Award No. 8818
Docket No. CL-10560

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE DENVER UNION TERMINAL RAILWAY COMPANY

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

(1) The terms of the Agreement were violated when Mr. Gerald E. Meusborn was dismissed from service January 25, 1958.

(2) That Mr. Gerald E. Meusborn be paid for all salary loss suffered as result of his dismissal January 25, 1958, until he was restored to service on February 26, 1958.

OPINION OF BOARD: As the claim indicates this is a discipline case and involves claim for a month's loss of pay account dismissal for violation of this company's Rule G, which reads as follows:

"The use of intoxicants or narcotics by employes available for duty, or their possession or use while on duty, is prohibited."

We think justice requires that when a man has been in the employ of a carrier (or Terminal Company as in this case) for a long period of time and has a clean record, we should take a good look at the claim to see that everything was fair and just at his hearing in compliance with his rights under his agreement.

Here the employes are contending with some merit that claimant was disciplined and "fined" a month's pay in violation of his rights under Rule 24, the discipline rule.

When claimant appeared at the hearing claimant's representative when asked if ready to proceed replied "We are ready to proceed; however, I do not feel that your letter of January 14, 1958 constituted any charges against this employe" to which the hearing officer replied: "I think, as you say, there have been no charges. We are investigating at this investigation and

hearing a violation of Rule G," and response thereto was "With your clarification we are ready to proceed." The Carrier, in seeking to establish the precision of its charge, here underscores the words "available for duty" appearing in its Rule G. This language must of necessity have reference to "availability" while off duty because the words above quoted are followed by the words "or their possesion or use while on duty."

The company says "Claimant in this instance was on his lunch period and most certainly was available for duty."

Company concedes that this is not a standard Rule G inferring thereby presumably that this Rule G is enforceable to regulate the use of intoxicants by an employe while he is off duty.

To the extent that it seeks to do that without any regard to the employe's fitness for service or ability to do his work satisfactorily, the rule is void for indefiniteness.

For example, this employe is subject to call while off duty, i. e., "to perform service not continuous with the (his) regular work period" (parenthesis ours), Rule 41, any hour of the day or night—wherever he may be.

While we can agree that this statement sounds absurd, it is mentioned only to indicate that the charge in this case, i. e., violation of the rule was too vague, and no wonder that when the hearing officer was asked what the charge was, he said "I think, as you say, there have been no charges. We are investigating at this investigation and hearing a violation of Rule G."

The Company's attempted explanation of this is significant. It "was holding the investigation and hearing to determine responsibility, if any, in connection with Rule G" which under the facts in this case could only mean if claimant had had a drink (of intoxicants) while off duty. It does not say anything about determining claimant's **responsibility** in connection with his job, seeking to show that he had been derelict in any duty he owed the company.

Such is the purpose of Rule 24 (Discipline) when it says—

> "* * * An employe, charged with an offense, shall be furnished with a letter stating **the precise charge** at the time the charge is made."

Carrier relies particularly upon two of our recent awards, Nos. 8310 and 8806. In 8310 claimant admitted the precise offense (as the claimant did in the instant case). But in that case the Carrier admitted and considered evidence of the claimant's past record in assessing the discipline. In our case claimant had no past record, and the award says "the additional charges leveled at the beginning of the hearing * * * while improper * * * do not justify setting aside Carrier's decision."

In other words, the claimant there was dismissed for her past record.

In Award 8806 the claimant was so intoxicated that he had to be taken off the job. In our case not a single witness, mostly employes working with claimant at the time, even intimated that he was "under the influence" or incapable in the slightest of doing his work.

However, in view of claimant having confessed to having "a couple of shots of whiskey and a couple of beers" we cannot say that this rule was not violated, but since Carrier raises the issue of whether the discipline was excessive, we hold that in the circumstances of this case it was excessive, and to the extent that the charge lacked precision the Carrier violated the agreement and the claim must be sustained.

This claim is not one of leniency but of claimant's contractual right.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively carrier and employe 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1959.

DISSENT TO AWARD NO. 8818, DOCKET NO. CL-10560

The Carrier's "General Rules for Guidance of Employes" were revised and made effective April 1, 1957. Claimant acknowledged receipt of the revised rules over his signature, witnessed by the Baggage Agent, on March 28, 1957. As an employe, Claimant was subject to such rules with no choice other than to comply therewith.

Claimant was observed in a Bar, during his lunch period, consuming two shots of whiskey and two glasses of beer. He admitted it when questioned by his supervisor upon his return to work at the expiration of his lunch period. He was notified to report for hearing to ascertain the facts and place responsibility in connection with violation of Rule G.

While the majority herein sets up what it characterizes as an absurd sounding statement "only to indicate that the charge in this case, i. e., violation of the rule was too vague", it admits—

> "* * * in view of claimant having confessed to having 'a couple of shots of whiskey and a couple of beers' we cannot say that this rule was not violated."

In such circumstances, Award 8818 is in error in sustaining the claim and thereby rewarding Claimant with a month off with full pay on the basis that the charge lacked precision. Violation of Rule G is a most serious offense on all Carriers.

For the foregoing reasons, among others, we dissent.

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp