NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24275

THIRD DIVISION Docket Number CL-24591

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Baltimore and Ohio Chicago Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9604) that:

(1) Carrier violated the rules of the effective Clerk-Telegrapher Agreement when on July 16, 1981, it imposed discipline of dismissal from Carrier's service upon Operator-Leverman C. A. Raila as a result of an investigation held July 14, 1981, which was improper and unjust, and

(2) As a result of such impropriety, Carrier shall be required to reinstate Mt. C. A. Raila to his former position with full rights and compensate him for all wages lost commencing July 16,1981, and continuing until reinstated.

OPINION OF BOARD: Claimant was employed as operator-leverman on the third shift at Carrier's Argo Yard, Chicago, Illinois. On July 6, 1981, he was notified by the Road Foremen of Engines to attend an investigation at 10:00 A.M., Wednesday, July 8,1981, on charge:

> "You are charged with your responsibility in connection with violation of Rule 'G' while on duty as Operator Leverman, Argo Tower, 11:59 P.M., July 3,1981, to 7:59 A.M., July 4, 1981."

In the letter of charge Claimant was also advised:

> "YOU are responsible for arranging for representation and/or any witnesses you may desire."

The investigation was postponed at the request of Claimant's representative and was conducted on July 14, 1981. A copy of the transcript of the investigation has been made a part of the record. Following the investigation, Claimant wes notified of his dismissal from the service on July 16, 1981.

Carrier's Rule "G" reads:

> "G. The use of intoxicants, narcotics, or dangerous drugs by employees subject to duty, while on duty, or on Company property is prohibited.
>
> The use of any medication, including those prescribed or dispensed by person or persons authorized to do so, that will adversely affect the employee's alertness, coordination, reaction, judgment, vision or gait when subject to duty or on duty is prohibited.

> Possession of intoxicants, narcotics, or dangerous drugs or participation in any transaction involving same by employees on duty or on Company property is prohibited."

The Organization makes several procedural contentions, one being that the charge against Claimant was not "precise". It is well settled that if exceptions are to be taken to the charge, or the manner in which the investigation is conducted, such exceptions must be taken prior to or during the course of the investigation; otherwise they are deemed to be waived. We have reviewed the transcript of the investigation and find that no exceptions were taken to the letter of charge or the manner in which the investigation was conducted. The issue may not properly be raised for the first time on appeal.

The Organization also complains in its submission to the Board that certain witnesses were not called to testify in the investigation. Here again, if the Organization wanted to object because of the lack of the witnesses, such objection should have been raised during the course of the investigation, but was not. In fact, the Carrier contends that such issue was not raised at any time during the handling of the dispute on the property. A review of the correspondence covering the appeal on the property bears out the Carrier's contention in this respect, and the matter may not properly be raised for the first time before the Board on the well established principle that issues and defenses not raised on the property may not be raised before the Board.

The Organization contends a further violation of the Agreement because the Road Foreman of Engines issued the charge against the Claimant, conducted the investigation, and rendered the decision. As we stated in Award 23114:

> "The Organization also complains because the same officer preferred the charge, conducted the investigation and rendered the decision. We have not been referred to any Agreement provision as to who shall prefer charges, conduct the investigation or render the decision. Furthermore, the procedure complained of has been upheld by numerous decisions of this Board."

We find that the Claimant was granted a fair and impartial hearing. In the investigation, the Chief Dispatcher testified that he was called at home about 1:20 A.M., on July 4, 1981 and informed that train dispatchers at Barr Yard were unable to reach the operator at Argo Tower, and that trains were being held up; that he went to the tower, found the door locked, thet he called Claimant three times rather loudly and on his fourth attempt he got an answer; that Claimant appeared to have just woke up from a sound sleep, and when Claimant was asked as to why certain trains were standing, he replied that he must have fallen asleep. He further stated that after Claimant had lined up one of the trains, he relieved him from duty. He also testified that Claimant remained at the tower and that he (the Chief Dispatcher) detected the odor of alcohol on Claimant, and that Claimant stated that he had been drinking while at the beach during the day prior to reporting for duty.

A Lieutenant of the Carrier's Police Department testified that he detected the odor of alcohol on Claimant and that he heard the Claimant wake the statement that he had been drinking at the beach.

In the investigation Claimant admitted drinking beer at the beach during the day and at dinner the night before reporting for duty. When questioned as to the reason for the train delays, he stated that he apparently fell asleep at his post of duty. He also testified:

"Q. 56. Would the fact that you drank beer also be the reason you fell asleep?

A. 56. It must have been."

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"Q. 66. Did the cons-tionof ● lcoholcontributetothe fact that you ware asleep at Argo Tower?

A. 66. I believe it must have."

The Organization also advances the contention that Claimant's admitted drinking which prevented him from properly performing his duties should be disregarded because the matter of the Use of alcohol came up after Claimant had been relieved by the Chief Dispatcher. We find such contention to be without proper basis. The entire matter came up because of Claimant's failure to properly perform his duties and the reason *for* such failure. As stated in early Award 2945 and reiterated in Awud 19558: "Truth and not technicality should be the controlling factor in making decisions of this kind."

We find no *proper* basis for disturbing the action of the Carrier.

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 apprwed 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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of March 1983.

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