

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25160
Docket Number MW-25302

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation
(Former Penn Central Transportation Company)

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

(1) The dismissal of Drawbridge Operator W. Flewellen for allegedly "Assuming an attitude of sleep", alleged "Failure to perform duty as Bridge Operator", alleged "violation of Rule 3002" and alleged "Failure to be properly dressed while on duty" on November 13 and 14, 1981 was without just and sufficient cause (System Docket No. 7341.

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, the charges leveled against him shall be removed from his record and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: The record shows that Claimant had been in the service of the Carrier since August 5, 1975, and at the time of the occurrence giving rise to the dispute herein, held the position of Drawbridge Operator on Delair Drawbridge, Philadelphia, Pa.. with tour of duty 11:00 P.M. to 7:00 A.M. Claimant worked alone at the drawbridge and was responsible for operating the drawbridge to permit the passage of river traffic.

Following a trial conducted on November 30, 1981, on the charge:

- "(1) Assuming an attitude of sleep during your tour of duty, 11 PM to 7 AM on 11/13 to 11/14 at Delair Drawbridge.
- (2) Failure to perform duty as Bridge Operator on 11/13 to 11/14 on Delair Drawbridge during tour of duty from 11 PM to 7 AM at 135 AM.
- (3) In violation of Rule 3002 of Safety Rule Book 57C at 320AM, 11/14/81, Rule reads: Narcotic medication and/or alcoholic beverages must not be used while on duty or within 8 hours before reporting for duty.
- (4) Failure to be properly dressed while on duty from 11 PM to 7 AM at 320 AM, 11/14/81."

Claimant was dismissed from service by notice dated December 4, 1981, in which Claimant was found guilty of the four charges.

A copy of the transcript of the trial has been made a part of the record. From our review, we find that the trial was conducted in a fair and impartial manner and that none of Claimant's substantive procedural rights was violated. Claimant was present throughout the trial and was represented.

In the trial Carrier's Assistant Supervisor of Track testified that about 1:20 A.M. (apparently on November 14, 1981), he received a call from the Operator at Camden that they were having difficulty getting in touch with the Bridge Operator; that he went to the drawbridge about 3:00 A.M., accompanied by a Conrail Police Officer and the Trainmaster at Pavonia Yard. He also testified:

"Upon entering the room at Delair Drawbridge on the morning in question, I found the operator, Mr. Flewellen, in a prone position on top of the table on the right hand side of the room. He was in a semi-state of undress. I observed that the TV on the control table to the bridge was on. There was no picture, the station had signed off, but the TV was on. I observed an empty bottle of what I thought to be alcohol with a shot glass beside it. That is about all I can recall."

The Assistant Supervisor of Track was not positive as to what was in the bottle that he observed.

The Trainmaster testified that when he entered the Operator's room at Delair Drawbridge he observed Claimant in a prone position on the table on the right hand side of the room and that Claimant was getting up from that position when he entered the room; that Claimant was nude from the waist down; that he did not notice any alcoholic beverages in the tower room. No statement was taken from the Police Officer.

Claimant denied that he was drinking on the night involved; claimed that he was sick, but prior to the close of the trial made a statement that he should have done better than he did. "I know punishment is necessary," . . . 'I made a fool of myself. I should have notified the operator and called in for relief to maintain my job with the Company. It was a misjudgment that I made in that situation and it will not happen again'.

In the trial, Claimant's representative objected to Claimant's prior discipline record being entered into the record of the trial. Many awards of this Board have held that such procedure is not in violation of the Agreement or prejudicial to Claimant.

In disciplinary cases the Board has consistently and repeatedly held that the parties to the dispute and the Board itself are limited to the evidence produced at the trial or investigation.

Based on our study of the evidence produced at the trial, we find substantial evidence in support of all the charges except (3) - "In violation of Rule 3002 of Safety Rule Book 57C at 320 AM on 11/14/81. Rule reads: Narcotic medication and/or alcoholic beverage must not be used while on duty or within 8 hours before reporting for duty". There simply was not substantial evidence to support this portion of the charge.

Based on the record, discipline was warranted, but we consider permanent dismissal excessive. The time that Claimant has been out of service should constitute sufficient discipline. We will award that Claimant be restored to service with seniority and other rights unimpaired, provided he passes satisfactory physical examination that may be required, but without any compensation for time lost while out of service.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of November 1984.