Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31741
Docket No. SG-32378
96-3-95-3-231

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Delaware & Hudson Railway Company, Inc.

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Delaware & Hudson Railroad (D&H):

Claim on behalf of J.L. Congdon to be reinstated to service with his record cleared of all charges in connection with the investigations conducted on June 29 and 30, 1994, and to be made whole for all time and benefits lost as a result of his dismissal from service, account Carrier violated the current Signalmen's Agreement, particularly Article 12, when it did not provide the Claimant with a fair and impartial investigation and assessed harsh and excessive discipline against him in this matter. BRS File Case No. 9646-D&H."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On June 17, 1994, Carrier sent Claimant a notice to attend an Investigation on June 22, 1994, concerning his alleged violation of Rule G and Code of Federal Regulations 49 Part 219.101 on June 15, 1994. On June 21, 1994, Carrier sent Claimant a notice to attend an Investigation on June 24, 1994, concerning his alleged false wage claims and absence from duty on June 15, 1994, in violation of NORAC Operating Rules D and T. The Investigations were postponed to and held on June 29 and 30, 1994, respectively. On July 15, 1994, Carrier sent Claimant notice that he had been found guilty of the charges and was dismissed from service.

The Organization maintains that Carrier failed to prove the charges by substantial evidence. The Organization further contends that the penalty of dismissal was excessive.

Carrier argues that it proved the charges by substantial evidence. Carrier further contends that, in light of the severity of the offenses, dismissal was appropriate.

Claimant, who at the time of the incident had 15 years of service, was scheduled to work from 7:00 A.M. to 3:30 P.M. on June 15, 1994. It is undisputed that he was observed from 12:00 Noon until approximately 4:00 P.M. with co-workers F. Schuler and G. A. Akulis at Mr. Schuler's home on a lake, eating, drinking and swimming in the lake. Their activities were videotaped by a private investigator who had been retained by Carrier to maintain surveillance on Mr. Schuler for reasons unrelated to the matters that resulted in Claimant's dismissal.

Carrier's finding of the Rule G and CFR violations is based on the proposition that Claimant was drinking beer. The videotape shows Claimant drinking from several brown bottles. However, it is impossible to tell from the videotape exactly what was in the bottles. The labels on the bottles cannot be read from the videotape.

Similarly, the private investigator testified that he observed Claimant drinking from brown bottles. He inferred that the Claimant was drinking beer. However, when pressed on cross-examination, the private investigator conceded that he did not know what was in the bottles, and was unable to read the labels on the bottles. Although he was able to see a head on the beverage, he conceded that non-alcoholic beer would have given a similar appearance. Claimant testified that he was drinking non-alcoholic beer.

Although Claimant's actions are very suspicious, suspicion cannot substitute for evidence. Based on the record developed on the property, we are unable to find substantial evidence that Claimant was drinking beer on June 15, 1994. Accordingly, the Rule G and Code of Federal Regulations 49 Part 219.101 violations cannot stand.

The record with respect to the Rules D and T violations is different. The Organization maintains that Claimant's time record reported only five hours worked on June 15, and that Claimant went off duty at 12:00 Noon, expecting to begin work three hours early on June 16 to get an early start on a trip to Sunburry to remove brush off a power line and clear branches that were blocking a signal. The record, however, contains substantial evidence that Claimant and his coworkers affirmatively deceived Carrier.

Initially, Claimant and Mr. Schuler were scheduled to travel to Sunburry on June 15, 1994. However, when Mr. Schuler completed another assignment in the Taylor area at 10:45 A.M. and telephoned the general supervisor, advising that he was ready to leave for Sunburry, the supervisor told him to wait until the following morning to go to Sunburry. The supervisor believed that it was too late to go to Sunburry that day and complete the job without incurring overtime. Upon the supervisor's inquiry, Mr. Schuler affirmatively represented that there was sufficient work in the Taylor area to keep himself and the Claimant busy for the rest of their shift. Furthermore, at approximately 1:45 P.M., Claimant responded to a trouble call and affirmatively represented that he and his two coworkers were in Nanticoke, when in fact they were at Mr. Schuler's residence drinking and swimming.

Mr. Akulis reported eight hours at straight time for himself, Mr. Schuler, and Claimant on June 15, 1994. Although Claimant subsequently corrected his time record, he did so only after he was informed that he was being taken out of service for the alleged Rule violations. Accordingly, we conclude that Carrier proved the Rules D and T violations by substantial evidence.

Violations, such as those proven in the instant case, which involve dishonesty, are extremely serious and warrant a most severe penalty. However, in view of the peculiar facts and circumstances of this case, including Claimant's long tenure, Carrier's failure to prove the Rule G violation, the absence in the record of any prior discipline, and Claimant's albeit belated correction of his time record; and without setting a precedent for future cases; the Board finds that the penalty of dismissal was excessive and that Claimant should be given one last chance to return to the workforce.

Therefore, we will order that Claimant be reinstated to service with seniority unimpaired, but without any backpay or other compensation, and conditioned on Claimant's passing any reasonable physical examination that Carrier may require.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of October 1996.