

Award No. 11338

Docket No. SG-10706

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Union Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 33, when it dismissed Signal Foreman W. G. Miller from the service following an investigation held on July 22, 1957, at Los Angeles, California, at which he was charged with the violation of Rule 700 of the Maintenance of Way and Signal Rules dated July 1, 1954.

(b) The Carrier now be required to reinstate Signal Foreman W. G. Miller with all seniority, service, and vacation rights unimpaired, and to compensate him for all time lost. In view of the signed agreement dated February 11, 1958, between the General Chairman of the Brotherhood, G. R. Eldredge, and Chief Engineer J. A. Bunjer, of the Carrier, whereby it was agreed to reinstate Foreman W. G. Miller with seniority and vacation rights unimpaired, it is understood that this claim now involves only the compensation due Mr. Miller for all time lost from the date he was suspended until the date he returned to service as a result of the above-cited agreement. [Carrier's File A-10425]

OPINION OF BOARD: The issue in this case is whether Claimant W. G. Miller, Signal Foreman, is entitled to compensation for the period July 16, 1957 - February 16, 1958. On July 16, 1957 Miller, who had been employed continuously in the Signal Department since 1946 (as well as for two years in 1940-42) was withheld from service by Signal Supervisor A. C. Gale pending the outcome of an investigation concerning charges that on July 13 he had violated Rule 702 by being careless of himself or others and conducting himself in such a manner that the railroad would be subject to criticism and loss of good will. (This replaced a July 15 charge by Superintendent Gale that Miller had violated Rule G by using intoxicants.)

On July 22, 1957 Division Engineer J. M. Bates conducted a hearing at which testimony was offered by Miller and Gale. The employe was represented by Local Chairman E. L. Russell. Following the hearing, on July 26, Division Engineer Bates sent the following dismissal letter to Miller:

"Please refer to notice of investigation and hearing sent you under date of July 17, 1957.

Having carefully considered the evidence adduced at the hearing held July 22, 1957, I find that the following charges stated in the above mentioned notice have been sustained:

That you were careless of yourself or others . . . and did conduct yourself in such a manner that the railroad would be subject to criticism and loss of good will, in violation of Rule 700, Maintenance of Way & Signal Rules.

Therefore, you are discharged from the Company's service."

The dismissal was appealed on August 24, 1957. This, and subsequent appeals, were denied. However, on February 11, 1958 a partial settlement of the case was achieved when General Chairman G. R. Eldredge reached an agreement with Carrier Vice President M. S. Mason and Chief Engineer J. A. Bunjer. This settlement was described in Bunjer's February 11 letter to Eldredge:

"Referring to your letter of December 19 concerning the case of former Signal Foreman W. G. Miller who was removed from service for violation of Rule 700 on July 15, 1957:

After a thorough review of the file in this case, I am of the opinion the claim for reinstatement with pay is without merit and same is hereby declined for the same reasons indicated in Mr. Stratton's letter to you dated November 25, 1957.

However, as per our conference on February 10, I am agreeable to Mr. Miller's reinstatement at the present time with seniority and vacation rights unimpaired and with the understanding that such reinstatement is without prejudice to the claim for compensation now pending.

If this meets with your approval, will you please indicate in the space provided returning the original and three copies of this letter to me, retaining one copy for your file."

Miller returned to work on February 16. His claim was processed and submitted to this Board on July 28, 1958.

The Organization argues, in substance, as follows:

1. Rule 33(b) was violated by the Carrier in proceeding against Miller since it changed the charge under which he was tried on the day of the hearing. (The July 17 notice to Miller specified Rule 702 and at the hearing this was changed to Rule 700.) Rule 33(b) provides in part:

" . . . at least twenty-four hours prior to the time fixed for the hearing the employee will be apprised of the precise charge."

2. Rule 33(f) was violated by the Carrier because it failed to render a decision on the Organization's August 24, 1957 appeal within the prescribed 10 day period. (Local Chairman Russell's August 24 appeal was denied by Division Engineer F. G. Sherman on September 10, some seventeen days later.) Rule 33(f) provides, in part, with respect to appeals:

"If conference is not requested, decision will be rendered within ten calendar days from date of appeal."

3. There is no substantial evidence of record to support Carrier's conclusion that Miller violated Rule 700 which states:

"Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

The Carrier believes that the record of hearing contains sufficient evidence to support the finding that Miller's conduct was such as to subject it to criticism and loss of good will in the community. It also denies violating Rules 33(b) or 33(f). (Additionally, 33(f), according to Management, has been superseded by Article V which allows 60 days in which appeals may be denied.)

The Organization's procedural objections are without merit in our opinion. At the outset of the July 22, 1957 hearing, Presiding Officer Bates suggested that all mention of Rule 702 be stricken and Rule 700 substituted. There had been a typographical error, he stated. When asked if this would be satisfactory Claimant Miller replied in the affirmative. Local Chairman Russell said: "Yes, this is agreeable as stated, with the understanding that we came here to be investigated on Rule 702, but inasmuch as you have admitted it is a typographical error, it is agreeable that we stand on Rule 700." Thereupon Miller was asked, "In light of the foregoing . . . did you receive proper notice?"—to which Miller replied "Yes." Clearly, Miller and the Organization waived their right to object that Miller's 33(b) privileges had been abridged.

As for 33(f), regardless of whether this provision was superseded by Article V as Carrier believes, there is no evidence whatsoever that a claim of tardy denial was asserted or considered on the property. Hence, it is not properly before us.

What, then, of the charge against Miller?

The transcript of proceedings reveals:

1. On Monday, July 15, 1957, Signal Supervisor Gale testified, he was told by Barstow Special Officer Henry E. Martin that (a) around midnight, or shortly thereafter, on the previous Friday night, Martin found Miller sprawled out on the steps of the Harvey House at the Barstow depot; (b) Martin had extreme difficulty in arousing Miller or conversing with him; (c) this indicated to Martin that the employee was drunk; (d) Martin called the City Police and it took two officers to load Miller into the car for transportation to the City Jail; (e) the City Police told Martin they had booked Miller under Ordinance No. 4 as drunk but at 9:29 A. M. Miller posted \$20.00 bail, was released, and thus forfeited bail. Gale also testified that Martin had told him that Miller, when aroused, had acted in an intoxicated condition and could have wandered, on arising, onto railroad tracks and endangered his life and possibly the lives of others. Martin further informed Gale that they did not tolerate sleeping on depot platforms or stairs.

2. A July 16, 1957 letter from District Special Agent C. W. Biggs to Management, introduced in evidence at the hearing, states that, according to

a report from Special Agent Martin, Miller was found "asleep and passed out on the Harvey House platform." Martin's actual report, quoted in Biggs' letter, stated:

"Subject was observed by the undersigned (Martin) sleeping or passed out on the Harvey House platform. Unable to wake up and when he did wake up it was necessary to carry him to car for transportation to City Police Station. Arrested and charged with City No. 4 (Drunk)."

3. Miller testified substantially as follows: (1) Prior to going to the Depot on the night of July 12 he walked around for at least 45 minutes and had some coffee and a sandwich at a cafe; (2) He fell asleep at the Depot (after a week of restless nights in a bunk car during the hot, summer desert weather, Miller asserts, a man becomes exhausted from lack of sleep); (3) He was positively not intoxicated; (4) He walked to the police car and entered it as directed by the Police Officers; (5) He was set to stand trial (no tests whatsoever were given to determine if he had been drinking), but, since that would have probably been a long drawn-out affair, he decided the easiest way was to forfeit bail and forget about it.

On the basis of this information did Management have any justification for finding Miller guilty of a Rule 700 violation and, in effect, suspending him from service for seven months? We think not.

At the outset it should be recalled that Carrier's original charge against Miller was placed on July 15 and alleged that the employe had been "using intoxicants constituting the violation of Rule G." But this charge was withdrawn after Supervisor Gale received Special Agent Biggs' July 16 report. This fact is underscored by the following statements of Presiding Officer Bates, made at the hearing:

—"We are not investigating under Rule G . . ."

—"I am not contending he was drunk nor is Mr. Gale."

—"We are not charging drunkenness."

In other words, Miller was not charged, tried, or convicted of using intoxicants. Under the circumstances it would be manifestly unfair and improper to consider evidence or testimony involving alleged intoxication. This would rule out Gale's testimony that Martin told him he thought Miller's difficulty in carrying on a conversation "indicated he was drunk" and that Miller "acted in an intoxicated condition." It would also rule out the references to Miller having "passed out" which, obviously, implies passing out from indulgence in alcoholic refreshment. (In any event, the only written report of the incident indicates that Miller was observed sleeping or passed out—not and passed out.) Finally, withdrawal of the Rule G charge means that little weight can be accorded the fact that Miller was booked on a City Drunkenness Ordinance charge. He was not tried for that alleged offense and his forfeiture of \$20.00 bail cannot be automatically translated into a confession of guilt.

The only charge with which we can be concerned, then, is that Miller (1) was careless of himself or others, (2) conducted himself in such a manner that the railroad would be subject to criticism and loss of good will. There is strong indication in the record that Management's decision on this charge was reached even before the hearing was concluded. Witness these remarks by the Presiding Officer:

—“... But if you are thrown in jail you are certainly violating that part of Rule 700 saying that employees will not be retained in the service who are careless of the safety of themselves or others . . .”

—“... If I were thrown in jail and felt it was unjustified I would make sure that I would get the money back and the record cleared. Mr. Russell, I think you would too.”

—“We are not charging drunkenness. He was arrested and had to have a Special Officer take him from the Depot to the jail and booked. It is part of the record. Then he forfeited bail. All of this is violation of Rule 700. Do you agree?”

—“He has violated Rule 700, not Rule G, acting in a manner unbecoming to employees.”

Be that as it may, there was no persuasive evidence or testimony at Miller's hearing to demonstrate that he was “careless of himself or others.” When the intoxication charge is removed, we have left only the fact that he was fast asleep, at about Midnight, either on the steps of the Harvey House (as Martin told Gale in conversation) or on the platform (as Martin wrote in his report). The Special Agent's conclusion (reported by Supervisor Gale) that, on arising, Miller could have wandered onto the tracks was pure speculation based, incidentally, directly on Martin's conclusion that the employe was intoxicated.

As for conduct which would subject the railroad to criticism or loss of good will, there are, essentially, two important allegations: (1) Miller was asleep; (2) He acted obstreperously when aroused. While it may not be the best of manners to fall asleep at the Harvey House in Barstow, when we consider the time (Midnight), and the circumstances (end of the week, hot weather, fatigue, off duty, time to kill before arrival of the train home) it is unreasonable to believe that Miller's slumber could have subjected the Carrier to criticism. (Moreover, there is no evidence that anyone—aside from the Special Officer—was even around.)

Finally, then, there is the question of Miller's behavior when aroused. The evidence is conflicting. Miller denies that he was forcibly removed and says he walked to the police car. Special Officer Martin reported that it was necessary to carry Miller to the car. Unfortunately Martin did not testify nor was his actual statement introduced at the hearing (it appeared by virtue of the fact that it was quoted in a report from Special Agent Biggs which was read into the record). Even this terse written report of Martin contains some perplexing statements; i.e. “Unable to wake up and when he did wake up . . .”

Significantly, however, when Miller stated at the hearing, “I might say that I did not have to be forcibly removed. That is definitely an error on somebody's part,” Presiding Officer Bates replied, “They took you to the jail in a car; that is being forcibly removed. I didn't mean fighting necessarily. I mean being taken to the jail.” It is apparent from this comment that Management was more disturbed by the fact that its employe had been removed to jail than by the possibility that he had acted improperly when aroused. It is common knowledge, moreover, that when a person is violently awakened from a deep or profound sleep, particularly in a foreign place, he may react strangely for a short while until he gathers his senses together. Whether this was the reason for Miller's behavior we cannot say, but even had his actions been as obstreperous as Management claims, they hardly warranted a suspension of seven months. And if, as seems likely, Management's principal complaint was

that Miller had been taken to jail for a few hours, certainly that fact alone is not reasonable grounds for severe discipline.

Under all the circumstances, this claim will be sustained since Management's decision was arbitrary and without reasonable foundation. In accordance with the provisions of Rule 36(f), Miller should be "compensated for the difference between amount actually earned and the amount lost in regular assignment" during the period July 16, 1957 - February 16, 1958.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim sustained. W. G. Miller shall be compensated for the difference between amount actually earned and the amount lost in regular assignment during the period July 16, 1957 - February 16, 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.