NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26517
THIRD DIVISION Docket Number SG-26308

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corporation.

Claim on behalf of Larry Smith who was suspended in all capacities effective February 7, 1984 for 75 days. Carrier file NEC-BRS-SD-184D."

OPINION OF BOARD: On January 15, 1984, the Claimant was held out of service for a" alleged Rule G violation. On that same day he was notified to attend a Trial to determine facts and place responsibility, if any, in connection with this as well as an alleged Rule D violation. The notification of Trial read, in pertinent part:

> "...On Sunday, January 15, 1984 at approximately 3:30 PM at 54th Street Interlocking, Philadelphia, Pa. you were observed . . . under the influence of an alcoholic beverage."

It also stated that:

> "...on Sunday, January 15, 1984 at 54th Street Interlocking Philadelphia, Pa. you were assigned the duty of removing T-20 movements, and you absented yourself from the work site from approximately 1:00 PM to 2:30 PM."

On the day in question the Claimant was working the 7:00 A.M. to 3:30 P.M. shift on overtime assignment. He was assigned to remove T-20 movements with two fellow workers. T-20 movements are switch machines which are fastened to ties by lag bolts. They are approximately six feet long, some two feet wide, ten inches high and they weigh approximately 300 pounds. The T-20 movements had been installed for temporary use at the 54th Street Interlocking. The overtime scheduled on January 15, 1984 was in preparation for the cutover of this major Interlocking. The latter was scheduled to take place in early February of 1984.

At the Trial the C&S Supervisor testified that on the day in question, at approximately noon, he received a call from the Claimant's son with information that he needed to talk with his father. When the Supervisor finally saw the Claimant and two fellow workers at about 2:30 P.M., according to his testimony, he ". ..detected a distinct odor of alcohol on (the Claimant's breath)." The Supervisor testified that he asked the Claimant and one

of his fellow workers, on whose breath he also detected the odor of alcohol, to "...please take a blood test to prove (him) wrong." Both employes declined to do so. From the time he received the call from the Claimant's son until 2:30 P.M. the Supervisor was unable to contact the Claimant or his fellow workers by either telephone or radio. The Claimant reported to this Supervisor, along with his two fellow workers, at 2:30 P.M. after he had been located. When the Supervisor queried the Claimant on his whereabouts from noon until 2:30 P.M. the Claimant responded that he had been at lunch since after 1:00 P.M. When the Claimant, after questioning by the Supervisor, stated that he and his fellow employes had removed some seven or eight T-20's during their work assignment up to that time, it was discovered upon physical inspection of the work site, according to the Supervisor, that only five of the T-20's had been unbolted and none of them had been removed.

Rule D reads, in pertinent part, as follows:

> "Employes must devote themselves exclusively to the Company's service while on duty...."

The record shows that the Claimant could not be located by the Supervisor from the time the Supervisor received the telephone call from the Claimant's son until the Claimant and his fellow workers reported to the Supervisor at approximately 2:30 P.M. It is the testimony of the Claimant that the three worked until about "20 after 1" to 1:30 P.M. and then took a late lunch. If so why could they **not** have been located from approximately noon until that hour? Further, if they were working, why did they accomplish so little, *in the mind* of the Supervisor, from 7:00 A.M. when the shift began, until 2:30 P.M.?

The record establishes that the Claimant had not been completely honest with the Supervisor if one compares what had factually been accomplished with what the Claimant told the Supervisor had been accomplished. The material facts of record, including the amount of **work** which had been done and the fact that the Claimant could not be located on property from noon until 2:30 P.M. on January 15, 1984, warrants the conclusion that the Claimant was guilty as charged and was in violation of Rule D. The Claim cannot be sustained with respect to this issue.

Rule G reads, in pertinent part, as follows:

> "Employes subject to duty, reporting for duty, or while on duty are prohibited from...being under the influence of alcoholic beverages...."

The Supervisor explicitly stated at the Trial that at close proximity to the Claimant he detected the odor of alcohol. The Supervisor testified that he detected alcohol first of all when the Claimant and his fellow workers reported to him at about 2:30 P.M. at the Central Instrument House at 54th Street. After asking the Claimant if he was on medication or if he was "...taking any rough drops," the Claimant responded in the negative. The Supervisor had two more occasions to detect the odor of alcohol after this. The second time was when he physically examined the work which the Claimant and his fellow workers had done from the beginning of the shift. The third

time was when the Supervisor opened the truck door to talk to the Claimant shortly after this. By the", the Claimant, "...visibly angry," had gotten into a Carrier truck and "...slamm(ed) the door." By the Claimant's own testimony this put the Supervisor in a position whereby he was so close to his face that he could not have made a mistake about the odor of alcohol on the Claimant's breath. According to the Claimant's testimony:

> "I got in the truck (and the Supervisor) walked real fast to the truck and yanked the door open and jumped in my face approximately a" inch away from me and I asked him if he was going to kiss me."

The Claimant denied, at the Trial, that he had consumed any alcohol on the day in question while on assignment. The Claimant was not ordered to take a test. He was merely requested to do so by the Supervisor in order that the Supervisor be proven wrong. It was the Claimant's prerogative to refuse to take the test. Nevertheless, in refusing to do so in order to unequivocally prove the Supervisor wrong, the Claimant contributed to a record, presently before this Board, wherein a conflict of evidence exists. First of all, there is nothing before the Board to warrant the conclusion that the Supervisor either did, or had motive to, fabricate his perceptions on this issue. Secondly, by testimony of the Supervisor, the Claimant "...wasn't acting in his normal way" by being argumentative and making racial insinuations on the day in question. Numerous arbitral decisions in the railroad industry have established that laymen are competent to provide evidence of drinking by employes by perceiving outward manifestations of behavior, either "...physical actions," or the odor of alcohol on an employe's breath (Third Division Award Nos. 10355, 10928, 13142, 19977 inter alia). Lastly, it is the position of the Organization that the Supervisor's testimony is not credible because there is no corroborating evidence. Of the four witnesses appearing for the Carrier two of them, the Foreman C&S and the Acting Assistant Foreman, were not in a position to offer evidence on this matter. The former did not testify that he was ever in close enough proximity to the Claimant to make a determination one way or the other about alcohol on the Claimant's breath, and the latter was only close to the Claimant earlier in the day, before the Claimant left for lunch. Testimony by the Supervisor is that he detected alcohol on the Claimant's breath after he returned from lunch. The other two Carrier witnesses were in proximity of the Claimant after he returned about 2:30 P.M. Although neither testified that they smelled alcohol on the Claimant at that time it is the opinion of the Board, after close study of the record, that there could have bee" reasonable cause for this. The Assistant Foreman C&S may simply not have been close enough to the Claimant to have detected either the presence or absence of alcohol on his breath. This witness testified that he was only as close to the Claimant on the day in question as he was, as witness, to the Hearing Officer while he was under interrogation at the Trial. Likewise, while the Assistant Signalman of the C&S Department who testified as Carrier witness also stated that he detected no odor of alcohol on the Claimant, while in the truck with him, the reason why he could-not reasonably have done so may have

been because this witness never directly faced the Claimant. According to testimony by this witness, he drove the truck and the Claimant was passenger. The Board must observe, however, that self-interest on the part of this witness, as well as that of the Claimant's own witness, relative to this point, cannot be ruled out by the Board given the total record before it.

On the record taken as a whole it must be reasonably concluded that the lack of corroborating evidence is not sufficient to warrant conclusions relative to the Supervisor's lack of credibility. The record does not impeach his clear and consistent testimony. Numerous arbitral forums in this industry have ruled that "...so long as the testimony of a Carrier's witness is not clearly so devoid of "...probity that its acceptance would be per se arbitrary and unreasonable" a Board such as this cannot substitute its judgment in cases of this type (Third Division Award No. 21612; also Third Division Award Nos. 10791, 16281, 21238). The Claimant is guilty, as charged, of violation of Rule G.

The Claimant was dismissed from service on February 3, 1984. After this discipline was appealed on property by the Organization it was reduced, on leniency basis, by the Carrier on April 30, 1984, to a seventy-five (75) working day suspension. The last issue to be considered by the Board is whether this suspension was proper. Awards emanating from the National Railroad Adjustment Board's various Divisions and those from Public Law Boards have precedentially ruled that in discipline cases it is appropriate to take into consideration an employe's past record when assessing the quantum of discipline (Second Division Award Nos. 5790, 6632; Third Division Award Nos. 21043, 22320 inter alia). The record shows four (4) letters in the Claimant's personal file dating from 1978 through 1982 relative to excessive absenteeism and following orders. Arbitration Awards in the railroad industry have underlined the seriousness of both Rule G violations (Second Division Award Nos. 9596, 10059) and unauthorized absences (Third Division Award No. 24554). Such precedent, and the Claimant's past record which is not unblemished, warrants the reasonable conclusion that the discipline assessed by the Carrier was neither arbitrary nor capricious and it will not be disturbed by the Board.

Objections by the Organization that the Trial was conducted in prejudicial manner by the Hearing Officer are dismissed for lack of evidence.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.