NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26096

THIRD DIVISION Docket Number MW-26375

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company (Southern Region)

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

1. The dismissal of Equipment Operator D. K. Ripley for 'possession and use of alcohol on Company property . . . on March 22, 1984 . . . .' was arbitrary, capricious and without just and sufficient cause (System File C-D-2296/MG-4632).

2. The claimant shall now be accorded the benefits prescribed within Rule 21."

OPINION OF BOARD: Claimant was employed by the Carrier as an Equipment Operator. Prior to his termination, Claimant had six and one-half years of service with the Carrier. Aside from the incident herein, Claimant had no prior disciplinary record with the Carrier.

Claimant was charged with and ultimately dismissed by letter dated April 19, 1984, for possession and use of alcohol on the Carrier's camp cars on March 22, 1984. The Investigation Transcript from the April 5, 1984, Investigation revealed that on March 22, 1984, Carrier's Lieutenant of Police, J. L. Walton and Officer G. L. Howard boarded one of the Carrier's camp cars located at Fulton in Richmond, Virginia and observed Claimant taking a drink from a Miller's beer can. Walton testified that he spoke with Claimant who stated that he had a couple of beers. Walton further testified that he could smell alcohol on Claimant's breath. There is further testimony from Patrolman R. D. Davis that while obtaining Claimant's name pursuant to instructions from Lieutenant Walton, he also smelled alcohol on Claimant's breath. Patrolman Davis did not, however, observe Claimant drinking.

Claimant testified that he did not remember consuming a beer at the time asserted by the Carrier and with respect to whether he consumed any beer in the camp cars on the night in question, Claimant testified "Not that I know of." Claimant asserts that when he got off work at 6:30 P.M. on the date in question, and before returning to the camp cars, he stopped at a 7-11 Store and had a beer. Claimant testified that "Upon returning to camp, I think I did have an open container but I don't remember drinking on Company property."

On March 13, 1984, the Carrier issued warning letters to approximately six employes who were caught with beer and whiskey while on the Carrier's camp cars in the Coach Yard, Clifton Forge, Virginia.

The Organization contends that Claimant was off duty and there was no evidence to show intoxication and/or misconduct by the Claimant in relation to the alleged offense. According to the Organization, since the Carrier, under similar circumstances, only issued warnings to other employees guilty of the same alleged offense, the Carrier's actions with respect to the Claimant were arbitrary and capricious. The Organization also raises issues concerning the fairness and impartiality of the Hearing.

The Carrier contends that the Investigation Transcript demonstrates substantial evidence that Claimant was guilty of the alleged offense. The Carrier asserts that with respect to the discipline imposed on Claimant, the assessment of discipline was within its managerial discretion and there was no abuse of discretion by the imposition of termination in this case. With respect to the Hearing, the Carrier asserts that the Hearing was conducted in in a fair and impartial manner.

Our careful review of the record satisfies us that there was substantial evidence in the record for the Carrier to conclude that Claimant was in fact in possession of and drinking beer in the camp car as alleged. Corroborated testimony of two Officers that Claimant was in fact observed drinking beer and of two Officers that Claimant had alcohol on his breath, coupled with the fact that Claimant admitted to possession of an "open container" on the property and never really denied drinking in the camp car, but only could not remember doing so, underscores our conclusion that substantial evidence existed.

However, we find that the discipline imposed was excessive and therefore constituted an abuse of discretion. In similar circumstances other employees were not discharged for similar misconduct. Nevertheless, the proven charge against Claimant was quite serious. We shall therefore award that Claimant be reinstated with a final warning on a last chance basis with seniority unimpaired but without compensation for time lost.

An examination of the record satisfies us that Claimant received a fair and impartial Hearing. The Organization's assertions concerning the fairness of the Hearing need not be addressed in light of our ultimate disposition of the Claim.

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 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 22nd day of August 1986.