

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22734
Docket Number M-22130

Rolf Valtin, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Illinois Central Gulf Railroad

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

(1) The suspension of sixty (60) days imposed upon Trackman C. M. Harper for alleged violation of 'Rule K' was capricious, arbitrary, without just and sufficient cause and-on the basis of unproven charges (System File 134-296 Spl. Case #1039 MofW/A1-47-T-76).

(2) The claimant's record be cleared of the charge placed against him and reimbursement be made for all wage loss suffered."

OPINION OF BOARD: The claimant is a Trackman. At the time of the incident hers at issue, he had about seven years of service with the Carrier. The record gives no indication of prior disciplinary difficulties between himself and the Carrier.

On Saturday, January 24, 1976, while off duty and off the Carrier's property and while situated as a passenger in a friend's car, the claimant was arrested for possession of marijuana and carrying a concealed weapon. He was taken before the Mayor's Court in Ackerman, Mississippi. He pled guilty, was fined, and was released over the weekend.

On Monday, January 26, 1976, the claimant was re-arrested on the charge that he had stolen the weapon. The weapon was a pistol and carried a serial number which matched that of a pistol which had been reported stolen in another town.' The claimant did not admit to this charge, contending that the weapon had been pawned to him at a pool hall. The question as to the claimant's guilt or innocence on this score was still pending at the time of the investigation of the present case (February 9, 1976). The Carrier is not in any way relying on the claimant's re-arrest and the attendant larceny charge in defending the present disciplinary action. We have made mention of the matter solely for the purpose of explaining the fact that the claimant, though released from the Ackerman Court by the time the weekend had ended, was absent from work on Monday (January 26, 1976). The claimant

was back at work **on** the **following** day **and** thereafter incurred no absences by virtue of the incident here at issue (**except**, of course, for **the serving** of the suspension).

The transcript covering the **investigation** shows the incident to have been made up essentially of the **following**:

- The claimant's friend was the owner of the car. The marijuana which was discovered by the arresting officer had been **stored** in the car, with the knowledge of the **claimant's** friend and without the **knowledge** of the claimant. When discovered, the marijuana was still stored in the car - i.e., it was not **in** the physical possession of either person.

- The claimant let the arresting officer **know** that the marijuana was not his. **He** was told by the arresting officer, and he accepted as true, that one's presence in a car which contains marijuana is the legal equivalent of possession of marijuana.

- The weapon, on the other hand, was on the claimant's person. The claimant **handed** it to the arresting officer without hesitation **and** without effort to shift **blame** to his friend.

- The claimant was not represented by counsel at the Ackerman Court. He pled guilty to both charges. **He** did so to assure his quick release and thereby to protect his job. He was released upon payment of a \$400 **fine** (\$300 for the marijuana and \$100 for the weapon).

Two things should preliminarily be noted. **One** is that the Carrier at the investigation, in response to the **Organization's** reliance **on** the fact that the incident occurred at a time when the claimant was off duty and off Carrier property, made mention of **Rule G**. Rule G deals with "Intoxicants, Narcotics, and Drugs" and refers to **employees** "subject to duty" as well as to employees "**on** duty". Both in **terms** of the **imposition** of the suspension and in **terms** of the defense thereof as submitted to the Board, however, the Carrier invoked **Rule K** alone. We view **Rule G** as not before us **in** deciding the case.

The other preliminary matter **concerns** the claimant's guilty plea at the **Ackerman** Court. We agree with the Carrier that the case should be dealt with on the basis of the plea which the claimant in fact entered - not on the basis of what might have happened had the claimant been represented by counsel, not on the basis of skepticism **concerning** the legal equivalency (rather **than** true possession) **on** which the marijuana charge rested, and not **on** the basis of the claimant's motivation in **entering** the guilty plea. We are sympathetic to the claimant on these

scores **and, indeed,** we **commend** him for acting decisively to protect his job. But we are **adhering** to the fact of the claimant's guilty **plea in** deciding the case.

Rule K is titled "Conduct" **and** reads as follows:

"Courteous **deportment** is required of all **employees** in their **relations** with the public, their subordinates and each other. Boisterous, profane **and** vulgar language is forbidden. *Courtesy and attention to patrons are demanded.* **Employees must** not enter into altercations, scuffle, wrestle, play practical jokes, fight, or engage in horseplay while on duty or **on company** property.

Employees must not be:

- (1) Careless of the safety of themselves or others;
- (2) Insubordinate;
- (3) Dishonest;
- (4) **Immoral;**
- (5) **Quarrelsome** or **otherwise** vicious;
- (6) Involved **in gambling** or **playing** games on duty or **on company** property."

We do not believe **that we can** properly uphold the suspension. There clearly are severe difficulties **in** assuming that Rule **K** applies to off-duty and off-Carrier-property conduct as well as to on-duty **and** on-Carrier-property conduct. Both by its terms and by the double-reference to "on duty or on **company** property" - see the last sentence of the first paragraph and item (6) - the **Rule** gives every indication that it is intended to regulate **employee** conduct while **on** duty and/or **on** Carrier **property**. And, were one to pursue a construction by which the absence of the "on duty or on company property" reference at some portions of **Rule K** is taken to reveal an intention to apply those portions without regard to the distinction, one would **run** into the absurdity of viewing such **away-from-work** events as the use of "boisterous" or "profane" or "**vulgar**" language and "carelessness" and a "**quarrelsome**" conversation as Carrier-punishable **wents**. Nevertheless, let it be assumed that items (3) and (4) - the "dishonest" and "**immoral**" **items** which the **Carrier** seems to be relying upon - are in some circumstances rendered applicable to off-duty and off-carrier-property conduct. There are some past Board Decisions which in effect make this assumption (though there

are others which reject it). We are not foreclosing the application of the assumption, but we believe that the least which **must** be true is that the **employee's** conduct has been shown to have been of **some** adverse **consequence on** the Carrier. Stating it otherwise, we believe that **some** linkage bearing on the **employer-employee** relationship must be demonstrated.-

We find that this condition has not here been satisfied. There is no **evidence which** would indicate that the incident was marked by unfavorable publicity, or that some patron expressed alarm, or that the claimant **was** engaged in an activity for which Supervision had expressed concern or which otherwise carried-over to the work place, etc. The record is bare of **any** evidence **of this** sort. It **shows** simply that the incident came to the Carrier's attention a few days after its occurrence and that the Carrier therewith commenced the disciplinary action here presented. In **these circumstances** to permit the suspension to stand, we believe, is to authorize the Carrier to sit in judgment and take disciplinary action with respect to an event which creates primary **accountability** to society, for which the **employee** has paid his debt to society, and which did not secondarily harm the Carrier's legitimate business interests. We direct that the suspension be rescinded and **the** claimant be reimbursed accordingly.

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 apprwed June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1980.