Award No. 6332

Docket No. MW-6371

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That W. H. Steele was improperly discharged from the Carrier's service on charges unproved on the basis of the evidence and testimony introduced at a hearing held at Denison, Texas on March 17, 1952;

(2) That W. H. Steele be restored to his former position with seniority and vacation rights unimpaired;

(3) That W. H. Steele be allowed pay, equal to the amount he would have earned in the Carrier's service, for all the time in which he has and/or will be improperly withheld from his position as crossing flagman, account of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: This is a discipline case. Respondent charged Claimant W. H. Steele with violation of Rule G.

At the time in question, that is on March 5, 1952, claimant held position as Crossing Flagman, Lueda Street crossing, Fort Worth, Texas, with assigned hours 3:00 P.M. to 11:30 P.M., with 30 minutes for dinner.

At about 11:05 P.M., while on duty, claimant was observed lying on the ground, either dazed or unconscious, between the watchman's cabin and the crossing in question. He was picked up by ambulance, taken to a hospital and later to his home.

Under date of March 10, 1952, claimant was formally advised that an investigation would be conducted on the charge as above shown. Hearing was held on March 17, 1952, and on March 18, 1952, claimant was notified in writing that it had been determined that he was guilty as charged, and that he stood discharged. Appeal from this finding was processed through the highest operating officer on the property and is now before this tribunal for review. Claimant seeks reinstatement as Crossing Flagman, with seniority and vacation rights unimpaired and to be made whole for any monetary loss incurred by virtue of Respondent's allegedly improper action.

The Organization contends that the record of the investigation does not sustain a finding of discharge inasmuch as it is based solely on the testimony of an individual (patrolman) who was not qualified to diagnose the claimant's condition or the cause thereof.

It is well established by awards of this Division that a disciplinary action of a Carrier will not be disturbed if substantial evidence of probative value is adduced and (1) the investigation rules have been followed, (2) the action of the Carrier is neither arbitrary nor capricious, and (3) the penalty invoked is neither excessive nor unreasonable.

Both claimant and his representative expressed opinions that a full and impartial hearing was held. Neither did the claimant offer testimony (other than his own) in his behalf and in answer to an inquiry specifically stated that he desired no other witnesses present. There is nothing in the record to substantiate a charge or sustain a finding of arbitrary or capricious action by the Respondent.

It is the opinion of the Board that the testimony of the patrolman is corroborated sufficiently by admissions of the claimant, and that there exists here evidence of probative value.

While admittedly the claimant pled not guilty to the charges brought, and while there was no evidence of bottles or other intoxicant containers around the shanty, or that he left his post of duty, claimant admitted having had a few beers. What an employe does when off duty and not on the property of his employer is no concern of an employer and will not warrant disciplinary action unless such acts impair his ability or render him unfit to perform his duties after reporting for duty. There is no evidence of record upon which this Board could justify substituting its judgment for that of the Respondent by finding the penalty invoked unjust or unreasonable.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the facts and circumstances of record will not justify this Board in vacating the action taken by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 18th day of September, 1953.