

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20588
Docket Number CL-20694

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steam-
(ship Clerks, Freight Handlers, Express
(and Station Employees
(Union Pacific Railroad Company
((South-Central District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7566) that:

1. Claimant E. W. Mann was improperly dismissed from the service of the Carrier following formal investigation held on May 12, 1973.

2. Carrier shall now be required to return Claimant E. W. Mann to the service of the Carrier with all rights under the Agreement restored and shall reimburse Claimant for all time lost commencing with May 4, 1973 at the rate of the position of Utility Bus Driver.

OPINION OF BOARD: On May 4, 1973, Claimant was removed from service for an alleged violation of "Rule G".

Initially, Claimant raises a procedural issue. Rule 45 (a) states, in pertinent part:

"No employee will be disciplined or dismissed without a fair hearing by his supervising officer. Suspension in proper cases pending a hearing, which will be held within seven days of the time charge is made, or employee suspended, will not be considered a violation of this principle..."

Because an investigation was not held until May 12, 1973, the Organization asserts that the seven (7) day rule, cited above, was violated. In order to properly consider this procedural issue, certain background information is pertinent.

A notice of investigation was prepared on May 6, 1973, advising Claimant to report for a hearing at 10:00 A.M. on May 7, 1973. Carrier made a number of attempts to personally deliver the notice on the 6th, at Claimant's residence, and attempted to contact him by telephone, to no avail.

Because of failure to contact Claimant, Carrier prepared another letter to Claimant, (May 7, 1973) postponing the investigation until May 12, 1973. The crew dispatch force was instructed to attempt to personally deliver the document at least once each day, and to call Claimant's residence once every four (4) hours.

The instructions were complied with, but no personal or telephonic contact was made.

At 2:00 A.M. on May 11, 1973 Claimant appeared at the Crew dispatcher's office. He received the formal notice and signed a document stating that he would appear at the hearing on May 12, 1973.

Carrier asserts that Claimant was aware that a notice had been prepared for him (and the record appears to confirm that fact) and Claimant's actions indicate that he was "hiding out". We can not, of course, speculate as to what may have motivated Claimant's lengthy absences from his home, but we do feel that Carrier took reasonable steps in an effort to contact Claimant. Claimant criticizes Carrier for failure to forward the notice by certified mail. The Rules agreement does not require such a procedure. Moreover, under this Record, it is questionable that use of the U.S. Mail would have resulted in an earlier notification to Claimant. If he was not home (when he had good reason to believe Carrier was attempting to contact him) for phone calls each four (4) hours, we question that use of certified mail would have altered the status of this record.

The Board feels that contractual provisions should be complied with, and that time limits, which are negotiated by the parties, should not be ignored. At the same time, we feel that each instance must be viewed upon its own merits.

Obviously, the original May 6 notification complied with the Rules Agreement. It then became necessary to reschedule the hearing when Claimant could not be located (or proceed without Claimant). The record is totally silent as to why Carrier chose the date of May 12, 1973 (which exceeded the seven (7) day Rule) when it had no knowledge, on May 7, 1973 that Claimant would not be served until May 11, 1973. Nonetheless, Claimant's disappearance did preclude Carrier from rectifying the situation. Finally, we note that the May 7, 1973 letter stated:

"Your signature to this postponement will indicate that you are agreeable to postponement and this postponement will not affect the validity of the hearing."

When Claimant received the notice, he signed a statement that he would attend the investigation on May 12, 1973.

We concede that the matter is not entirely free from all doubt, but under this record, we feel that Claimant's own conduct must be considered, as well as his apparent acquiescence to the date of the hearing. We specifically note that we do not comment upon other factual circumstances and records not now before us.

Concerning the merits, we note that Claimant was employed from 4:00 P.M. to 12:00 P.M. by Carrier as a truck driver (delivering messages and personnel in a Company vehicle) and devoted about 75% of each shift to driving.

At about 8:10 P.M. on May 4, 1973 Carrier's Special Agent received an anonymous phone call which suggested that Claimant had been drinking. He and the Assistant Terminal Superintendent interviewed Claimant shortly thereafter. Both testified that Claimant had a strong odor of alcohol on his breath; had bloodshot eyes and slightly slurred speech. There was some conflict as to whether or not he walked in a steady manner. At or about 8:30 P.M. Grievant was relieved from duty. Subsequent to investigation, he was terminated.

Although Claimant denied that he had been drinking on duty, he did concede that he had consumed an alcoholic beverage at 1:00 P.M.

Claimant denied (at the investigation) that he had been drinking and produced three (3) witnesses who worked on the same shift with Claimant and were in close contact with him. All three (3) testified that they did not smell alcoholic beverages on Claimant's breath, and none noticed anything out of the ordinary to suggest consumption of alcoholic beverages.

While there is an apparent conflict of testimony, we note an absence of time frames. The two Carrier witnesses testified as to Claimant's condition at 8:30 P.M. The record is entirely void of any indication as to when Claimant's first two witnesses were in close contact with Claimant. It may have been shortly after Claimant reported for duty at 4:00 P.M. The third witness stated that his contact with Claimant was between 6:00 P.M. and 6:30 P.M.: a period of two (2) to two and one half (2½) hours prior to the confrontation which lead to termination.

The Board concludes that Carrier has presented substantive evidence to demonstrate that Claimant violated Rule G.

Claimant was initially employed by Carrier in 1938. In 1949 he resigned, but was reemployed in 1951. While Claimant had certain disciplinary difficulty in 1970 and 1972, there is no indication of any Rule G violations in his thirty-four (34) years of service with Carrier. While we are quite reluctant to overturn a Carrier determination of quantum of punishment, we feel that Claimant's long years of service, are worthy of the Board's consideration.

Surely, a Rule G violation, is a most serious matter, especially when it involves an employee who drives a company vehicle, and severe disciplinary action is warranted. But under this record we feel that a permanent discharge is excessive.

We do note that Claimant's disciplinary difficulties have been confined to the last few years. His future employment tenure with the Company will obviously be closely scrutinized, and he alone can control that tenure.

We will restore Claimant to active service with seniority and other rights unimpaired, but without compensation for lost compensation.

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 Employees involved in this dispute are respectively Carrier and Employees 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 discipline of termination is excessive.

A W A R D

Claim sustained to the extent stated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.

CARRIER MEMBERS' DISSENT TO AWARD 20588, DOCKET CL-20694

(Referee Sickles)

In view of the seriousness of the offense committed by the Claimant, we dissent to that portion of the award which restores Claimant to Carrier's service.

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