NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20828
THIRD DIVISION Docket Number CL-20956

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Washington Terminal Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7727) that:

(a) The Carrier violated the Rules Agreement, effective August 1, 1958, particularly Rule 24, when it assessed discipline of dismissal on Claimant L. Boston, Baggage and Mail Handler at the Washington Terminal Company, Washington, D. C.

(b) Claimant L. Boston's record be cleared of the charges brought against him on November 9, 1973.

(c) Claimant L. Boston be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: On the date pertinent to this dispute, November 9, 1973, Claimant held the regular position of Baggage and Mail Handler, with 31 years of service with Carrier. On said date, Baggage Agent Miller removed Claimant from service, pending a hearing, for being under the influence of intoxicants at about 3:55 p.m. On November 16, 1973, formal hearing was held for "being in an unfit condition to perform your duties" in violation of Rule "G". Claimant was found guilty as charged and on November 23, 1973 he was dismissed from service.

General Rule "G" of the Washington Terminal Rules and Regulations effective August 1, 1968, reads as follows:

> "The use of intoxicants or narcotics by employes subject to duty is prohibited. Being under the influence of intoxicants or narcotics while on duty, or their use or possession while on duty is prohibited."

Petitioner raises several issues:

1. Was Claimant given a fair and impartial hearing.
2. Was he guilty of the offense charged.
3. Was the discipline imposed warranted.
4. Should his record be cleared, with compensation for monetary loss suffered.

Carrier urges that this claim is procedurally defective and should be dismissed inasmuch as it was brought under Rule 24 of the Agreement effective August 1, 1958 instead of under Article 18 of the Agreement effective July 1, 1972. Petitioner responds that since the latter issue was not raised on the property it should not be given validity now. These two positions, however, are not irreconcilable. For, the fact is that although Rule 24 and Article 18 are worded differently, both recognize the right of appeal and set forth the Grievance procedures to be followed. Insofar as the issues involved in this dispute, the procedures under Rule 24 and Article 18 are almost identical and were fully complied with. The foregoing objections, therefore, are not of sufficient impact to deter this Board from disposition of this claim on the merits.

1. THE HEARING

Complete review of the testimony adduced and the method in which the hearing was conducted evidences the fact that there was no impairment or prejudice of any of Claimant's rights. The hearing was fairly and properly conducted, Claimant was represented by the Vice General Chairman and he was given full opportunity to testify in his own behalf and to bring such witnesses as he deemed proper. Petitioner's contention that the hearing officer asked leading questions in some instances, even if true, is not well founded. For, the testimony of Witnesses Miller and Warner was clear, concise and completely factual. (rp 26-30). Thus, there was no impairment of Claimant's right to due process, particularly since there was ample opportunity for cross-examination.

We acknowledge, further, the objection by Petitioner that although the investigation was conducted by General Foreman Farr, the decision was rendered by Train Master McCabe. Petitioner contends this was improper and cites the following prior Awards as precedents.

In Award No. 13240 (Dorsey) there was a sharp issue of credibility as between statements of two complainants (passengers) and the directly conflicting testimony of Claimant. There was no corroborating testimony and the determination of credibility by the hearing officer became of paramount importance. In fact, however, the hearing officer never saw the complainants, made no finding of credibility, and made no decision. In these peculiarly limited circumstances, the Referee held that Carrier's decision that Claimant was guilty as charged was not supported by the evidence. Accordingly, the claim was sustained.

In Award No. 14267 (Hamilton), although the Referee made concededly "dicta" reference to the fact that the Carrier officer who made the decision did not see the witnesses, it was nevertheless concluded that "the Carrier established a prima facie case which was not successfully refuted by the Claimant". Here, the claim was in fact denied.

These cases therefore are clearly distinguishable from the dispute here involved. Carrier, on the other hand, cites many Third Division cases to the contrary, in which the following quotation from Award No. 16347 (Devine) is pertinent here:

> "The primary contention of the Petitioner is that Claimant's procedural rights were violated because the decision following the investigation was rendered by other than the official who conducted the investigation, . . .
>
> "We find no valid basis for such contention. There is nothing in the Agreement that prescribes who shall prefer charges, conduct hearings, or that the officer conducting the hearing must render the decision or assess the discipline. Awards 15714, 14021, 13383, 10015, 12001, 12138, among others."

See also: 9102 (Stone), 9819 (McMahon), and 12001 (Dolnick).

Accordingly, we find that Petitioner's objection to the decision having been rendered by Train Master McCabe is not supported by the weight of authority. Nor is it supported by the pertinent provisions of the Agreement between the parties.

Petitioner raises the further objection that review of Claimant's disciplinary record at the hearing precluded him from being accorded a fair and impartial investigation of the charge against him. Award No. 17156 (McCandless) supports this position and cites Awards Nos. 11130, 11308 and 13758.

Carrier on its part cites many cases to the contrary, including Award Nos. 16315 (Engelstein), 9863 (Weston), 13684 (Coburn) and 15184 (Mesigh). In 16315, supra, the guiding principle is set forth as follows:

> "With reference to the contention that it was improper for Carrier to review Claimant's service record during the investigation, we find the use of such information to determine the measure of discipline to assess is valid. . ."

In any event, where the prior Awards on this issue are apparently in conflict, we must look to the testimony and the entire record to determine whether, notwithstanding Claimant's service record, the hearing was in fact properly conducted and whether the evidence, relevant specifically to the charge, sustained the Carrier's burden of proof by a clear preponderance.

We find in the affirmative on both these issues. Our reasons for concluding that the hearing was fairly and impartially conducted are set forth above. Our reasons for concluding that the record testimony amply supported Carrier's finding that Claimant was guilty of the offense charged are set forth in detail hereafter.

2. THE EVIDENCE

In support of its charge against Claimant, Carrier submitted the testimony of two witnesses, Baggage Agent Miller and Mail Foreman Warner. Each was absent from the hearing room during the testimony of the other.

Miller testified that on November 9, 1973 at about 3:55 p.m. he observed Claimant in the Baggage Room. "He was unsteady on his feet, his speech was incoherent and he had the odor of intoxicants on his breath. I gave Mr. Boston the option to go to Hunters Laboratory for a blood test to determine his condition. At first he said he would." However, when Miller returned from the office to get cab slips, Claimant refused to go for the blood test "and I sent him off duty for being in unfit condition to perform his duties." (rp. 26). Further, on record page 27:

> "In determining at that time -3:55 P.M., that Mr. Boston was under the influence of intoxicants; I detected an odor of intoxicants on his breath, his actions were not normal; he was waving his arms, dancing, jumping up and down - just not his normal actions."

In response to the question that Claimant was jumping up and down to prove he was not intoxicated, Miller replied:

> "I can't really say what he was trying to prove, but those were his actions. Even as he jumped up and down, it wasn't in perfect fashion; it was just a sloppy, careless manner."

Mr. Warner corroborated Miller as to Claimant's condition by testifying that Claimant "was talking right loud, waving his hands" and when Miller left to get the cab tickets "I saw that Mr. Boston wasn't steady on his feet and he was waving his hands, still talking loud" and, finally, "Mr. Boston refused to go to the Lab" and was ordered off the property. (rp. 28) Warner testified further that there was no doubt in his mind that Claimant "was under the influence of intoxicants", and that "he wasn't steady when he walked away from me to the foreman's office." (rp 29)

Neither witness was shaken on cross-examination.

It is noteworthy that at one point during the testimony, Claimant interjected that he was "in a fit condition to work" and "wasn't drunk". (rp 29). However, when asked by way of formal testimony whether he had anything to say in his own behalf (rp 31), he offered nothing of any relevance to the charge against him. Peculiarly, although he had ample opportunity to do so, he did not deny that he had imbibed intoxicating liquors on that day. Other than his interjection above referred to, he offered no evidence and produced no witnesses to refute the charge. Apropos his statement that he was "fit", we quote from Award No. 20100 (Sickles):

> ". . . 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".

As to the qualifications of the witnesses to determine Claimant's condition, this Board has held in many prior Awards that laymen are competent to testify as to outward manifestations and physical actions on conclusions of intoxication. See 20100, supra, and other Awards cited therein.

In view of the testimony, therefore, and the absence of any probative refutation by Claimant, we are compelled to the conclusion that Carrier's finding that Claimant was guilty as charged was amply supported by the evidence. This Board has repeatedly held that it will not disturb the findings of the Carrier nor interfere with the discipline meted out where it is apparent on the record that Claimant received a fair and impartial trial and that none of his rights were capriciously or arbitrarily violated. See Award No. 17156 (McCandless), among many others. The foregoing principle is directly applicable to the instant dispute.

3. THE DISCIPLINE IMPOSED

This Board has consistently held that an employe who is under the influence of intoxicants while on duty, and thereby unfit for duty, is guilty of a serious disciplinary offense and is subject to dismissal, particularly where warranted by his disciplinary record.

See Award Nos. 15184 (Mesigh), 15714 (Engelstein), 18036 (Dolnick) and 20100 (Sickles).

Claimant's disciplinary record reveals serious personal incidents consisting of "attempting to strike Assistant Foreman Phelps with his fist" on January 29, 1964; threatening Phelps "with bodily harm" on July 10, 1964; for which offenses Claimant received two five days suspensions. On November 26, 1965, he was discharged for insubordination, but was restored to duty on a leniency basis.

On the entire record, therefore, and in view of Claimant's disciplinary record and the authorities cited herein, the discipline of dismissal imposed by Carrier in this case cannot be held to be arbitrary, capricious or an abuse of discretion. See Award Nos. 16074 (Perelson), 17914 (Quinn), 18550 (O'Brien), 19487 (Brent) and 19708 (Lieberman).

The claim here involved must therefore be denied in its entirety.

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 30th day of September 1975.