Award No. 10232

Docket No. MW-12273

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY EASTERN LINES

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

(1) The Carrier violated the effective Agreement when, on April 28, 1959, it dismissed Section Foreman R. A. Gilliland from service without just and sufficient cause and on the basis of unproven charges.

(2) Section Foreman R. A. Gilliland be reinstated with seniority, vacation and all other rights unimpaired and that he be reimbursed for all wage loss suffered since he was removed from service.

OPINION OF BOARD: The claim of the Organization is on behalf of Section Foreman R. A. Gilliland who after hearing on the charges preferred against him, was discharged from the service of the Carrier.

The Organization asserts that in the discharge of Section Foreman Gilliland, the Carrier acted arbitrarily and capriciously and asks that he be restored to service with all rights unimpaired and compensated for time lost.

The investigation accorded the Claimant was originally convened to determine whether he violated either or both of the following Rules governing his Department on April 3, 1959:

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

Rule O: "Employes must obey instructions from the proper authority in matters pertaining to their respective branches of service. They must not absent themselves from, exchange duties or substitute other persons in their places without proper authority.

"They must report for duty as required and those subject to call for duty will be at their usual calling place, or leave information as to where they will be located."

The charge against Section Foreman Gilliland is that on April 3, 1959, he was assigned and worked as foreman of the track section at Frontenac, Kansas: that he reported for work in the morning, but was absent from the job for approximately 3 hours and that he returned to the job at 12:30 P. M.: that when he returned, he had alcohol on his breath and gave outward evidence of the fact that he had been drinking, namely his appearance.

The record contains the testimony of four witnesses who saw the Claimant when he returned and testified as to his actions, heard him talk, watched him walk and some who smelled his breath and detected the odor of alcohol thereon: no one claimed he was intoxicated.

Opposed to this is the denial of Section Foreman Gilliland of any drinking during his absence from his work and a statement received in evidence from one Antone Menghini, Jr., who certified that Claimant was with him on the morning in question and had gone over the track work with him where Claimant's crew was next assigned and they inspected to determine where the best location for a drain would be. He further stated, "Gilliland showed no sign of being intoxicated and didn't appear that he had been drinking."

In considering this particular rule and the showing and sustaining of a violation thereof, the Board holds, as held in many previous awards, that it is not necessary to offer evidence of a witness who saw the employe drinking. The effect of the use of intoxicants is well known. It is not necessary to employ a doctor or other expert to prove a person was using intoxicating liquors. The opinion of ordinary laymen to determine such fact, from the manner of speech, or walk or general conduct or odor of intoxicating liquor is practically universally recognized as competent and probative testimony.

It is true Claimant was not removed from his job at the time. Claimant was not intoxicated, so that he was unable to continue and his superior officers, one of whom remained until late afternoon, testified: "I could not see anything he could have hurt from then on."

Failure to remove him immediately on his assignment would be weighed as a circumstance that might go to the probative force of other proof of record, but would detract none from the obvious, if the record showed Claimant to be intoxicated.

In view of the foregoing, the claim with reference to violation of Rule G is denied and the Board further finds that the Carrier's disciplinary action with reference to the violation of Rule G was not arbitrary, capricious, unjust or excessive.

Relative to the claimed violation of Rule O, the Opinion of the Board is as follows:

It is unquestioned that Claimant on April 3, 1959, was foreman of the track section at Frontenac, Kansas, pursuant to orders and direction of his superiors: that the assigned hours of his gang being from 8:00 A. M. to 4:30 P. M. That Claimant was absent from the job for approximately 3 hours, without the consent, approval or knowledge of any of his superior officers and in disregard of instructions given him the previous day by the Roadmaster.

It is the claim of Claimant that he left the job to which he was assigned and to the job where his crew and he were to be moved to, to go to the next job at or close to the Manghini Packing Company Plant to inspect the job and determine what work was to be done and how to do it and he thus accounted for the two hours or more he was absent from his designated job: he does not claim any instructions were given him to do this, in fact he admits he had previously been at this particular job with his two immediate superiors and they had discussed with him, at least to some extent how the work should be done. It is apparent Claimant disagreed with the Roadmaster, in connection with his instructions and decided to do what he thought should be done.

In view of the foregoing, the claim with reference to violation of Rule O is denied and the Board further finds that the Carrier's disciplinary action was not arbitrary, capricious, unjust or excessive or done in bad faith.

In evaluating these two charges considered in this Award, the Board has considered that discipline is a prerogative and discretionary power of management and has followed the well-established rule that the Board may not interfere with such disciplinary action unless it clearly appears that it is unjust, unreasonable, capricious or arbitrary.

The Board has also followed the Rule of this Division that we do not resolve questions as to the credibility of the witnesses nor the weight to be given their testimony: that is the function of the trier of the facts. This did not and does not mean, however, that we were or are precluded from all the evidence of record to determine whether it supports the action taken. Our appellate function is necessarily limited and we should refrain from substituting our judgment for that of the Carrier in these disciplinary cases unless there is an abuse of discretion or substantial error. Upon the facts developed in this matter, we feel that both charges made against the employe were sustained and that the action of the Carrier was not unjust, unreasonable or arbitrary.

The record discloses that in handling the matter on the property the Carrier had agreed to reinstate Claimant with seniority unimpaired on a leniency basis and without pay for time lost, which Claimant refused. This offer was made in consideration of Claimant's long service and clear record at the time of the occurrence of the events on April 3, 1959.

The record shows that Mr. Gilliland had been an employe of Carrier 39 years and a Section Foreman 37 years and was 61 years of age.

While we subscribe to the principle that an offer of settlement is not binding on the party who makes it, we are of the opinion here that the Respondent, in making the offer, properly evaluated the degree of discipline that should apply. This factor leads us to conclude and we so find and hold, that Claimant should be reinstated, with seniority unimpaired, but without pay for time lost.

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

AWARD

Claim disposed of in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1961.