imagination.

No authority is cited, and we do not believe there is any decent authority, for the proposition that dismissal from the service is excessive punishment for the serious offenses committed by Claimant, and we respectfully submit that this award espousing such proposition is arbitrary and capricious on its face.

G S Naylor

John W. Johnson

J. C. Carter

J. Johnson

Sam Youker