

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25704
Docket Number MW-25690

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

(1) The dismissal of Extra Gang Foreman G. Y. Ochoa and Power Tool Operator S. T. Montes for alleged violation of 'General Rules B and G' on September 3, 1982 was arbitrary, capricious, improper, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File 5-19-11-14-55).

(2) The claimants shall be reinstated with seniority and all other rights unimpaired, their respective records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss suffered and expenses incurred (\$38.00 for blood test)."

OPINION OF BOARD: Claimant, Extra Gang Foreman, G. Y. Ochoa, entered the Carrier's service on March 24, 1977. Claimant, Power Tool Operator S. T. Montes, entered the Carrier's service on March 20, 1978. By letters dated September 8 and September 7, 1982, Mr. Ochoa and Mr. Montes were issued Notices to attend a formal investigation on September 27, 1982 concerning the following charges:

"...to develop facts and determine your responsibility in connection with incident when you were observed with an open can of beer in your hand at approximately 2:30 P.M., on Friday, September 3, 1982, while you were on duty as an Extra Gang Foreman of Extra Gang 5901 at Pomona Compound, indicating a possible violation of General Rules B and G of 'Maintenance of Way and Signal Rule Book,' effective May 1, 1972, and revised September 1, 1976, which reads as follows:

'Rule B: Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation.'

'Rule G: The use of alcoholic beverages or possession of narcotics by employees subject to duty is prohibited.'

'The use or possession of alcoholic beverages or narcotics while on duty or on company property is prohibited.'"

By letters dated October 11, 1982, Hearing Officer F. D. Wengert notified Mr. Ochoa and Mr. Montes of the outcome of the hearing, in pertinent part as follows:

"...After carefully considering the evidence adduced at the hearing held at Los Angeles, California on September 27, 1982 I find that the following charges against you have been sustained:

'While employed at a PTO on Extra Gang 5901 you were observed with an open can of beer in your hand at approximately 2:30 PM, on Friday, September 3, 1982 in the Pomona Compound indicating a violation of General Rules B and G of Form 7908.'

You are, therefore, dismissed from the service of the Company..."

The Organization, in its Submission to this Board, contends that the Agreement was violated in that the Hearing Officer was also the Officer designated to handle appeals at the first level and hence deprived the Claimants of a fair and impartial review at the first level. This contention was not raised on the property, and it is not now properly before this Board. The Carrier's Rebuttal asserts that such a practice has long prevailed on the property, and that a Letter Agreement between the parties dated June 19, 1981 clearly contemplates that the same Officer may act in both the capacity of Hearing Officer and first Appeal Officer. If the Organization had pursued the issue in the handling on the property, both parties could have addressed the matter including the practice of the parties and the matter could have been sufficiently developed for this Board to consider the merits of the contention. In its present posture, however, the matter is not properly before us.

The Organization states that following the Investigation it learned that Sectionman E. P. Barron was advised not to attend the Investigation by Carrier Supervisors Brandt and Brown; and the Organization submitted a statement from Mr. Barron to that effect dated October 7, 1982. Thereafter, the Carrier submitted evidence that Mr. Barron did not appear at the Investigation because he did not want to be placed in a position of perjuring himself. Division Engineer Wengert's letter of April 13, 1983 and Mr. Barron's April 18, 1983 letter stand in contradiction to the Organization's assertion that Carrier officials obstructed a witness. The contention of the Organization has not been proven, and this cannot serve as a basis to set aside the discipline in this case.

The Investigation Rule does not either prohibit or require the sequestration of witnesses. In the instant case all witnesses were sequestered except the two employees being investigated, Mr. Ochoa and Mr. Montes and the Charging Officer Mr. Reeder. The two employees charged had the absolute right to hear all of the testimony against them, and to fully assist in their own defense and to testify as they saw fit. We find no basis to set aside the discipline in this case because the Charging Officer was allowed to be present during the entire proceedings along with the two employees being investigated and was called back to testify after hearing the testimony of the witnesses.

We have considered all of the Organization's contentions that the hearing was neither fair nor impartial. We find that while the hearing format was a poor one, neither Mr. Ochoa's nor Mr. Montes' procedural or substantive rights under the Discipline Rule was violated.

Concerning the merits of this case, we find that substantial evidence of record including testimony of Mr. Reeder and Mr. Larsen supports the Carrier's determination that Mr. Ochoa and Mr. Montes each possessed an open can of beer in his hands at 2:30 P.M. on Friday, September 3, 1982. The charge and the Hearing Officer's findings dealt only with the contention that Mr. Ochoa and Mr. Montes had an open can of beer in their hands. They were not charged with being under the influence of alcohol. The testimony of both B & B Supervisor Reeder and Special Agent Larsen was that they observed both men actually holding a can of beer. Possession of an alcoholic beverage alone, while on Company property or on duty, is a violation of Rule G.

We agree with Chief Engineer Duarrant's conclusion that the discipline has had the desired effect. Mr. Montes was allowed to return to service on January 23, 1984 reserving his right to pursue his Claim for time lost to this Board. Mr. Ochoa also reserved his right to pursue his Claim for time lost to this Board. However, he was apparently unable to pass his return to work physical examination on February 1, 1984 due to a diabetic condition. Because the record is not certain as to his exact status, we find and make it part of this Award that Mr. Ochoa is entitled to return to work with all rights unimpaired, but without backpay, provided he is medically fit to return to 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;

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

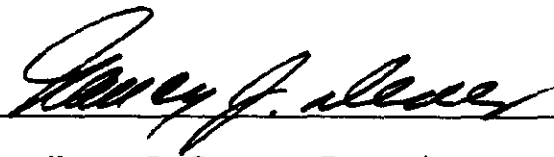
That the Agreement was not violated.

A W A R D

Claims disposed of 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 14th day of November 1985.

