

Award No. 8477

Docket No. TE-9037

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

COPY

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk and Western Railway, that:

1. Carrier violated terms of the Agreement between the parties hereto, when on the 4th day of October, 1955, without just cause, it discharged E. L. Fisher.
2. Carrier shall clear the service record of E. L. Fisher, of the charge upon which the dismissal was based; restore him to former assignment; and pay him for all time lost.

OPINION OF BOARD: This claim arises out of a discharge for Rule "G" violation. That rule reads as follows:

"The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited."

Claimant was regularly assigned as second trick telegraph operator at Blackstone, Virginia, from 4:00 P.M. to 12:00 Midnight. On September 17, 1955, at about 11:00 P.M., he requested the local police to quell a disturbance in the waiting room of the station. The two policemen who responded to the call thereafter reported to their desk sergeant that Claimant did not appear in condition to perform his work. The sergeant then notified Carrier's Special Officer at Crewe, Virginia, who, in turn, contacted the Trainmaster. The latter, accompanied by the Special Officer and the Road Foreman of Engines, then proceeded to Blackstone to investigate the situation. They arrived there at about 12:20 A.M. (September 18). After observing his condition and interviewing him, the Trainmaster suspended Claimant from further service with Carrier.

Claimant had been relieved by the third trick operator at about 11:40 P.M. (September 17) and had driven off the property in his privately-owned automobile shortly thereafter -approximately 11:45 P.M. He did not return to the station until some time between 12:00 Midnight and 12:20 A.M. of September 18. He parked his car on Company property and according to his

own testimony had "three or four drinks" while waiting to assist the operator who had relieved him in handling trucks for a train that was due.

Under date of September 22, 1955, Claimant was served with the following notice:

"You are hereby notified to report to the office of the Trainmaster at Crewe, Virginia, at 10:00 a.m. Monday, September 26, 1955, for formal investigation in connection with your conduct and condition at Blackstone Station, night of September 17 and early morning of September 18, 1955. If you desire an employee representative or witnesses present you should arrange to have them present at the above mentioned place, time and date."

On September 26, 1955, the Carrier conducted a formal investigation at Crewe, Virginia. Claimant was present and permitted to testify, as well as to introduce evidence in his own behalf. The Carrier representatives testified as to what they had seen and done in the course of their investigation at Blackstone on September 17 and 18. The Claimant was represented by the Order of Railroad Telegraphers and all present were afforded opportunity to testify and to question other witnesses. The proceedings were stenographically recorded and transcribed. The transcript is a part of the record in this case.

On October 4, Claimant was advised of his dismissal from Carrier's service for violation of Rule "G" on September 17 and 18, 1955.

On October 5, a conference was held on the property. The General Chairman met with Superintendent Noell to protest Claimant's dismissal and to request reconsideration and reinstatement. No agreement was reached.

On October 6, Claimant's job was declared vacant and bulletined for bids.

On October 11, the claim was filed and handled in the usual manner on the property.

On December 2, 1955, the Carrier's highest officer designated to handle disputes of this nature on the property declined to give further consideration to the claim on the ground that a hearing had not been requested in accordance with the requirements of Article 12 (a) of the applicable agreement and that, therefore, the discipline imposed had been accepted by Claimant and the Organization.

The first issue before this Board is a jurisdictional question posed by the Carrier. It insists we are without authority to consider the claim because it was not properly processed on the property in that neither Claimant nor the Organization requested a hearing in accordance with Article 12 (a). That provision of the contract is as follows:

"(a) An employe disciplined or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written request is presented to his immediate superior within ten (10) days of the date of the advice of discipline, and the hearing shall be granted within ten (10) days thereafter."

It seems to us, and we so find, that Carrier's procedural objection has not been timely raised, and is without merit. Contractual provisions such as Article 12 are designed and agreed upon to provide employes with some

measure of protection against the imposition of discipline in an arbitrary manner. The protection is afforded by well-established methods whereby the person subject to discipline is given a hearing, the right to introduce evidence in his own behalf, to confront and question adverse witnesses, and to perfect and process an appeal to higher authority. The whole intent and purpose of Article 12 is to afford such protection, and such provisions must be liberally construed in favor of those for whose benefit they are designed.

We have gone to some lengths to describe the procedures followed in bringing this case here for decision because it is clear that first, as to due process, Claimant was afforded a hearing by the Carrier in the proceeding it insists upon calling an investigation and that proceeding, although initiated by the Carrier, satisfies the requirements of Article 12 (a); second, Carrier's failure to raise its objection in the first instance lends credence to the contention that it had in fact treated the investigation as a hearing, particularly since it entertained the appeal throughout the progress of the claim on the property without raising the objection until final decision by its highest authorized official; and third, Carrier's rights have in no way been infringed or prejudiced by Claimant's failure to invoke Article 12 (a).

We, therefore, hold that the objection is without merit and is overruled.

Proceeding now to the merits of the dispute, it is the Organization's position that the evidence of record does not support a dismissal for Rule "G" violation. The Carrier, on the other hand, insists that the evidence is sufficient to justify its action and that its decision was neither arbitrary nor capricious.

Rule "G" prohibits employes from using intoxicants when subject to duty or their possession or use while on duty.

Carrier's dismissal of the Claimant here is based upon violation of this rule the night of September 17 and morning of September 18.

We are aware of the rule of this Division that we do not resolve questions as to the credibility of witnesses or the weight to be given their testimony. This does not mean, however, that we are precluded from reviewing all the evidence of record to determine whether it supports the action taken. Our appellate function is necessarily limited and we should refrain from substituting our judgment for that of the Carrier in these disciplinary cases unless there is an abuse of discretion or substantial error.

From our review of the record in this case, one thing is clear. There is no evidence that Claimant was intoxicated **while on duty**. The hearsay statements attributed to the two policemen who observed Claimant shortly after 11:00 P.M. should not have been relied on by the Carrier and can not be considered here as evidence to support the charge that Claimant used intoxicants **while on duty**. There is no evidence substantiating that assumption. On the contrary, three witnesses testified that they observed Claimant while on duty on the night in question and found his condition normal. The relief operator also testified that when he relieved Claimant at 11:40 P.M. he found the transfer sheets, cash, etc., all in order and observed nothing unusual in Claimant's condition.

It is clear that Claimant became intoxicated after he went off duty and that he imbibed liquor on Company property while in an off-duty status. It was reasonable, perhaps, for Carrier's investigators to **assume** that Claimant had been drinking while on duty but the severe penalty of dismissal from

service should never be imposed on the basis of speculation and assumption or on hearsay. (See Awards 5030, 4427 and 4981.)

There being no evidence of probative value in this record to support a discharge based on a Rule "G" violation, the claim should be sustained as to clearing claimant's service record and his restoration to duty. However, in respect to the claim for compensation, the amount due for time lost shall be determined after deduction of claimant's earnings in other employment. (Third Division Awards 4325, 5787, 5821, 5835, 7173, 6614, 6074.) The objection to the set-off of outside earnings on the ground that it was first presented in argument is overruled because the record reveals that the subject matter was in dispute during the progress of the claim on the property.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1958.

DISSENT TO AWARD 8477, DOCKET TE-9037

The Opinion of the Majority errs by failing to give proper and due consideration to the least controversial evidence developed at the hearing as well as the significance and intent of Carrier's Rule "G".

This Claimant was called into a hearing to explain his "conduct and condition at Blackstone Station, night of September 17 and early morning of September 18, 1955" and after the hearing he was notified of his dismissal for having violated Rule "G" the "night of September 17th and early morning September 18th, 1955."

The Majority found that there was no evidence that Claimant was intoxicated while on duty and that there was no evidence that he used intoxicants while on duty. On this basis the claim was sustained. Assuming the Majority's findings in this respect were warranted, it only disposed of half the basis for which the Claimant was dismissed, i.e., his conduct and condition the "night of September 17th".

Claimant was also dismissed for his conduct and condition during the "early morning September 18th, 1955." In this respect the Majority found: **"It is clear that Claimant became intoxicated after he went off duty and that he imbibed liquor on Company property while in an off-duty status."** (Emphasis added.) This Claimant was assigned to work 4:00 P.M. to 12 Midnight and was paid accordingly, but the evidence was that he left the station, without permission, at 11:45 P.M., or fifteen minutes before he was to go off duty. According to Claimant's own testimony he returned around midnight and his presence there was unknown to the third trick Operator, who, at the time, was setting trucks for Train No. 15 which was due to arrive shortly. While the Opinion does not so indicate, the Claimant was found alone, at about 12:20 A.M., in the passenger station ticket office, by the Trainmaster, the Road Foreman of Engines, the Special Officer and the third trick Operator, in an intoxicated condition. This, just shortly prior to the arrival of Train No. 15, the Cavalier, one of Carrier's crack passenger trains. The evidence in this respect was conclusive and not contradicted in the least. Moreover, at the hearing the Claimant admitted having imbibed liquor on Company property and to being intoxicated on Company property, but only after he went off duty. According to the Majority finding, and it could be no less, the evidence developed at the hearing supported the fact that Claimant became intoxicated on Company property while imbibing liquor on Company property, but, because it appeared to have taken place while Claimant was in an off-duty status, it is obvious the Majority concludes it was not a violation of any Carrier rule or regulation. Such a conclusion is indefensible.

No Carrier, and this Carrier is no exception, can countenance, and this Board most certainly cannot condone, an employe imbibing liquor and becoming intoxicated, all on Company property, whether on or off duty. This would be particularly true here where the Claimant was found in the passenger station in an intoxicated condition at a time shortly before the arrival of one of Carrier's crack passenger trains. Such actions by an employe violate not only the spirit, but the intent of Carrier's rules and regulations. Nevertheless and however erroneous, by this Award this Board has placed its approval on such actions.

Even assuming the record did not contain sufficient evidence concerning Claimant's conduct and condition the night of September 17, the record definitely contained evidence, which the Majority has admitted, concerning the Claimant's conduct and condition during the early morning of September 18. That there was not sufficient evidence concerning Claimant's conduct and condition the night of September 17, in no way lessened the uncontradicted evidence concerning his conduct and condition the early morning of September 18. Where the record contains evidence, as here, to support disciplinary action, this Board is not warranted in substituting its judgment for that of the Carrier. (Award 6866—Parker) Further, this Board has consistently held that in assessing the measure of discipline, but not guilt, Carrier can take into consideration the employe's past record. (Award 6307—Wenke) Here, and without contradiction, the record contained evidence that the Claimant had been cautioned on prior occasions about his use of intoxicants. Under the circumstances Carrier's action was neither arbitrary nor capricious.

Carrier's action in this case was warranted even absent a specific rule violation (our Awards 6171—Wenke, 7139—Cluster and First Division Award 17047—Rogers) and most certainly this Board cannot construe Carrier's Rule "G" or any other Carrier rule or regulation as permitting and condoning an employe imbibing liquor and becoming intoxicated, all on Company property,

regardless of whether an employe is on or off duty. Such would be absurd and the Majority has committed serious error on that account.

A conclusion such as reached in this Award does a disservice to the industry and operates as a wholly unwarranted interference with Carrier's rights and responsibilities in discipline matters. For the reasons stated, we dissent.

/s/ C. P. Dugan

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp