

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19977
Docket Number CL-19941

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(**Freight** Handlers., **Express** and Station Employees

PARTIES TO DISPUTE: (

(George **P.** Baker, Richard **C.** Bond, **Jervis Langdon**, Jr.,
(and Willard **Wirtz**, Trustees of the Property of
(Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7224)
that:

(a) The Carrier violated The Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on-D. R. Cortrecht, Chief Crew Dispatcher, Avon Yard, Indianapolis, Indiana, Southern Region, Indiana Division.

(b) Claimant D. R. Cortrecht's record be cleared of the charges brought against him.

(c) Claimant D. R. Cortrecht be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained during the period out of service, plus interest at 6% per annum compounded daily.

OPINION OF BOARD: Claimant was terminated for an alleged violation of Rule "G" which states:

"The use of alcoholic beverages, intoxicants or narcotics by **employees** subject to duty is prohibited. Being under the influence of alcoholic beverages, intoxicants while on duty, or their use or possession while an duty is prohibited."

The Organization suggests that Rule "G" appears in a Book of Rules to which Claimant was not subject, and urges that if the Claimant were to be accused **of** improper use of intoxicants, he should have been charged under Rule 10 of the "General Rules for Employees not Otherwise Subject to the Rules for Conducting Transportation."

A review of prior Awards of this Board indicates that Rule "G", by **common** usage, is an all-inclusive term referring to any rule dealing with use or possession of intoxicants. At the investigation, the Claimant stated that he understood that Rule "G" prohibited him from drinking while on duty. In any event, the Board rejects the Organization's procedural objection in this case because a review of the record shows that the issue was not raised at the investigation, or while the matter was being considered on the property. See Awards 14444 (Dolnick), 16170 (Perelson) and 17241 (Yagoda).

The Organization also contends that the investigation procedures were prejudicial to the Claimant because the decision to terminate was rendered by an individual other than the Hearing Officer. This contention was not raised while the matter was being considered on the property and accordingly, the Organization's objection must be dismissed. Awards 16348 (**McGovern**) and 19590 (**Blackwell**). See also Awards 14021 (**Coburn**) and 17965 (**Devine**).

Concerning the merits, the Organization notes that the Claimant played golf on the day preceding the incident (his day off) and then responded to a call to work overtime. It is suggested that his physically active day resulted in an explainable fatigue, etc., and that the determination to discharge the Claimant was based upon surmise, suspicion and circumstantial evidence, rather than direct evidence that the Claimant was in violation of Rule "G". In support of its contention, the Organization cites a number of sustaining Awards. We have reviewed those Awards in detail, but note that each turned on the quantum and quality of proof submitted in the individual case. Certainly, if the evidence of record fails to support a Carrier's burden, a claim is sustainable; but a thorough review of the evidence of record presented in this dispute fails to demonstrate that Carrier's action was dictated by surmise and/or suspicion; nor is the evidence circumstantial.

As noted above, Claimant played golf on one of his regular rest days - when he was not subject to duty. Upon completion of his golf game, he consumed three or four beers and three or four "shots" of whiskey before returning to his home. At or about 8:30 p.m., he received a telephone call requesting him to report to work for a "third-trick assignment." He states that he immediately went to bed, and reported for work at about 2:30 a.m. Shortly after 5:30 a.m., Claimant was removed from service, allegedly in violation of Rule "G".

The Claimant denies that he consumed any intoxicants while on duty. While the Carrier speculates that he did so, the evidence of record fails to support any such assertion. However, the record does contain testimony of four witnesses who observed the Claimant while on duty. Their testimony indicated slurred speech, slow action, glassy and bloodshot eyes, somewhat disheveled appearance, use of profanity, repetition in performing seemingly routine duties, minute concern for detail, and an odor of alcoholic beverage. Although there is no testimony to suggest that the Claimant staggered, the evidence indicated that he remained seated during the discussions which led to the conclusion that he was under the influence of intoxicants. At the time Claimant was removed from service (~~with~~ knowledge of the reason), he was advised that he could take a test of any sort (blood test: breatholators, etc.). Claimant declined. The witnesses, who had observed Claimant on other occasions, clearly felt that he was under the influence of alcoholic beverage and/or intoxicants on the day in question. Surely, laymen are competent to testify as to outward manifestations and physical actions and activities, and conclusions of intoxication have been sustained in this, and in other forums, based upon lay testimony. See Awards 15574 (**Ives**) and 19590 (**Blackwell**).

Awards 15574 (Ives) and 19396 (O'Brien) denied claims considering evidence quite similar to that under consideration here. See also Award 15714 (Engelstein).

The Organization states that the fact that Claimant was called to duty on a day off is significant to our determination. It asserts that Claimant ~~was~~ under a "compulsion" to respond affirmatively to a call in, because he would be subject to disciplinary action if he failed to do so. Both parties have speculated concerning a "requirement" to report for **duty** when called on a day off. However, a thorough scrutiny of the record, as established and prosecuted on the property, fails to demonstrate that such an issue was discussed or considered prior to submission to the Board. While such a "requirement" would raise certain issues, nonetheless, this Board may not indulge in speculation, and absent any showing to the contrary, we must presume that Claimant was not required to report for work if his condition precluded him from **adequately** performing his duties.

The Carrier does not suggest that Claimant did not have a personal right to consume alcoholic beverages during off-duty hours, nor does it seek to discipline him for that. The discipline is for reporting to work and being on duty while in an intoxicated condition. Upon the entire record, the Board is of the view that the Carrier's determination is based upon substantial and credible evidence and that there is no valid basis here for attempting to substitute our judgment for the disciplinary action taken by the Carrier. Accordingly, the claim must be denied.

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 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.