NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20254
THIRD DIVISION Docket Number CL-20123

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and station Employes
(George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CUM: Claim of the System Committee of the Brotherhood (CL-72531 that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on L. M. Cooper, Clerk, West Breakwater Yard, Cleveland, Ohio, Lake Division, Western Region.

(b) Claimant L. M. Cooper's record be cleared of the charges brought against him on May 15, 1972.

(c) Claimant L. M. Cooper 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: This is a discipline case in which claimant was held out of service pending the investigation hearing and thereafter was dismissed from service. The Organization hen raised the following objections: That claimant was held out of service for violation of Rule G which is not a rule contained in the Clerks' Agreement nor was this the offense with which he was charged for the purpose of hearing; that the notice for the hearing did not clearly specify the exact offense with which the claimant was charged; that the hearing was not conducted fairly and impartially; that the discipline was excessive.

A careful review of the transcript of the testimony (referred to as "Tr.") revealed the following relevant and material facts:

The notice of the hearing informed claimant that he was entitled to representation and to present witnesses to testify in his behalf. It charged claimant with, "Playing cards and gambling while on duty and having in your possession a can of beer and the odor of beer on your person approximately 3:50 A.M., May 13, 1972, West Breakwater Yard Office, Cleveland, Ohio, while working Clerical assignment G-197." The hearing scheduled for May 19, was postponed to May 26 upon the written request of claimant who also requested in writing that

four named employes be present as witnesses. The hearing was further postponed to June 2 at the written request of the Division Chairman. On June 2, the requested witnesses for the claimant were present and also the Division Chairman was present to represent claimant. Claimant stated that he was ready to proceed, Tr. p.l-5.

As to the notice for the hearing, we find that the charge is precise and specific in stating the offenses alleged, the time when and the place where the alleged acts occurred. The request for witnesses indicates that claimant was fully informed. The postponements provided adequate time to be prepared and to be represented. Claimant was ready to proceed. That the notice was adequate is supported by numerous Awards of this Division as expressed in Awards 18606 and 18872.

Further reading of the transcript disclosed the following material and relevant testimony:

Claimant testified that he removed himself from the property when instructed to do so, Tr.p.7. He testified that at approximately 3:50 A.M., he came downstairs, sat at a bench by the table, the only available seat in the room, was conversing with trainmen and enginemen present. One of the brakemen was going to get food and claimant took out some money to give him to bring back food. Claimant denied that he played cards, gambled, possessed a can of beer or that the odor of beer was on his person. Claimant testified that there were cards in the middle of the desk where he was sitting but none in front of him; that he did not observe any beer on the table and to his knowledge there was no money on the table but that there was money in his hand to purchase food, Tr.p.8,9.

The Terminal Superintendent testified that he entered the room at approximately 3:50 A.M., saw four men seated at the table, cards and money on the table in front of each man and money in the center of the table. When entering the room he observed claimant with a green can in his hand which he placed under the desk. The Superintendent picked up the can and found it to be a can of Rolling Rock beer. He ascertained that claimant was on duty; asked him if he had been drinking. When claimant said, "no", the Superintendent asked claimant to blow his breath in face of Superintendent who detected

odor of beer on claimant's breath. There were also two decks of cards on the side of the desk. The money in front of claimant was change and dollars. It appeared to be a large amount of money, more than a couple of dollars, nicely stacked. The green can was half full. There was an empty can of the same brand of beer under the table, a half full can on the bench on the opposite side of the table and an empty can in the window. The Superintendent did not see claimant or any other employe drinking and none of the employes other than claimant had a can in his possession. The Superintendent checked the breath of the three other employes seated at the table but did not detect the odor of beer on their breath. He also testified that the half full can of beer he saw claimant holding was cold. The money was still on the table when the Superintendent left the room. When the Superintendent entered the room, he was accompanied by the Trainmaster who was behind him, Tr.p.9-11. In the Superintendents opinion, claimant was not intoxicated but was gambling, although he did not see money change hands, cards being handled, or bets being made, Tr. p.13. Rule 6-A-1A was read into the record as follows: "An employe who has been in the service more than 60 days--shall not be disciplined or dismissed without a fair and impartial investigation. He may, however, be held out of service pending such investigation only if his retention in service could be detrimental to himself, another person, or the company."

A trainman called as witness for the claimant testified that he was in the room at approximately 3:50 A.M. when he saw the Superintendent enter with the Trainmaster. He did not observe claimant playing cards or gambling, was seated next to claimant and talked with him but did not detect odor of beer on claimant's breath. He testified that the Superintendent was the only man in possession of can of beer when he picked up the can of Rolling Rock from under the table. No money was in center of table but money was present, being given to him to buy food. It was conceded for the record at this time thst claimant had worked for Carrier approximately seven years and his record was clear. There were cards on the table in the Left corner, Tr.p.25-30.

The Trainmaster testified that he entered the room at approximately 3:50 A.M. behind the Superintendent. He observed four men sitting at the table with cards and money in front of them and money in the center of the table. There was money in front of claimant in a neat stack definitely more than one or two dollars; there was a hand of cards face up in front of claimant a little to the right of the money and a deck of cards face down to the right of claimant. He did not see a can in claimant's hand when he entered behind the Superintendent but claimant's right hand was out of sight, "in a motion like he was reaching to the floor." The witness saw the Superintendent pick up a can of beer from the floor where claimant's right hand had been. The can

was open and partly consumed. The Superintendent also picked up an empty can. The partly empty can was cold. The brand name of the beer, on the can, was Rolling Rock. There was also a partially consumed can sitting on the bench across the table from claimant and one empty can on the window sill. When the witness smelled claimant's breath a little Later, he detected the odor of beer. The Trainmaster gave *claimant* the suspension notice at 4:15 *A.M.* in accordance with Carrier's instructions, "to remove from service employes found with possession or use of alcoholic beverages, pending investigation." He observed the Superintendent smell the breath of each of the four men sitting at the table including claimant. *This* witness prepared the notice. The money was still on the table when he Left the building, Tr.p.30-33. The trainmaster did not think that claimant was intoxicated. Claimant was removed from service because he had, "the odor of beer on his parson, smelled on his breath." The witness testified that he smelled the half empty can of Rolling Rock found on the floor next to claimant and it was beer, Tr.p.37-39.

At the completion of the trainmaster's testimony the hearing had been in session for eight hours. At 6:30 P.M. all present consented to recess the hearing until June 5, at 9:30 A.M.

An engineer testified for claimant that he was in the room at 3:50 A.M. when the two Carrier officials entered. He did not see claimant with playing cards in his hands, with a can of beer in his hand, gambling, drinking beer and did not smell the odor of beer on claimants breath. He testified further that he saw the Superintendent retrieve two cans of Rolling Rock Beer from under the table; that there were cards on the table but not in front of the seated men; that there was some money on the table, one man had money in front of him and another had money in his hand. This witness testified that there were men seated at the table including claimant, Tr.41-43.

The next witness for claimant was a conductor who testified that he was in the room at 3:50 A.M. when the two Carrier officials entered but that he left the room 10 minutes Later. He testified that he did not see claimant playing cards, having a can of beer on his person, gambling or smell the odor of beer on claimants breath. He further testified that he saw four men seated at the table and saw cards on corner of desk that had been there since "we" went to work. This witness testified also that he saw money on the desk, "everybody had money out", different guys were ordering sandwiches and change was being made. He saw the Superintendent retrieve one can of beer from under the table but didn't know exactly where he got it and didn't know that it was beer, Tr.p.43-45.

The next witness for claimant was a trainman who was in the roam at approximately 3:S0 A.M. but was Leaving when he met the two

Carrier officials in the hallway. He returned to the room. He testified that while he was in the room there were some cards laying on the table and did not see any money at all. He wasn't sure how many men were seated at the table. He didn't see any beer and saw the Superintendent pull some empty cans out of a desk drawer not from under the table. These cans were folded in half. He did not see Claimant drink beer, play cards, gamble, hold a can of beer, and stated that claimant was not intoxicated, Tr.p.45,46.

The final witness for claimant was an engineman who testified that he was in the room prior to 3:50 A.M. but not while the Carrier officials were in the room. While in the room prior to 3:50 A.M., claimant was present. The witness did not see claimant play cards, gamble, with a can of beer in his hand, and did not smell beer on claimant, Tr.p.47.

Claimant was recalled and testified that he saw the Superintendent retrieve, "two cans, green in color, from underneath the desk of which I was seated. As to what the contents of the cans were I do not know." He also testified that the Superintendent smelled his breath and 15 to 20 minutes later the Trainmaster smelled his breath, Tr.p.48.

At the conclusion of the hearing, claimant stated that the hearing was not conducted in a fair and impartial manner because he was not guilty and that made the hearing unfair. He also stated that he had answered all questions in his own words, Tr.p.SO.

The transcript also contains argument made by claimant's representative at many points throughout the hearing. What came through Loud and clear from the argument is that the other employes at the table went through investigation hearings at which they were not charged with drinking beer, were disciplined but not dismissed. Claimant's representative insisted that this was discrimination. The Terminal Superintendent answered by testifying that others were not charged with drinking or possessing beer because he did not see them holding a beer can and did not smell the odor of beer on their breath.

Careful examination of the entire transcript makes it clear that the hearing was conducted in a fair and impartial manner. Every opportunity was afforded claimant to tell his story, present witnesses who answered questions and volunteered answers freely and in their own words. Claimant's representative had wide Latitude in making statements, offering opinions, arguing the effect of evidence while witnesses were testifying, and in questioning all the witnesses. It was not a denial of due process when the hearing officer would not allow in this hearing the transcript of hearings regarding the other employes who were involved. Those men were present and subject to questioning by claimant's representative. No prejudice resulted to

claimant because his representative's statements regarding the other hearings were permitted to stand in the record. It also was not denial of due process when the hearing officer objected to questioning by claimant's representative when the questions became repetitious or argumentative.

We agree with the contention that claimant should not have been held out of service. It is our opinion that Carrier's instructions that employes observed to be in possession or use of alcoholic beverage be immediately held out of service is not applicable to this specific situation. However, this would not give the claimant a License to possess or to drink alcoholic beverage at any time or place related to his work. As a general rule, claimant could have been held out of service if he was judged to be unfit for his work. Under Rule 6-A-lA, claimant could have been held out of service if it was demonstrated that his retention in service could be detrimental to himself, another person, or the Company. There was no testimony or evidence to support the conclusion that detriment would result. On the contrary the testimony indicates that a judgment decision was not made, only that Carrier's instruction was carried out. Rule 6-A-lA suggests that evidence should be presented upon which a judgment may be made. Holding a can of beer and odor of beer on the claimant's breath but no evidence of intoxication does not tell us enough. What was there that indicated to the Carrier's officials that it would be detrimental for the claimant to return to his work? The record does not say anything on this point.

We observed from the testimony that there is conflict between the testimony of the Carrier's witnesses and the testimony of claimant and his witnesses. In fact, there was conflict in the testimony of the claimant's witnesses on several issues.

Many prior Awards have covered this subject. Award 13356 stated that credibility of witnesses and weight to be given their testimony is for the hearing officer. Also more witnesses on one side than on the other is not, by itself, sufficient to require this Division to disturb the finding unless we judge the finding to be arbitrary and capricious. This policy is stated in Award 16265. Award 16354 in following this policy, also stated that the Board acts as an Appellate forum and does not weigh the evidence or judge the credibility of witnesses . In addition, it was stated that if the evidence is sufficiently substantial, it cannot be said that the Carrier was arbitrary, capricious or acting in bad faith. A more recent Award 19747 repeated that we cannot resolve credibility issues. It added that, once the testimony of Carrier's witnesses, "is credited and claimant's is not, the weight of the evidence clearly supports that Carrier's conclusion of the guilt of the Claimant." Award 19928 repeated the same opinion with reference to conflicts in testimony.

Prior Awards considered the sufficiency of the evidence. These Awards, however, also follow the Board's policy with regard to conflicting testimony. We have reviewed Awards 13613, 19522, 19744 on this point.

Following the well established policy, we have determined that the decision of the Carrier was based on evidence sufficient to overcome the possibility that the decision was arbitrary, capricious or made in bad faith.

We are concerned, however, with the degree of the discipline in view of the employe's clear record during seven years of employment and the nature of his work. In this regard we are persuaded by the reasoning found in Award 8431. On page 2 of that Award: "(3) A Carrier's disciplinary decision is unreasonable, arbitrary, capricious or discriminatory when (a) the Carrier's rule or rules violated were not reasonably related to the orderly and efficient operation of Carrier's business;--." Also, "(7) In judging whether the Carrier sustained its burden the Board will not try to reconcile or choose between contradictory, conflicting testimony of opposing witnesses at the hearing. It is sufficient if the Carrier's decision was based on substantial evidence of record." On page 3 of the Award: "(8) If for any of the proper reasons stated above under (3) the Carrier's disciplinary action is deemed not supportable but if at the time the record of the case shows that in the circumstances directly leading up to the Carrier's action the employe himself was not free of improper behavior, the employe may be required to suffer some penalty such as no pay for time lost, upon reinstatement." It is within the Boards province to review the degree of discipline imposed, Awards 19561, 19797, 20092. In the exercise of our discretion, we find that the dismissal under the circumstances of this case was unreasonable and arbitrary and direct the reinstatement of the claimant with no back pay. However, claimant shall be entitled to pay lost from the time he was held out of service up to the date of the letter of dismissal i.e. June 15, 1972, Claimant shall also retain his seniority earned to June 15, 1972 and retain all rights flowing therefrom.

No provision in the Agreement entitles claimant to interest. The Organization's argument that the National Labor Relations Board has been granting interest on back pay awards is not applicable. The Courts have held that the NLRB has authority to grant interest by reason of language in the statute which states that the Board may fashion a suitable remedy to overcome the effect of an unfair labor practice. The Railway Labor Act does not contain such a provision. The great majority of Awards of this Board have held that we do not have discretion to award interest. We are bound by the Agreement between the parties.

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

The Carrier violated the Rules Agreement when it held the claimant out of service pending investigation.

The decision after hearing is sustained.

The discipline assessed was unreasonable and arbitrary under the circumstances of this case.

A W A R D

Claim disposed of as set forth above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1974.