NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20100
THIRD DIVISION Docket Number MW-20304

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Delaware and Hudson Railway Company

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

(1) The dismissal of Plumber Foreman John P. Jones was without just and sufficient cause and wholly disproportionate to the offense with which charged (System Case No. 1.73 MW).

(2) Plumber Foreman John P. Jones be reinstated with seniority, vacation and all other rights unimpaired and be reimbursed for all monetary loss suffered subsequent to November 1, 1972 plus six per cent (6%) interest per annum on the monetary allowance until paid.

OPINION OF BOARD: Claimant, a Plumber Foreman, with more than thirty (30) years service with Carrier was dismissed from service for a violation of "Rule G":

> "The use of intoxicants or narcotics by employees subject to duty or their possession or use while on duty, reporting for duty or on Company property is prohibited, and is sufficient cause for dismissal." (underscoring added)

Claimant's regular hours are 7:00 A.M. to 12 Noon (a ½ hour lunch period) and 12:30 P.M. to 3:30 P.M. On the afternoon in question, three Carrier officials requested Claimant to accompany them to the main shop.

The three officials testified, at the investigation, that Claimant had difficulty in pronouncing words, had slurred speech, smelled of intoxicants, talked slowly and deliberately, and was unsteady on his feet. This condition prompted one official to inquire of Claimant if he had been imbibing in alcoholic beverages. He replied that he had consumed a rye and soda and a vodka when he went home during his lunch break (Noon-12:30 P.M.). One official asked if such practice was normal. It was testified that Claimant responded...."Some people have a glass of milk, I have a rye and soda and a vodka. I need it for medication."

At the investigation, Claimant stated that he had been using cough medicine which may have contained a degree of alcoholic content. He neglected to mention that to the three officials on the day of the incident, although he did mention to them that he had an equilibrium problem which may have accounted for his unsteady gait. He conceded that he had two alcoholic drinks at lunch.

The Board has considered the authority advanced by Claimant but finds that the cited Awards are not applicable to this dispute. In Award 6821 (Robertson) the Claimant was not subject to duty within the context of his "offense". Here, Claimant consumed intoxicants during a thirty minute period immediately prior to scheduled duty hours. In Award 15023 (Hamilton) the Board found no evidence of intoxication to any apparent degree whatsoever. Here, there was an impairment. It is important to note, however, in Award 15023:

> ".... the degree of impairment is not essential, and the Board will not condone the performance of work by those under even the slightest alcoholic impairment".

Nor is Award 2991 (O'Malley) pertinent. There, the employee had completed his work, was off-duty and not subject to recall. Similarly, other cited Awards are not material to this Claimant's culpability.

As noted by this Referee in Award 19977, (citing Awards 15574 (Ives) and 19590 (Blackwell)), laymen are competent to testify as to outward manifestations, physical actions and activities, and conclusions of intoxication. We can not ignore the testimony of the Carrier officials as it related to a violation of Rule G.

This Board finds that none of Claimant's substantive procedural rights were violated in any manner. Substantial and credible evidence was presented at the investigation, including Claimant's own statements, to support the charges against him.

Finally, the Organization suggests that the punishment of permanent discharge is wholly unwarrented in this case, citing Claimant's years of service and an "unblemished" record. Carrier points out that long service, in and of itself, is not a criteria for reinstatement, citing Award 14442 (Dolnick) and 16268 (Perelson), among others. Further, Carrier disputes that Claimant's record was unblemished. A Carrier may (under the Awards of this Board) consider personnel records, not in determining guilt or innocence, but in assessing the quantum of punishment. See Awards 13684 (Coburn) 16315 (Englestein) 16678 (Perelson) 18362 (Ritter). In this case, the record fails to suggest that the Carrier based its decision on the prior record, but rather based its determination solely upon the events described herein.

At the same time, Claimant failed to rely upon his record, on the property, as a mitigating factor. It was not until the Organization's Submission to this Board that the matter of Claimant's "unblemished" record was raised. Thereafter, in its Submission, Carrier disputed that characterization, and submitted purported evidence to the contrary. Under these circumstances, the Board feels that Claimant's prior record is not properly before it and the record on review is neutralized in that regard.

The Board is not unmindful of Claimant's stated reason for his consumption of hard liquor during his lunch break. One official testified that he asked Claimant if drinking during lunch time was "normal". In direct reply Claimant stated, ". . . some people have a glass of milk. I have a rye and soda and a vodka. I need it for medication." This Board may draw all conclusions reasonably inferred from the testimony, and the above cited admission appears to imply that the consumption of two drinks at lunch was not an isolated occurrence. While the cited statement, standing alone, might be considered innocuous, it was made in the context of a hearing on a very serious matter, and, although the Claimant testified, he failed to comment on the damaging implication, nor did he suggest that his alcoholic consumption was limited to the day in question. We do not alter the burden of proof; we merely comment on a failure to reply to a rather damaging inference.

This Board will not disturb an assessed penalty unless it finds that Carrier's decision was so unjust, unreasonable, arbitrary, capricious or discriminatory so as to amount to an abuse of discretion. Award 19433 (Blackwell). We are unable to make such a finding in this case. The claim will be denied.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1974.