

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20099  
Docket Number MU-20283

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**  
(Southern Pacific Transportation Company  
(Pacific Lines)

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

(1) The dismissal of Extra Gang Foreman Charles Gutierrez was arbitrary, excessive and based on unsupported and unproven charges (System File 011-181 **(G)**).

(2) Mr. Charles Gutierrez be reinstated to his foreman's position and that he shall be paid for loss of compensation suffered until he is restored to his former position with seniority and vacation rights unimpaired.

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier for being under the influence of intoxicants during his tour of duty, and for using alcoholic beverages while subject to duty in violation of Rule G:

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

Claimant contends that the investigation procedures were prejudicial in two manners. Initially, he cites the fact that the decision to terminate was rendered by an individual other than the Hearing Officer. While there is conflicting authority on this subject, it is noted that this **contention** was not raised while the matter was being considered on the property and accordingly, the objection must be dismissed. See Award of this Referee in Docket **Number** CL-19941, citing Awards 16348 (McGovern) 19590 (**Blackwell**) 14021 (**Coburn**) and 17965 (**Devine**).

Secondly, Claimant suggests that his procedural rights were prejudiced because, at the investigation, two Carrier witnesses were allowed to read lengthy prepared statements into the record, whereas Claimant, and his witnesses, were interrogated without benefit of prepared statements, and neither Carrier witness testified in rebuttal to the Claimant's witnesses. In this regard, we have reviewed Second Division Award 6463 (Bergman). There, written testimony of three witnesses was read into the record (although the witnesses were present) and the only oral testimony at the hearing was by Claimant. The witnesses failed to deny Claimant's version which was at wide **variance** with the prepared statements. We do not feel that the cited Award controls in this case. Here, the two witnesses read prepared statements, but were further questioned by the Hearing Officer on material items. The Claimant's Representative's

cross **examination** of one witness consumed 3  $\frac{1}{2}$  pages of the transcript of investigation **and** his cross examination of the other witness consumed 4 pages. Based upon the charges, and Claimant's testimony, a failure to rebut is not considered fatal. In short, the factors which appear to have motivated the decision in Award 6463, are not in issue in this dispute. While utilization of prepared statements when the witnesses are present and available to testify may not be the better procedure to follow, we cannot conclude, under this record, that Claimant's rights were prejudiced thereby.

A good portion of the disputed testimony adduced at the investigation concerned itself with whether or not Claimant consumed any alcoholic beverages while on duty. However, the investigation clearly confirmed that the Claimant did consume alcoholic **beverages** while subject to duty and that he appeared under the influence of intoxicants during his tour of duty.

Two Carrier officials stated that there was a strong odor of alcohol on Claimant's breath; that his eyes were glassy and bloodshot, his speech slurred, and his **enunciation** was thick. Further, they both testified that Claimant admitted to them that he had consumed two "stiff" **rum** and orange juices at breakfast and had **drunk** two beers approximately fifteen minutes prior to his reporting time. This consumption was motivated by some drinking the preceding evening at a reunion of sorts.

**At** the investigation, Claimant denied drinking the beers **immediately** prior to reporting for work, but rather, stated that he had stopped at a bar to drink two bottles of "**Calso** Water" to settle his stomach. However, he did admit to having "**....** a couple of shots with eggs in the morning."

Claimant reported for work at 8:00 A.M. on the day in question. Certainly, he was subject to duty when he ate his breakfast, and by his own admission, he violated Rule **G**.

Upon the entire record, the Board finds that none of Claimant's substantive procedural rights were violated in any manner. Substantial and credible evidence was presented at the investigation, including Claimant's own statements, to support the charges against him.

Concerning the quantum of punishment, the Organization urges that dismissal was excessive under the circumstances. In this regard, we note that the Carrier considered "**...difficulties** experienced with him (Claimant) in a similar regard before **...**". The Organization properly points out that an employee's past work record may not be considered in determining guilt of the charges brought against him, but there is no evidence of record to suggest that such was the case here. However, this Board has repeatedly determined that a Carrier may, and should, consider a personnel record in assessing the amount of discipline to be imposed. In its "Reply and Rebuttal" to Carriers

Initial Submission, the Organization states that copies of certain documents in Claimant's record were not sent to Claimant or his representatives, nor were they notified that such entries would be placed in his record. However, we note that on February 7, 1973, while the matter was under consideration on the property, the Carrier discussed with the Organization "prior difficulties of a similar nature." That conference was confirmed in writing on February 12, 1973. Thereafter, the Organization submitted two (2) additional letters to Carrier regarding Claimant's status (March 5, 1973 and March 19, 1973). The Organization failed to raise any issue concerning either the Carrier's consideration of the personnel record, or a lack of knowledge that prior incidents (dealing with four warnings concerning Rule G from 1970 through 1972) were in Claimant's record. The failure to raise appropriate objections on the property, even though there was time and opportunity to do so, precludes this Board from issuing a finding that the Carrier acted improperly when it considered the personnel record of Claimant while the quantum of punishment was under consideration.

This Board will not disturb an assessed penalty unless it finds that Carrier's decision was so unjust, unreasonable, arbitrary, capricious or discriminatory so as to amount to an abuse of discretion. Award 19433 (**Blackwell**). We are unable to make such a finding in this case. The claim will 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: *W. B. Paul*  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1974.