NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23052

THIRD DIVISION

Docket Number CL-22920

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Washington Terminal Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8828) that:

(a) Carrier violated the rules of the Agreement effective July 1, 1972, particularly Article 18 and others, when effective July 20, 1978, it arbitrarily suspended Mr. George N. Jackson from active service for a period of 20 calendar days.

(b) Carrier's action in suspending Mr. Jackson from service on unproven charges was arbitrary, capricious and an abuse of Carrier's discretion.

(c) Carrier shall be required to expunge from his record this disciplinary notation placed thereon, and compensate Mr. Jackson for all the time (20 calendar days) held out of service, including protective agreement payments ad over-time earnings that would have accrued to him, had he not been suspended from July 20, 1978, to and including August 8, 1978.

OPINION OF BOARD: An investigation was held on July 28, 1978 at the Washington Terminal Company's Union Station to determine whether Claimant was guilty of being under the influence of intoxicants while on duty on July 19, 1978, acting in a belligerent manner toward his foreman and fellow employes, behaving in a manner inconsistent with acceptable department norms and leaving his assignment on two occasions without permission. Claimant was found guilty of Carrier's General Rules G, K, N and 0 respectively and was suspended from service for twenty (20) days effective July 20, 1978. This disposition was contested pursuant to Agreement Rule and is now before this Board for appellate consideration. In defense of his position Claimant contends that, at most, the investigative trial transcript only shows that he was loud and acting in an uncommon manner. He denies being under the influence of alcoholic beverage or acting in a manner that was palpably threatening to his foreman or fellow workers. He disputes the patrolman's testimony that he left the property on two occasions and contests the interpretative validity of the clinical report that the diagnostic impression indicated stage 1 of alcohol intoxication.

In our review of this case we concurwith Claimant that the evidence doesn't categorically demonstrate thathewas under alcoholic Influence. Admittedly, his obstreperous deportment when coupled with his alcoholic history would indicate that he ingested liquor but more proof is needed. The employes who were with him that night did not smell alcohol or testify forthrightfully that he was intoxicated, although they all uniformly noted his loud and disquieting behavior. The laboratory report, which delineated the findings of the blood and urine specimens, obtained at 9:00 P.M. on July 19, 1978, does not show that he was intoxicated, at least, by reference to the key medical and physiological indicators, but opines as a diagnostic stage of Intoxication. Accordingly, given the unmistakable readings of the salient clinical indices, we would be remiss if we concluded authoritatively that he was intoxicated. Of course, we can postulate a presumption, but that is insufficient proof by our rigorous standards. In Third Division Award 16343, involving intoxicant usage, we held in pertinent part:

> "The burden of proving the Claimant was guilty as charged rested with the Carrier. To meet the burden the transcript of hearing must contai substantial material and relevant evidence of probative value supporting Carrier's findings."

We believe this holding is applicable to the assertion herein that he violated Rule G "Being under the Influence of intoxicants or narcotics while on duty" and thus we are compelled to dismiss this charge.

On the other hand, careful analysis of the investigative transcript shows that he acted in a belligerent and improper manner vis his foreman and fellow workers and that his continuous use of profanity created an apprehensive work environment that was disturbing. His behavior toward his foreman, particularly hisstatement, "Goddamit, I ain't talking to you. I em talking to this man" in the context of its expression certainly cannot be construed as routine and normal conversation. It was plainly disrespectful. The record clearly shows that Carrier was correct in finding him guilty of violating General Rules K and N and such conduct cannot be countenanced.

In assessing the merits of the fourth charge that he left the property on two occasions without permission, we find that its difficult to determine precisely whether he left that many times. He contends that he left only once, while patrolman Dyer testified that he saw him leave at approximately 4:10 P.M. and 4:30 P.M. on July 19, 1978. It my

well be that he left twice, but that is not really germane. If he left once without permission what would be unacceptable and thus a violation of General Rule 0. But the record appears to show that it is not unusual for employes on the 4:00 P.M. to 12:00 midnight shift to move their cars closer to the work situs or the south end of the yard. Because of this practice, we would be unduly harsh if we sustained Carrier's determination on this point, particularly, where as here there are conflicting statements as to how many times he left the property. He is cautioned that he must observe to the letter General Rule 0.

Upon the record, we have found substantial evidence to support the charges that he violated General Rules K and N, but not General Rules G and 0 and we will modify the disciplinary penalty to comport with these findings. We agree that Carrier's twenty (20) day suspension was not unreasonable when the Intoxication specification is considered, but we do not think It would objectively serve the purposes of progressive discipline if we sustained it in toto. Claimant had been employed approximately twenty-one (21) years at the time of the incident and most likely, will respond positively to a penalty that is corrective in nature. We will reduce the twenty (20) days suspension to five (5) days in accordance with this judicial observation and admonish Claimant that we will not look, kindly upon any recedivist behavior.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties wived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employee 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 sustained to the extent expressed herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1980.