

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21241
Docket Number MS-21483

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Roberto Lebmnn
(**Brooklyn** Eastern District Terminal

STATEMENT OF CLAIM: This is to serve notice, **as** required by the **rules** of the National Railroad Adjustment Board, of my intention to file an **ex parte** submission on January 8, 1976 **covering** an unadjusted dispute between me and the Brooklyn Eastern District Terminal involving the question:

- a) Carrier violated the agreement when it failed to provide Mr. Roberto **Lebron** a fair and impartial hearing on February 19, 1975 in connection with alleged violation of Rule **"G"** and Rule **"X"** - General Rule - B.E.D.T.
- b) **As** a result of this violation, Carrier will reinstate me with all seniority rights unimpaired.
- c) Restoration to me for all lost compensation.

OPINION OF BOARD: Claimant Roberto Lebron was employed by Carrier as Laborer at its Bulk Flour Terminal - Brooklyn, New York. By notice dated February 10, 1975 Claimant was advised as follows:

"REGISTERED MAIL
RETURN RECEIPT REQUESTED

February **10th**, 1975

File: FFD-40169
Subj: Investigation.

Kr. Roberto Lebmnn,
102 Floyd Street,
Brooklyn, N.Y. 11206

Dear Sir:

Please report to **Superintendent's** office at 86 **Kent** Avenue, Brooklyn, N.Y. at 10:00 **A.M.** Wednesday, February **19th**, 1975, for investigation incident to your failure to properly protect your assignment as a laborer - Bulk Flour Terminal - **February 7th**, 1975 2300 hours.

Incident to the above, you are charged with violation of **Rule G** and Rule **X** General Rules - Brooklyn Eastern District Terminal - which reads as **follows:-**

RULE G -

The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited and is sufficient cause for dismissal.

RULE X -

Employees reporting for duty must have had ample rest. Employees must not sleep on duty.

You are privileged to have present at this investigation a representative of your choice or such witnesses as you may desire.

Yours very truly,

/s/ A. A. Lembo

A.A. LEMBO

SUPERINTENDENT OF OPERATIONS"

Following the investigation Claimant was found guilty and discharged effective February 27, 1975. Claimant on March 6, 1975 requested an appeal hearing which was granted and appeal denied April 3, 1975 by Carrier's V.P. Operations and Maintenance. By letter dated April 7, 1975 the General Chairman of the Brotherhood of Railway, Airline and Steamship Clerks made further appeal on Claimant's behalf to the President of the Carrier. Another appeal hearing was granted, following which the appeal again was denied on April 22, 1975. Thereafter Claimant initiated an Ex Parte Submission to our Board alleging denial of his right to a fair and impartial hearing and seeking reinstatement with full back pay.

The scope of this Board's appellate jurisdiction is well established in discipline matters. We are to determine 1) Whether Claimant received a fair and impartial investigation, 2) Whether substantial evidence supports Carrier's finding of culpability, and 3) Whether the discipline assessed is appropriate in all of the circumstances, or is arbitrary, or unreasonable or capricious. As we view the record there is no question that substantial evidence supported the findings of Carrier that Claimant was asleep and under the influence of an intoxicant while subject to duty on February 8, 1975. The testimony of two eyewitnesses that he was sleeping on duty was never denied by Claimant. Claimant admitted to consuming several shots of whiskey before reporting to work, although he denied actually drinking on the job. From the foregoing we cannot conclude that Carrier based its findings on insubstantial evidence or information not on the record. Nor is there any doubt that such offenses when proven are recognized dismissal offenses in this industry. All that remains are Claimant's

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assertions that the hearing **was** not properly conducted because of the bias and multiple roles of the hearing officer. We have carefully reviewed the entire record and find that **these** allegations were raised for the first **time** before our Board, never having been presented on the property. Such **de novo** arguments are not properly before us and cannot be considered. So much of the record **as** we may consider **demonstrates** no deprivation of Claimant's rights to a fair and impartial **investigation**. **On the basis** of the entire record we **must** deny the claim.

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. Parker
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.