Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9270
SECOND DIVISION Docket No. 9197
2-CMStP&P-EW-'82

The Second Division consisted of the regular members and in addition Referee Thomas A. Bender when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
( System Council Number Eight
(
( Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the current agreement when it unjustly dismissed Electrician Richard Reyes on October 12, 1979 and improperly held Richard Reyes out of service from September 16, 1979 to October 12, 1979.

2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to make Electrician Richard Reyes whole by reinstating him to service with all seniority and other rights unimpaired and compensating him for all lost wages and benefits and his record cleared.

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 in this matter was employed as an electrician at the Carrier's Western Avenue Diesel Shops in Chicago, Illinois. On September 16, 1979, the Claimant was scheduled to work 4 p.m. to 12:00 Mid. Because of an incredible series of events the Claimant was suspended from duty pending an investigation into the following charges:

"1. Your alleged failure to protect your assignment September 16, 1979 as follows: September 16, 1979 Tardy - 30 minutes late.

2. Your alleged failure to protect your assignment at approximately 7:55 p.m. found sleeping in Switch Engine No. 806, September 16, 1979.

3. Your alleged failure and refusal to perform work assignment given by Foreman, Charles Hood, at approximately 8:00 p.m., September 16, 1979.

4. Your alleged violation of Rule G - use of alcoholic beverages while on duty, September 16, 1979.

5. Your alleged violation of Rule 3 on September 16, 1979, as listed in Safety Rules Form 2983 Rev...."

6. Your alleged harassment between the hours of 9:30 until 11:30 p.m. on September 16, 1979 during which period you called Mr. Charles Hood on the telephone several times and threatened bodily harm to his person."

A. PROCEDURAL ISSUES

Before reviewing the merits of this case the Board must address two procedural issues raised by the Organization. The first relates to the Claimant's receipt of notices from the company regarding this case. The transcript affirmatively shows that the company had the Claimant's current address. The Carrier had every right to rely on that information, and if mail should have been sent to another location, it was the Claimant's duty to so inform the Carrier.

The Organization also objects to the fact that the Claimant was withheld from service pending an investigation. A review of the charges shows them to be of sufficient severity, gravity and seriousness that suspension prior to investigation was warranted. And, according to authority presented at the hearing, Rule 35 of the Agreement between the parties sanctions such conduct.

In concluding the discussion of these procedural points the Board takes note of the fact that:

1. The Claimant and his representative were ready to proceed when the investigation began. Both so stated on the record.

2. No prejudice can be found to any of the Claimant's rights. The Claimant suffered no handicap in defending himself as a result of any of the Carrier's activities.

Therefore, these procedural objections are found to be without merit. The Organization also makes reference to the conduct of the hearing officer. Our view of this objection is best resolved by reference to Second Division Award No. 9013 (Carey) in which we noted:

> "An objective review of the record of the hearing indicates several intense exchanges, but none that can be elevated to a level suffficient (sic) to sustain, on their face, charges of prejudging. The Hearing Officer's active participation during cross-examination by the Organization, while inappropriate, was not a reversible error. Several of the challenges by the Organization center around the Hearing Officer's commentary and attempted explanations during the course of the hearing concerning Rule 23 and its application to the instant case.
>
> There is no evidence in the record which supports a charge of prejudice or bias or which would sustain a claim that the investigation was conducted in a manner to justify an assertion that the Claimant did not have a full and fair hearing within the procedures set by the Parties."

It is also appropriate to note that the persons handling investigations are not lawyers or judges and are not acquainted with the legal niceties of the courtroom. Their first

job is to insure the trains run. Thus, unless their actions deprive, in any meaningful degree a Claimant's rights to a fair hearing, their actions must not be judged too severely. See also Third Division Award No. 22703 (Kasher).

B. MERITS

Charge No. 1 - Tardiness. This issue may be quickly resolved. The Claimant admitted being tardy for work, arriving at approximately 4:30 p.m.

Charge No. 2 - Sleeping on duty. The testimony taken at the investigation supports the conclusion that at approximately 7:55 p.m. on September 16, the Claimant's Foreman found him asleep in Engine 806. The Foreman testified that when he found the Claimant in the engine he had to shake him to wake him up. The foreman also stated that when he opened the door to the cab, the Claimant did not move. Such lack of life squares with the conclusion that the Claimant was indeed asleep.

The investigation contains substantial evidence of the fact that the Claimant had been asleep for sometime prior to 7:55 p.m. in the shift. The foreman found him asleep in the electrical shop at 7:30 p.m. Other testimony received indicates that the Claimant had probably been sleeping in there for an hour or more before being discovered by the foreman. Now, the charge only addresses the 7:55 p.m. incident. The prior incident is mentioned only to show that the foreman had trouble keeping the Claimant awake on this particular night.

Sleeping on duty has long been recognized as a very serious offense. Second Division Award No. 8712 is right on point with the instant case. In that case, the Board, with Referee LaRocco, held:

> "Lastly, the Organization, on the property and in its submission, contends that the supreme penalty of dismissal was arbitary and unduly harsh. The carrier asserts that sleeping is a serious offense and, given claimant's short length of service, discharge is warranted. Numerous awards of this division have declared that sleeping while on duty is a serious infraction justifying dismissal. Second Division Award No. 8537 (Brown). Under the circumstances, we cannot say the carrier acted in an arbitrary fashion, so we will not substitute our judgment for that of the carrier in assessing the penalty. Thus, we decline to modify the discipline in this case."

The question of appropriate discipline for employees found sleeping on the job was also addressed in Second Division Award 8537 (Brown). In that case the Board concluded:

> "The remaining question is whether or not discharge of Mr. Walker is, under all the circumstances, supported by just cause. The record reflects that from 4:30 A.M. until 6:50 A.M. on the morning in question Claimant failed to do his job, sleeping at least part of the time. A host of awards of this and other divisions of the National Railroad Adjustment Board and of Public Law Boards declare that sleeping on duty is an offense for which an employee may be dismissed. We have no justification for modifying the discipline assessed."

Charge No. 3. - Failure to Perform Assigned Duties as Directed at 8 p.m. Upon arriving for duty at 4:30 the Claimant's foreman advised him of the tasks that needed to be done. The Claimant was directed to perform a monthly inspection of Engine 806 and jump start Engine 233. These instructions were repeated at 7:30p.m. when the foreman

first found the Claimant asleep. Finally, when he woke the Claimant at 8:00 p.m. the foreman told him again to jump start Eng. 244; again the Claimant refused. At this point, the Claimant was told to either go to work or go home. Obviously, the foreman had lost all patience. The fact of the Claimant's refusal is substantiated by a P.M. Tarnowski, a machinists' helper. Mr. Tarnowski had no interest in the matter and may be accurately described as a disinterested party.

This Board has consistently recognized insubordination as a very serious offense. And, a careful review of the transcript fails to disclose any reason for the Claimant's failure to carry out the foreman's instructions. A foreman should not have to follow each man around to make sure some work gets done.

The Claimant did testify that he had completed part of the inspection on Eng. 806. However, this effort is negated by the fact that four (4) hours into the shift the Claimant should have been done with this task. There was testimony establishing that such an inspection normally requires three (3) hours.

The actions of the Claimant here may best be characterized as opposed to any lawful order issued by the Carrier's personnel; such a posture has been recognized as insubordination. See Second Division Award Nos.7128 (Twomey) and 7973 (Larney).

Charge No. 4. - Rule G Violation The Claimant's foreman testified that he detected alcohol on the Claimant's breath at 7:35 p.m. when he woke him up in the electrical shop. This charge is further supported by a Mr. Ivy who testified that he saw the Claimant with a half empty bottle of dark rum. Mr. Ivy testified that the Claimant was sitting in the electrical shop when he saw him. And, Mr. Ivy was only 18-20 feet away from the Claimant. Further, Mr. Ivy is a part-time bartender and is presumably familiar with liquor bottles. The charge is further supported by a conversation between the Claimant and a Chicago police officer. During the conversation the Officer said, "you (Claimant) have been drinking". The Claimant responded, "Officer, I wouldn't admit that to no one.".

One could raise some interesting questions given the scenario. Why didn't the foreman send the Claimant home at 7:35 p.m.? Why didn't Mr. Ivy report the man to the foreman when he observed the bottle? Unfortunately none of these questions were raised. And, technically they are beyond our purview at this time.

This Division and all others have long recognized that alcohol and trains do not mix. Moreover, a large number of awards recognize that a Carrier need not tolerate such behavior. By drinking on duty a person endangers their own safety as well as that of the other employees. It is also well known that violations of Rule G lead to discharge. See Second Division Award 8636 (Dennis).

Charges No. 5 Horseplay and No. 6 Threatening a Supervisor. A careful review of the record discloses so much speculation and conjecture on these two points that no definitive conclusions can be drawn.

Based on the entire record we cannot say that the discipline imposed was either arbitrary, capricious or unreasonable. There is substantial evidence to support the conclusion that the Claimant was guilty of a number of very serious infractions. If

the Claimant had been guilty of only one of the proven charges this Board or the Carrier might have modified the discipline imposed. But given this record no such action may be considered.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of July, 1982.