

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29746
Docket No. MW-29976
93-3-91-3-372

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Maintenance
of Way Employees
PARTIES TO DISPUTE: (
(Detroit and Mackinac Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Foreman D. Alda for alleged violation of Rules 'E', 'B', portions of Rule 'I', Section 'M' of Rule M-4 C and Safety Rule 1056 was an abuse of the Carrier's discretion, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

(2) The dismissal of Machine Operator B. Kendall and Trackmen K. Filarski and C. Hudak for alleged violation of Rules 'B', 'E' and 'G' was an abuse of the Carrier's discretion, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

(3) The six (6) month suspension imposed upon Trackman A. Krajniak for alleged violation of Rules 'B' and 'E' was an abuse of the Carrier's discretion, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

(4) The dismissal of R. Dittenbir for alleged violation of Rules 'B', 'E', 'G', 'K' and those portions of Rule 'I' covering insubordination, willful neglect and gross carelessness was arbitrary, capricious, an abuse of the Carrier's discretion, on the basis of unproven charges and in violation of the Agreement.

(5) Claimants D. Alda, B. Kendall, K. Filarski, C. Hudak and R. Dittenbir shall be reinstated with their seniority and all other benefits unimpaired, their records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss suffered.

(6) Trackman A. Krajniak's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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 employe 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 involves discipline or dismissal of six individuals. At the time of the incident in question all were employed by the Carrier as Maintenance of Way workers in Tawas City, Michigan. At the time of the incident Foreman D. Alda and Trackmen B. Kendall, K. Filarski, C. Hudak, A. Krajniak and R. Dittenbir were working on a spur at McIvor/Rainbow Gardens. Witnesses at the investigatory hearing testified to the sequence of events, as follows:

A Receptionist/Telephone Operator for the Carrier, stated that on November 28, 1990, at approximately 2:36 P.M., she received an anonymous phone call in which an individual stated that he lived out by McIver Hall and Rainbow Gardens. According to the Receptionist, the caller sounded "upset." He stated that the crew who were working on the spur were "drunk and disorderly, coming in and out of the bar." He told the Receptionist that he was "giving us an hour of notice before he called the sheriff's department." According to the Receptionist, the caller then went on to say that "they were saying obscenities" to the neighbors and "acting like a bunch of animals." He mentioned that a man in a dark hat and coat, later identified as Claimant R. Dittenbir, was "the troublemaker."

The Receptionist reported the call to Mr. Richard Van Buskirk, Vice-President of Operations. Van Buskirk in turn contacted Darryl L. Leslie, Superintendent of Transportation. Leslie investigated the situation and confirmed to Van Buskirk that the crew the caller was referring to were Maintenance of Way workers. Van Buskirk instructed Mr. Leslie and another employee, Mr. White, to "go out

there and find out what is going on." As Leslie and White were preparing to depart, Van Buskirk observed a small crane or "tie handler" coming into the yard. Claimant Dittenbir was on the equipment. Van Buskirk informed Dittenbir that there had been a complaint from Rainbow Gardens concerning the crew. Van Buskirk instructed Claimant Dittenbir to park the machine and report to the lunch room in order that Mr. James Keavey, Manager-Claims and Property, could take Dittenbir's deposition.

Van Buskirk and Keavey both testified that at the time they could "smell alcohol on Dittenbir's breath," and that his speech was "slurred." Van Buskirk testified that Dittenbir also became belligerent, addressing him in an obscene manner. However, Van Buskirk stated, "It wasn't his fault, he was quite intoxicated." Further, according to Keavey, Dittenbir "insisted" that he was going to move the machinery "down to the end of the yard." Keavey testified that he removed the key from the equipment so that Dittenbir would not be able to do so.

When the remainder of the crew arrived, they were instructed to report to Keavey and Van Buskirk for questioning. In addition to Claimant Dittenbir, Mr. Alda, Mr. Filarski, Mr. Kendall and Mr. Hudak were present. Mr. Krajniak was apparently "not available." Van Buskirk advised them that there had been a complaint and "it had to do with drinking and being disorderly." According to Van Buskirk, Foreman Alda stated that he had not been drinking. Claimants' Filarski and Kendall stated that they had had one beer, and Dittenbir stated that he had had five beers and one schnapps. When Van Buskirk asked Mr. Hudak if he had been drinking, Hudak did not respond verbally, but merely nodded his head, which Van Buskirk "assumed to be an affirmative response."

Van Buskirk then informed the crew that "effective at 16:00 their day of work was complete due to this incident, and due to the fact that we had some knowledge that they had something to drink." No one was removed from service pursuant to this meeting, and Van Buskirk assured the Claimants that "whatever would be determined would be determined subsequent to an interview." Van Buskirk testified that he instructed Dittenbir to arrange for a ride home as he was in no condition to drive himself. After determining that neither Alda nor Bechtol had consumed any alcohol, Van Buskirk instructed others to put the remaining equipment away.

On November 29, 1990, Van Buskirk directed Mr. Keavey and James Ancel, Track Supervisor, to interview the owner of the Tavern, and a waitress who was employed there in connection with the alleged incident. The women stated that the "majority" of the crew were at the Tavern for approximately 1/2 hour, and Pierson stated that she had taken a pitcher of beer to the crew's table. Further, the witnesses testified that "there was a commotion out

there and it was one gentleman whose name was Randy." Jordan and Pierson further testified that "Randy" became "very verbal and abusive." Neither woman was willing to repeat the words Mr. Dittenbir actually used, however, the waitress stated that she "wouldn't take that even from her husband," and that she "slapped Randy" at which time Dittenbir allegedly turned his beer upside down on the bar.

Pursuant to Keavey and Ancel's investigation, the Claimants received the following correspondence:

"Please arrange to attend a hearing in the upstairs conference room at the Detroit & Mackinac Railway Company on Wednesday, December 5, 1990 at 10:00 a.m.

You are hereby being charged with the following:

CHARGES:

That on November 28, 1990 you consumed or observed the consumption of alcoholic beverages while on company time and thereafter operated track machinery to Tawas from National City, MI. Also that you were abusive, vulgar and insubordinate in your actions and speech.

RULES VIOLATED:

Violation of Timetable No. 113, dated May 6, 1984, Operating Rules and General Regulations. General Rules Section 'E', Rule 'B', Rule 'E', Rule 'G', Rule 'I' and Rule 'K'.

GANG FOREMAN ONLY in addition to the above rules.

1. Motor Car Rules - Section 'M'
Rule M-4 C, Page 50.
2. Safety Rule Book, Rule 1056, Page 15.

You may be accompanied by a representative of your choice along with any witnesses you desire at no expense to the company."

Claimants Alda, Kendall, Krajniak, Filarski, and Hudak appeared at the hearing. Although Claimant Dittenbir acknowledged receipt of the registered letter informing him of the hearing, he did not attend the hearing, nor did he contact his representative or the charging officer to request a postponement.

At the hearing, the Claimants recanted their earlier testimony by individually stating that "none of the crew members consumed alcohol, nor did any of them see a crew member consuming alcohol." Further, each of the Claimants stated that they did not observe any altercation between Claimant Dittenbir and the waitress at the Rainbow Tavern.

Subsequent to the hearing, the Claimants received notification of the results of the investigation as follows:

- "1. Claimant A. Krajniak that he had been cleared of the charges under Rules G, I and K, that he had been found guilty of Rules B and E and was assessed a six (6) month suspension, effective December 28, 1990.
2. Claimants B. Kendall, K. Filarski and C. Hudak that they had been cleared of the charges under Rules I and K, that they had been found guilty of Rules B, E and G and as a result thereof, they were dismissed from service, effective December 28, 1990 with consideration for re-employment after one (1) year upon successful completion of a state approved rehabilitation center for alcohol abuse and approval by the Company physician.
3. Claimant R. Dittenbir that he had been cleared of the charges under Rule I, he had been found guilty of Rules B, E, G, K and portions of Rule I and as a result thereof, he was dismissed from service, effective December 28, 1990 with consideration for re-employment after one (1) year upon successful completion of a state approved rehabilitation center for alcohol abuse and approval by the Company physician.
4. Claimant D. Alda that he had been cleared of the charges under Rules G, K and portions of Rule I, he had been found guilty of Rules B, E and portions of Rule I and Motor Car Rules - Section 'M', Rule M-4 C and Safety Rule 1056 and as a result thereof, he was dismissed from service, effective December 28, 1990."

The Organization appealed the employees' discipline up to and including the highest Carrier officer designated to handle such matters. A conference held on March 25, 1991 failed to resolve this dispute. It is now properly before this Board for adjudication.

Agreement rules B, E, G, I and K, Motor Car Rules Section M, Rule M-4 C and portions of Rule 1, pertinent to this dispute, read as follows:

- "B. Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, the employee must apply to proper authority for an explanation.
- E. Employees must render every assistance in their power to carrying out the rules and special instructions and must promptly report any violations to the proper authority.
- G. The use of intoxicants, narcotics, or dangerous drugs by employees subject to duty either while on duty or on company property is prohibited. Possession of intoxicants, narcotics or dangerous drugs or participation in any transaction involving same by any employee while on duty or on company property is prohibited.
- I. Dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violations of the law, are prohibited.
- K. Employees on or about trains and at stations must be courteous and orderly.

RULE 1 - WORKING ON OR ABOUT TRACKS

- 1051. Employees on or about tracks must be alert, watchful and keep out of danger, exercising care to avoid injury to themselves and others. Nothing in these rules is to be construed as relieving any employee from performing his full duty in this respect.
- 1056. Supervisors are responsible for providing necessary protection for their men and equipment in accordance with operating rules.

M-4 AUTHORITY FOR CAR MOVEMENT

- C. Separate authority will be issued for each car, except when groups of cars, or machinery is operated as one work force or work gang, then the employee in charge will be responsible for the movement of all cars and equipment."

The Organization's procedural argument pivots upon the absence of Claimant R. Dittenbir at the hearing. The Organization maintains that the Claimants were not afforded a fair investigation in light of the fact that not all of the charged employees were present. With respect to the merits of the claim, the Organization has asserted that the Carrier failed to present "sufficient or probative" evidence to support its actions in that all of the Claimants who were present at the hearing denied and/or refuted the charges leveled against them. Inasmuch as none of the Carrier's witnesses was present at the Tavern, the Organization submits that the Carrier must rely on the Claimants' testimony concerning the alleged violation of Rule G.

Moreover, the Organization protests the amount of discipline assessed: The Organization maintains that Claimants Kendall, Hudak and Filarski were dismissed without evidence of any prior discipline and without consideration to their length of service to the Carrier. With respect to the discipline imposed upon Foreman Alda, the Organization points out that even though his violations were less serious than Claimant Dittenbir's, the Carrier offered Dittenbir the option of re-employment after one year and did not offer Foreman Alda the same.

For its position, Carrier maintains that Claimants Kendall, Filarski, Hudak, and Dittenbir "clearly" violated Rule G by their own admission when interviewed by Mr. Van Buskirk and Mr. Keavey. The Carrier points out that, "This act put these men and the general public at risk." Further, the Carrier maintains that Foreman Alda's lack of action "condoned" the activity, and that Claimant Krajniak was present and took no action to stop or report the incident. Finally, the Carrier submits that Claimant Dittenbir indicated that he was drinking alcohol when he was interviewed by Van Buskirk and Keavey, and that he was "insubordinate to his supervisors and insulting to the general public."

In labor-management arbitration of discipline cases under the traditional just cause standard the Carrier bears the burden of

demonstrating persuasively, by at least a preponderance of the record evidence, that: 1) Management made a fair, informed and correct determination of the employee's guilt or innocence; 2) The accused employees actually engaged in the breach of duty, malfeasance or misconduct charged; and 3) The disciplinary penalty imposed was not unreasonably harsh, discriminatory or otherwise inappropriate in all of the circumstances, including considerations of nature of the offense, progressive discipline, and factors, if any, exacerbating or mitigating the employee's demonstrated guilt. There is no showing on this record that the Carrier failed in its duty to make a fair and correct investigation of the Claimant's guilt or innocence. The Carrier afforded each of the Claimants ample opportunity to testify concerning the events of November 28, 1990. Claimant Dittenbir elected to absent himself from the hearing with no communication to either the Organization or Carrier. Accordingly, Carrier was not obliged to hold a separate hearing for him, or to make other extraordinary accommodations.

On the issue of culpability in this case, the Board is faced with the direct and irreconcilable credibility conflict between the statements attributed to Claimants on November 28, and their recanted testimony at the hearing held on December 5, 1990. Carrier witnesses testified that on the day of the incident, Claimants Kendall, Filarski, Hudak and Dittenbir admitted they had been drinking. Further, several witnesses testified that they could smell alcohol, particularly on the breath of Dittenbir, whose behavior was viewed as indicative of an individual in an intoxicated state. Claimants' revised testimony on December 5 is clearly self-serving and lacks credibility in light of abundant consistent and credible contrary testimony at the hearing.

The only question remaining is whether it was unreasonable, excessive or discriminatory for Carrier to impose the discipline that it chose. Foreman Alda was in a position of authority, and although he did not consume any alcohol, it was his responsibility to address the situation rather than ignoring it as he did. Claimant Krajniak was guilty of the same offense, however, unlike Foreman Alda, he was not in a supervisory capacity, and therefore, Carrier is not unreasonable in assessing him discipline less severe than Claimant Alda. As for Claimants Kendall, Filarski, Hudak and Dittenbir, Carrier has shown persuasively on this record that these individuals did, in fact, consume alcohol while in the Carrier's service. Numerous decisions on this and other Boards have supported assessment of severe discipline in similar cases. In light of the foregoing, the Board finds no basis for disturbing Carrier's assessment of discipline for any of the aforementioned Claimants.

Form 1
Page 9

Award No. 29746
Docket No. MW-29976
93-3-91-3-372

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Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.