NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21106
THIRD DIVISION Docket Number CL-21296

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7955, that:

1. Carrier violated the terms of the Current Agreement, particularly Rule 21, when under date of August 29, 1972 it dismissed Mr. R. G. Schmidt, car clerk, from the service of the Carrier as a result of an improper investigation held on August 26, 1972, and;

2. Carrier shall be required to reinstate Mr. R. G. Schmidt, with all rights unimpaired, and to compensate him from August 29, 1972 forward until he is restored to service, including fringe benefits, and;

3. In addition to the money amounts claimed above, the Carrier shall pay Mr. R. G. Schmidt interest thereon at the rate of 6 per cent per annum, to be compounded on each anniversary date of the claim.

OPINION OF BOARD: Claimant was discharged, in this dispute, for violations of Rule G. Claimant, a Car Clerk, had not reported for duty at 7:00 P.M. on August 16, 1972. He appeared on the property and talked with his supervisor at about 8:45 P.M. that night. An investigation was conducted on August 21, 1972 to determine his responsibility for failure to protect his assignment. As a result of this investigation he was assessed ten days' deferred discipline. On August 22, 1972 he was charged with a violation of Rule G while on Company property at about 8:50 P.M. on August 16th. After an investigation held on August 26, 1972 Claimant was dismissed from service. It is the latter incident which is the subject of this dispute. A further problem occurred subsequent to Claimant's dismissal and is raised by Carrier. In accordance with well established doctrine and rules, we cannot consider evidence with respect to disciplinary matters which was not raised at the time of the investigation on the property; consequently that material cannot be considered.

Petitioner takes the position that Carrier did not prove its case in this dispute, since the Supervisor testified that he could not determine whether or not Claimant had been drinking. Further it is argued that Claimant had been called to come and talk to his supervisor and was not at work

at the time. Finally, the principal argument made is that Claimant was subjected to double jeopardy as a consequence of two investigations stemming from the same incident. First Division Award 21343 is cited in support of this last argument.

Carrier argues that in this dispute Claimant's guilt was clearly established at the investigation by his own admissions that he had been drinking. Further, it is contended that Claimant was not tried twice for the same offense. In the first investigation he was tried for a distinct offense: failure to protect his assignment; in the second investigation the issue was violation of Rule G.

It must be noted that there was an addition to Rule G in 1971: the last paragraph. The entire Rule provides:

> "The use of alcoholic beverages or narcotics by employes subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on company property is prohibited. The use or possession of alcoholic beverages or narcotics while on duty or on company property is prohibited.
>
> Employes shall not report for duty under the influence of any drug, medication or other substance (including those prescribed by a doctor or dentist) that will in any way adversely alter their alertness, coordination, reaction, response or safety; their use or possession while on duty or on company property is prohibited."

The Organization's argument with respect to double jeopardy is not well taken. Claimant was tried for two different offenses: failure to protect his assignment and secondly, violation of Rule G. Thus, he was not tried for the same offense twice but rather was tried for two distinct violations arising from the same circumstance. This is analogous to a criminal being tried separately for rape and robbery, both arising from the same incident. We conclude that Claimant was not charged twice with the same offense arising out of the same occurrence, as were the facts in First Division Award 21343.

The unrefuted testimony at this investigation indicates that Claimant had told his supervisor, when he talked with him on the evening of August 16th, that he felt he should not go to work since he had been taking allergy pills and also he had decided to get drunk. It would appear clear that Claimant was in compliance with the addition to Rule G, supra, when he chose not to report to work on the night in question. It is ironic that in explaining his reasons which involved obeying the rule, he should be held to be in violation thereof. Under that circumstance, I do not deem it important to determine whether or not the evidence indicates he had been called

to see his supervisor in person. There is obviously some ambiguity in the total new Rule G: specifically the prohibition against the use of alcohol or drugs while "subject to duty" in relation to the sentence "employes shall not report for duty under the influence...." There is no question but that Claimant had been taking pills as well as beer about the time he was to go to work, which under Rule G and its latest change would preclude his going to work (as contrasted with being a direct violation of the first part of the rule). For all the reasons indicated, and under the particular circumstances of this dispute, the Claim must be sustained. The remedy requested, however, is inconsistent with the provisions of the Agreement. Fringe benefits and interest payments are not contemplated in the Agreement; Claimant shall be reinstated and made whole in accordance with Rule 21 (c).

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 violated.

A W A R D

Claim sustained; Claimant shall be reinstated in accordance with Rule 21 (c).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1976.

DISSENT OF CARRIER MEMBERS
TO
THIRD DIVISION AWARD 21106 (DOCKET CL-21296)
(Referee Lieberman)

Award 21106 is in serious error in sustaining the claim on the basis of the second part of Rule G.

Claimant was not charged with violation of the second part of Rule G. He was charged with the first portion thereof which prohibits the use of alcoholic beverages or narcotics by employes subject to duty, and being under the influence thereof while on company property. Certainly, the second part of Rule G does not nullify the first part, as the majority seems to think when they refer to an alleged ambiguity that actually is non-existent.

The unrefuted record developed that claimant's on-duty time was 7:00PM. When he failed to report for duty his supervisor called his home several times, and checked through the yard, but was unable to locate or contact him. He then called a replacement to fill the job. At 8:50PM Claimant showed up and stated that he had gotten involved in a bar and didn't notice the time, that he had had a few beers and had taken some allergy pills.

Thus, by his own admission he had been using alcoholic beverages and narcotics not only while subject to duty but also when he should have been on duty; and he was on company property. His excuse for being on company property in that condition was:

> "I might state that on my way home it is just about impossible for me to get there without coming onto company property".

He was not responding to a call to see his supervisor in person, simply because he was unaware that his supervisor was looking for him. The majority doesn't "deem it important to determine whether or not the evidence indicates he had been called to see his supervisor in person". Apparently, the majority feels it also is not important that Claimant was on his way home, that he was on company property under the influence of alcohol and narcotics, nor that he stopped merely to tell his supervisor that he wasn't going to work but was going to go out "drink some more and get drunk".

The completely unconsconable disregard by the majority for the facts in the record, and the clear and undenied violation of Rule "G",

renders this award a complete nullity. It is not supported by the record, by the agreement, or by case law of the National Railroad Adjustment Board. We, therefore, register our most vigorous dissent.

G. M. Youhn

P. C. Carter

W. F. Euker

J. E. Mason

G. L. Naylor

CARRIER MEMBERS

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 21106 (Docket CL-21296)

(Referee Irwin M. Lieberman)

The dissent registered by the Minority is not supported by the admissible evidence of record. Their arguments are based upon (1) inadmissible evidence, and (2) taking testimony out of context of its proper setting.

Their arguments to the contrary notwithstanding, the Carrier made all parts of Rule G, as revised effective June 1, 1967, a part of the proceedings.

The second part or paragraph of Rule G carries an absolute prohibition against an employe reporting for work "under the influence of any drug, medication or other substance (including those prescribed by both a doctor or dentist) that will in any way adversely alter their alertness, coordination, reaction, response or safety."

The transcript of the proceedings shows that the employe was on the property at the request of the supervisor for a personal meeting and that he reported that he had not covered his work assignment because he had been taking medication for an allergic condition, as well as having had beer. This testimony was unchallenged at the investigation. The second paragraph of Rule G

justified his absence from work and as his appearance was made on the property at the request of the carrier, no discipline was justified.

Based upon the admissible facts of record and the rule, the award by the Majority was just and proper.

Gerald Toffpan

Labor Member