

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20706
Docket Number MW-20397

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(George P. Baker, Richard C. Bond, and Jervis Langdon,
(Jr., Trustees of the Property of
(Penn Central Transportation Company, Debtor

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

(1) The dismissal of Machinist Glen E. Gordon was without just and sufficient cause and on the basis of unproven and disproven charges (Harrisburg Division Case No. MW-H-60/71).

(2) Machinist Glen E. Gordon shall be restored to service and made whole for loss of all wages.

OPINION OF BOARD: The record does not support the discipline of permanent dismissal. Accordingly, the Board award will restore the Claimant to service with all rights unimpaired, but without pay for time lost.

This case arose from incidents on September 28 and October 1, 1971, which led to the Claimant being noticed on the following charges:

1. "Being on duty under the influence of alcoholic beverages at approximately 4:45 P.M. on Tuesday, September 28th, 1971"
2. "Absence from regular assigned position for approximately one (1) hour from 5:20 P.M. to 6:30 P.M. on Friday, October 1st, 1971"
3. "Insubordination to Gang Foreman, H. H. Hockensmith at approximately 6:40 P.M. on Friday, October 1st, 1971"
4. "Threatening Gang Foreman, H. H. Hockensmith with bodily harm at approximately 6:30 P.M. on Friday, October 1st, 1971"

The October 19 hearing received evidence from two supervisors relative to the charge of being under the influence of alcohol on Tuesday, September 28. Both observed the Claimant at close range and said they detected an alcoholic odor during their conversation with him. The senior supervisor testified that: "... I could smell the alcohol from his

breath, and he appeared to me, judging from the glazed condition of his eye that he was under the influence of alcohol." The Claimant was sent home early by the senior supervisor who said Claimant made no protest about the accusation relating to alcohol. The Claimant was not removed from service at this time, and apparently, there would have been no charges about alcohol except for the October 1 incident. In his hearing testimony the Claimant denied this charge and also said that he had made a denial contemporaneous with the accusation concerning alcohol on September 28. The supervisors' temporary condonation of this incident indicates that the focus of their interest in Claimant's conduct did not involve his behavior about alcohol. Nonetheless, the record contains substantial evidence to support the charge of being on duty under the influence of alcoholic beverages, as well as a finding that some discipline therefor was warranted.

However, the record does not support the remaining charges. The sole testimony to support these charges came from the foreman of the Claimant, Mr. Hockensmith. The essence of this testimony was that at 5:00 p.m. the foreman saw the Claimant at the bulletin board and at 5:50 p.m., he noticed that the Claimant was not at his machine. He found the Claimant in the toilet at 6 p.m. and admonished him about being away from his machine. He saw the Claimant return to the shop at about 6:15 and began talking with other employees. At this point the foreman issued another admonition about returning to the machine which resulted in an abrasive exchange in which the Claimant threatened to hit the supervisor. Later, at about 8 p.m., another employee, Mr. Carbaugh, confronted the supervisor, protesting that the supervisor had told the Claimant that he (Carbaugh) had been loafing at the bulletin board for half an hour. The Carbaugh incident, according to the following testimony of the supervisor, led to another abrasive exchange:

"....At 8:30 PM when Mr. Gordon came up to sign his card, I asked him why he told Carbaugh that I had said he loafed half hour at the bulletin board? Then he told me that is what you told me. I told him that was a lie. The best thing you can do is go home; I told him. I wanted no more of his agitation. He went down the steps and stood there by his machine and he said, am I to go home, and I told him yes. He said, well, another easy night, and he left."

The Claimant's testimony in refutation of charges 2 through 4 was corroborated to some extent by three fellow-workers who were in the area during the incident. As regards Charge No. 2 that he was away from his machine from 5:20 p.m. to 6:30 p.m., one witness said the Claimant went to his machine at 5:20 p.m. and that he did not hear the Claimant refuse orders or threaten the supervisor. Another witness, without giving any times, testified to the same effect. A third witness testified that he and the Claimant

were in the toilet at 6 p.m. for about 5 minutes, and that otherwise the Claimant was operating his machine between 5:20 p.m. and 6:30 p.m.

In finding guilt on charges 2, 3 and 4, the Carrier apparently viewed the record as involving an issue of the credibility of its sole witness, the foreman, as compared to the credibility of the Claimant and three fellow-workers. This view reflects an erroneous analysis of the evidence. The Carrier's allegation in charge No. 2 was that Claimant was away from his machine from 5:20 p.m. to 6:30 p.m. However, since 5:50 p.m. is the beginning of the foreman's chronology about the Claimant's absence from his machine, there is no evidence at all to support the first 30 minutes of the alleged absence from the machine. (5:20 p.m. to 5:50 p.m.) Further, the Carrier's evidence makes no showing that it was improper for the Claimant to be away from his machine to use the toilet so the Claimant's time in the toilet must also be discounted. (Indeed, another worker was in the toilet simultaneously with the Claimant, but only the Claimant was directed to return to his machine.) Thus, the foreman's testimony, viewed in its most favorable light, puts the Claimant away from his machine from 6:15 p.m. to 6:30 p.m. Evidence of a 15-minute absence from a machine does not support a charge of an absence of 1 hour, and accordingly, the record does not contain substantial evidence to support charge No. 2. As to the evidence on the remaining charges of a threat and insubordination at 6:30 p.m. and 6:40 p.m., charges No. 3 and 4, the foreman's own testimony makes it clear that he found these incidents tolerable when they occurred and that the Carbaugh incident which occurred an hour and a half later at 8:00 p.m. was the actual basis of the foreman's decision to send the Claimant home. These circumstances manifest an element of unobjectivity in the foreman's testimony, and thus, in the context of the conflicting testimony on charges 3 and 4, the foreman's testimony alone is inadequate to constitute substantial evidence in support of such charges.

Friction existed between the foreman and the Claimant when these incidents arose, and the record shows that they had an abrasive effect upon one another. The record also shows that the foreman was personally involved in the friction, and for that reason, the Board has carefully appraised his role in the incidents involved in Charges No. 2, 3, and 4. Based upon that appraisal, and in view of the foregoing, the Board concludes that the discipline of permanent dismissal is inappropriate and that the Claimant should be returned to service without pay for time lost.

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;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The discipline of permanent dismissal is not supported by the record.

A W A R D

The claim is sustained to the extent that the Claimant shall be restored to service with all rights unimpaired, but without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulsa
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1975.