NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19732
THIRD DIVISION Docket Number MW-19797

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Illinois Central Railroad Company

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

(1) The Carrier violated the Agreement when it dismissed Section Foreman D. A. Tyson as of March 5, 1971 (following suspension on January 9, 1971) on the basis of a hearing that was not fair or impartial and on the basis of unproven charges (System File LA-99-F-71/Case No. 765 MofW).

(2) Section Foreman D. A. Tyson be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered subsequent to January 9, 1971 in accordance with Rule 25(i).

OPINION OF BOARD: Claimant, Mr. D. A. Tyson, a Section Foreman, was suspended on January 9, 1971 and subsequently dismissed from service on March 5, 1971 following a hearing to determine his responsibility for "allegedly being in an intoxicated condition on the morning of January 9, 1971, between the hours of 7:00 A.M. and Noon." On Friday, January 8, 1971, claimant and his gang were performing work in connection with a derailment which had occurred at the Carrier's Baton Rouge Yard. Carrier decided to defer the unfinished portion of this work until 7:00 A.M. the following morning. Upon receipt of this advice, claimant is alleged to have informed the Supervisor of Track that he would not be present the following day because he had to arrange for the repair of his automobile but that his Assistant Foreman, Mr. J. Dyer, would supervise the work of the section gang on January 9. When claimant went off duty at approximately 11:50 P.M. on January 8, he allegedly instructed Mr. Dyer accordingly.

Claimant did not report for work at 7:00 A.M. on January 9. Later that morning, at approximately 9:30 A.M. claimant was observed by the Supervisor at the tool house and, in the opinion of the Supervisor, appeared to be intoxicated. The Supervisor then secured a witness, Assistant Superintendent Moyers, returned to the tool house and advised claimant that he was "pulled out of service pending investigation for being drunk on duty." Claimant was removed from the property and driven home by Police Lieutenant Elmore due to the fact that he was alleged to be too intoxicated to drive. Later that same day the claimant returned to the property, having been driven there by another person, refused to relinquish the company time book he had in his possession and then left the property.

A review of the transcript of the hearing shows that, among others, the witnesses to the claimant's condition were the Assistant Superintendent, the Track Supervisor, the Shop Foreman, and the Police Lieutenant, each of whom testified that claimant was intoxicated. These assertions were denied by claimant. Further, testimony by the Assistant Superintendent given at the hearing indicates that claimant was advised that arrangements would be made to give him a blood test to determine whether he was intoxicated and claimant stated that he would not submit to such a test.

Part and parcel of the Carrier's allegations is that claimant was on duty at the time of the incident in question. There is conflicting testimony in the transcript of the hearing on this point. The Supervisor of Track stated that he did not recall claimant saying anything to him the evening of January 8 about absenting himself the following day so that he could have his car repaired. On the contrary, the Supervisor testified that he had told claimant to report back to work at 7:00 A.M. on the day in question. Claimant, on the other hand, stated at the hearing that he told the Supervisor of Track that he would not be able to report at 7:00 A.M. on January 9 and that the Supervisor replied "Al-right." Claimant then testified that when he relieved himself from duty the night of January 8 he told his Assistant Foreman and one of his section laborers that he would not be at work at 7:00 A.M. the following day. None of claimant's witnesses heard the conversation between claimant and the Supervisor of Track regarding his intended absence during the day in question. However, there is no disagreement that claimant was on company property at the time he is alleged to have been intoxicated.

In further support of its position, Petitioner challenged the propriety of the hearing officer allowing the insertion into the transcript of the claimant's past record over the objection of the claimant's representative. The transcript reveals the following statement made by the hearing officer:

> "Mr. Tyson, in the notice of investigation I stated that your personal record would be reviewed. I want the record to show that you are not being tried on this record but it is merely being entered in the transcript for the benefit of anyone who might read or use this transcript."

Insofar as this contention of Petitioner is concerned, Award No. 13308 stated, in part, "* * * * *the Carrier was careful to point out at the trial that it was offering the Claimant's previous discipline record only for the purpose of 'determining the degree of discipline to be imposed'. It has been repeatedly held by this Board that for such a limited purpose the past record of a Claimant can be appropriately considered. See e.g. Awards 5821 (Guthrie), 9511 (Elkouri), 12127 (Dolnick), 13063 (Engelstein)." We concur in this rationale and do not find that the introduction of the employee's pest record precluded a fair and impartial hearing.

The Board further finds that the evidence is convincing that the claimant was under the influence of alcoholic intoxicants on the morning of January 9, 1971, notwithstanding claimant's statements to the contrary. This Board has held on many previous occasions that it is not our province to weigh conflicting evidence where there is valid and sufficient evidence to support Carrier's action. Additionally, Award No. 16168 stated, in part:

> "If, as in this dispute, there be a conflict in the testimony adduced, it is the function of the trier of facts and not the function of this Board to resolve such conflict."

Award No. 19310 stared, in part:

> "We do not weigh the evidence de novo. If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

After a careful review of the record the Board has seen no evidence to support claimant's assertion that the Carrier did not conduct a fair or impartial investigation or that the finding was not based upon substantial evidence.

Finally, Petitioner asserted in its submission to the Board that claimant was not on duty on the date in question and therefore the provisions of Rule 8 of the Maintenance of Way and Structures Department (prohibition against use of intoxicants) did not apply, and, consequently, the Carrier's action in dismissing the claimant was improper.

As previously stated herein, there is no disagreement that claimant was on company property at the time of the occurrence in question in this case. Nor is there any apparent disagreement that an employee on company property is subject to company rules. However, the record is not clear as to claimant's duty status on the day in question. The record, in fact, fails to establish that claimant was under pay on January 9 and, therefore, we must assume that claimant was not on duty as alleged by the Carrier. Throughout the record of the proceedings in this case the Carrier alleged that claimant was on duty and yet no evidence was introduced to support this allegation other than the conflicting testimony in the transcript as to the conversation between claimant and the Supervisor of Track the evening of January 8, to which there were no witnesses. The claimant's work is not at issue in this case.

Further, a careful review of claimant's past record shows that during his more than twenty one years of employment with the Carrier, the past seventeen years as Foreman, he was disciplined on only one other occasion, other than a reprimand for not wearing safety shoes. While the Board does not condone intoxication, and considers the offense sufficiently serious to justify discipline, we believe that in this particular case, and based upon the record before us, claimant's dismissal from the service is excessive. Claimant has already been punished by the penalty of about twenty-six months of unpaidabsence from his job.

On the basis of all the evidence the Board feels that the claimant should be restored to service with all rights unimpaired but without monetary compensation for time lost.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 penalty of discharge was too severe.

A W A R D

The claimant should be restored to service with all rights unimpaired but without compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. H. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1973.