

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26666  
Docket Number MW-26594

Dana E. Eischen, Referee

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Consolidated Rail Corporation

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

1. The discipline imposed upon B&B Plumber A. M. Nawracaj for alleged violation of Safety Rule 3010 and General Rule G was arbitrary, unwarranted and on the basis of unproven charges (System Docket CR-900-D).

2. The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant entered Carrier's service in 1972 and in 1984 was working as a B&B Plumber, regular hours 7:00 A.M. - 3:30 P.M., under the supervision of a General Foreman and an Assistant Supervisor. On March 14, 1984, Claimant was assigned to take out a toilet, sink and boiler at Willow Creek Tower. While working on this job, Claimant was notified by the Assistant Supervisor to meet with the General Foreman and check out a boiler at Ashland Avenue. According to Claimant's subsequent testimony, when he completed the Willow Creek Tower job he had lunch and then went to C. P. 466 to fix some switch heaters before he attempted to hook up with the General Foreman regarding Ashland Avenue.

While at C. P. 466, Claimant was advised by an Electrical Foreman that the General Foreman wanted Claimant to "give him a call" at a tavern located at 43rd and Maplewood. Instead of telephoning the General Foreman from the Yard Office, Claimant proceeded to the tavern in his Company truck, arriving at approximately 2:00 P.M. At the tavern, Claimant met briefly with the General Foreman and another B&B employee before departing the tavern at approximately 2:20 P.M.

In the meantime, the Assistant Supervisor had received an anonymous telephone tip that several Conrail employees were drinking while on duty at a tavern. After trying several times unsuccessfully to raise the General Foreman by radio, at approximately 1:50 P.M. the Assistant Supervisor went to the tavern where he found the Company trucks driven by the General Foreman and Claimant parked outside. The Assistant Supervisor radioed a Trainmaster to

assist him in surveillance of the tavern. The Trainmaster arrived on the scene at approximately 2:00 P.M. and after conferring with the Assistant Supervisor he approached the tavern. As the Trainmaster walked toward the tavern Claimant came out the door. According to subsequent unrefuted testimony from the Assistant Supervisor and the Trainmaster, Claimant attempted to hide his face from them and walked quickly away from his parked vehicle. The Trainmaster chose not to confront or pursue Claimant at that time but rather entered the tavern where he found the General Foreman and a B&B employe at the bar.

The Trainmaster took both employes out of service immediately, subject to formal charges and investigation for alleged Rule G violation. The B&B employe advised the Trainmaster that he had already marked off earlier in the day.

The Assistant Supervisor and the Trainmaster then returned to the office where Claimant was found in the washrooms splashing cold water on his face. The Trainmaster required Claimant to blow breath into his face twice, following which he took Claimant out of service at approximately 3:00 P.M., pending formal notice and investigation for alleged drinking on the job. Thereafter Claimant received Notice of Investigation regarding the following charges:

- "1. Violation of Safety Rule 3010 of the Conrail S7-C Safety Rules for Maintenance of Way Employes.
2. Absenting yourself from your duties without property authority.
3. Violation of General Rule G of the Consolidated Rail Corporation - Rules of the Transportation Department."

The Carrier Rules which Claimant was accused of violating read as follows:

"3010. Narcotic (medication or drug) and/or alcoholic beverage must not be used while on duty, or within 8 hours before reporting for duty.

If necessary to use medication:

(a) Explain to physician all of the details of work assignment, such as climbing, being on or about track, or being on or about train, operating or being on or about self-propelled, hoisting, vehicular or other equipment or supervising duties.

(b) Obtain and comply with physician's advice as to performing duties if he indicates that medication contains antihistamines, barbiturates, stimulants, narcotics, tranquilizers or other such drugs.

(c) Assure self before reporting for duty that you are not experiencing drowsiness, mental confusion, dizziness or other adverse effects that are likely to interfere with performing duties safely. If any such symptoms are experienced while on duty immediately inform immediate supervisor.

G. The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.

Employees under medication before or while on duty must be certain that such use will not affect the safe performances of their duties."

Following the Investigation, Carrier found Claimant guilty as charged on all counts and assessed a penalty of termination. The Organization took timely appeal on behalf of Claimant and during handling on the property elicited agreement from Carrier to reduce the penalty to time held out of service and reinstate Claimant effective June 28, 1984. The Parties, however, remained deadlocked on the balance of the claim and accordingly the matter is before us for disposition of Claimant's grievance seeking complete exoneration and remedial damages for the period March 14 through June 27, 1984.

There is no probative evidence that Claimant was denied a fair and impartial Investigation and accordingly the only two questions before the Board are: 1) Did Carrier adduce substantial preponderating record evidence to support its conclusion that Claimant was culpable as charged? and 2) If so, was the penalty imposed unreasonably harsh or discriminatory in all of the circumstances? On the question of culpability, the record evidence is in substantial conflict. Claimant maintains that he entered the tavern on instructions from his General Foreman and remained inside only long enough to use the men's room and obtain his work assignment. Claimant insists that he departed without imbibing any drinks, let alone alcohol. The Trainmaster insists that Claimant's breath smelled of alcohol, that his eyes were bloodshot, and that his gait was unsteady within one hour of leaving the tavern. Claimant responded that the odor smelled by the Trainmaster probably was a medicated cough drop and that his eyes were bloodshot due to a cold from which he was suffering and not because he had been drinking.

The Carrier apparently weighed the credibility of the conflicting witnesses and elected to credit the Trainmaster and reject Claimant's version of events. This was admittedly a close call which obviously was heavily influenced by the strong circumstantial evidence surrounding Claimant's presence and behavior at the tavern. Carrier apparently relied heavily upon the fact that Claimant elected to go personally to the tavern rather than to call the Foreman as instructed and also upon Claimant's suspicious behavior upon observing the Supervisors outside the tavern.

Given the appellate nature of railroad labor-management arbitration, we are not in a position to observe witnesses, assess demeanor and resolve first hand conflicting testimony. For that reason, it is rather firmly established that this Board will not intervene to set aside credibility determinations made on the property absent a showing that Carrier acted in bad faith or without substantial evidence, i.e., in an arbitrary, capricious and unreasonable manner. While the cold transcript reveals a virtual standoff in testimony, we cannot find that Carrier abused its discretion by electing to credit the Trainmaster's testimony and reject Claimant's particularly in light of the corroborating circumstantial evidence. Absent a showing of abuse of discretion or absolute failure of proof, this Board has no legitimate basis for disturbing Carrier's finding of culpability. See Third Division Awards 25151, 10846, 26031. Finally, it cannot be said that the penalty actually imposed, a ninety-day suspension without pay, was excessive or unreasonable for the charged and proven offenses.

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

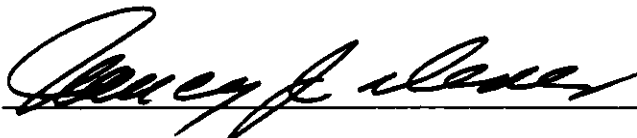
That the Agreement was not violated.

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 23rd day of November 1987.