

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Canadian National Railways

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10362) that:

1. Carrier unjustly dismissed from the service Mr. D. B. Messing, Yard Clerk, Black Rock, N.Y., as a result of investigation held on June 3, 1988, in which the transcript failed to support the Carriers discharge decision considering the mitigating circumstances involved.

2. The Carrier should now be required to reinstate Mr. Messing to service with all rights unimpaired and make him whole for all time lost from May 26, 1988 as a result of being held from service, attending the investigation and being dismissed."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute concerns the discharge of Claimant from the service of the Carrier effective May 26, 1988. At the time of the incident at issue, Claimant was regularly assigned to a position at Black Rock, New York. Part of his duties involved issuing waybills for trains traveling across the international border at Black Rock. The incident in question arose on May 26, 1988. At approximately 1925 hours, two employees of another Carrier arrived at the Customs Office at Black Rock to investigate an apparent problem with the waybills on Train 146. After a discussion with Claimant, these individuals in turn contacted Claimant's supervisor, alleging that he was intoxicated and visibly impaired in his duties.

At approximately 2235 hours on May 26, 1988, Claimant was relieved from duty, and on May 27, 1988, the removal was confirmed in writing. An Investigation was scheduled for June 3, 1988. This notice advised Claimant that he was charged with violating General Rule "G", contained in the Carrier's Safety Rule Book, during his tour of duty on May 26, 1988. Rule "G" states as follows: "The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited." The Investigation was conducted as scheduled on June 3, 1988. On June 7, 1988, Claimant was notified that he was discharged "for violation of General Rule 'G' of CN Safety Rules form CN-7355-E,...".

The Organization maintains that the Carrier failed to prove that Claimant was impaired in performing the duties of his position on May 26, 1988, and that the Carrier failed to prove that Claimant was intoxicated or drinking while on duty on that night. The Organization concedes that Claimant violated General Rule "G" on that night by drinking alcohol prior to his tour of duty, and notes that Claimant admitted this at the Investigation. However, the Organization argues that the Claimant credibly and forcefully denied that he was drinking during his tour of duty on that night. As a result, the Organization contends that the penalty of dismissal was excessive, since Claimant was a long-term employee whose discipline record had been clear for over two years. The Organization stresses that demerits Claimant had received for a Rule "G" incident in 1985 had been removed from his record. In addition, the Organization notes that Claimant had never been dismissed for a Rule "G" violation in his prior thirteen years of service.

According to the Organization, the Carrier based the discharge on the testimony of the other Carrier officials, who were prejudiced since they were very angry at the Claimant for what they perceived as unwarranted delays in processing the waybills for Train 146. The Organization argues that the Carrier never asked Claimant whether he was impaired or intoxicated. It further contends that a close review of the transcript of the Investigation, including a statement from Claimant's supervisor, fails to prove that Claimant was impaired or intoxicated while on duty. The Organization also strenuously maintains that the Carrier ignored the testimony of impartial witnesses who stated that they talked to Claimant on that night and found nothing unusual.

The Carrier argues that Claimant was properly discharged for violation of General Safety Rule "G". The Carrier stresses that Claimant admitted that he was familiar with Rule "G", and that he had violated it when he was drinking before his tour on May 26, 1988. The Carrier then stresses that the discharge was consistent with Carrier policy, particularly since Claimant had received a second chance in 1985 when the Carrier reduced his discharge to forty-five (45) demerits for a similar Rule "G" violation.

According to the Carrier, the Organization's position that mitigating circumstances rendered the discharge excessive, is mistaken. The Carrier emphasizes initially that Claimant occupies an important position vital to the operation of the trans-border traffic at Black Rock. The Carrier then reiterates that Claimant admitted that he violated Rule "G" by drinking prior to his tour of duty on that night, and further stresses that Rule "G" prohibits the use of any intoxicants regardless of the quantity consumed.

The Carrier then argues that the observations and signed statements of three officials established that Claimant was in fact severely intoxicated. The Carrier contends that this evidence is critical, since each of these witnesses talked with Claimant on that night and observed his condition. According to the Carrier, the Board cannot discount these eyewitness statements simply because the officials were angry with Claimant for the apparent delay to traffic. It argues that they had sufficient time in which to determine that Claimant was intoxicated, and that their observations should be accorded great weight.

The Carrier then maintains that the discipline was not excessive, particularly since Claimant had assured the Carrier, during the Investigation of his 1985 Rule "G" violation, that he would not do anything like this in the future. The Carrier stresses that it reduced that discharge to an assessment of forty-five (45) demerits, in consideration of his apparent sincerity in the Investigation, his age and years of service, as well as in recognition that this was his first alcohol-related offense. The Carrier emphasizes that Claimant was told in no uncertain terms that it would not tolerate any recurrence of a Rule "G" violation, and that Claimant was fully aware of the consequences of any such future violation. Given Claimant's prior history, and the fact that he had already been given a second chance, the Carrier argues that the discharge penalty was not excessive when Claimant again violated Rule "G".

The Board has carefully considered the arguments of the Organization and the Carrier, and the evidence in the record. It is the conclusion of the Board that Claimant should be returned to service with a conditional reinstatement, without back pay, but with seniority and all other rights unimpaired. The Claimant shall fulfill all of the requirements set forth below: (1) Claimant will be referred to the Carrier's Employee Assistance Program; (2) Claimant must successfully complete the Employee Assistance Program; (3) the Employee Assistance Program counselor must report that Claimant has fully participated in the Employee Assistance Program; (4) the EAP counselor shall report on Claimant's attendance and programs every sixty (60) days; (5) that this is a "last chance" reinstatement, and that Claimant will be immediately discharged if he violates Rule G in any manner in the future.

A W A R D


Claim sustained in accordance with the Findings.

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Award No. 29072
Docket No. CL-28826
91-3-89-3-239

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1991.