

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22314  
Docket Number TD-21933

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association  
(  
(The Atchison, Topeka and Santa Fe  
( Railway Company

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Atchison, Topeka & Santa Fe Railway Company herein-after referred to as "the Carrier", violated the Agreement in effect between the parties, Article VII thereof in particular, by its action in assessing discipline in the form of dismissal of J. L. Thomas following a formal investigation held October 1, 1975. The record of said formal investigation fails to support Carrier's charges; thus imposition of discipline was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) Carrier shall now rescind the discipline assessed, clear Claimant's employment record of the charges which provided the basis for said action, and to compensate Claimant for wage loss suffered due to Carrier's action.

OPINION OF BOARD: Train Dispatcher J. L. Thomas completed his regular work assignment on Sunday, September 7, 1975, at 3 p.m. and left work subject to returning to duty on his next regular assignment commencing at 7 a.m., Monday, September 8, 1975. After leaving work, Thomas spent some hours in a nearby lounge, thereafter left the lounge at approximately 10 p.m., and drove away in his own car. He subsequently was involved in an automobile accident which involved hitting another car and then hitting a house adjacent to the road. Thomas was arrested under a charge of driving while intoxicated. At 3 a.m. he was permitted to make a telephone call. He called his father and asked him to report him off duty for Monday. The father called the Carrier, reached Train Dispatcher J. C. Russell (then serving as Acting Chief Train Dispatcher) and reported his son off duty for the shift starting at 7 a.m. Russell acknowledged the information and proceeded to schedule a replacement Train Dispatcher. Thomas' father also indicated to Russell that he would telephone the Chief Train Dispatcher, with whom he was personally acquainted, to give a further explanation of the circumstances.

Following an investigative hearing, Thomas was advised by the Carrier as follows by letter dated October 1, 1975:

"Formal investigation was held in the Trainmaster's Office at Fort Worth, Texas, beginning at 9:00 a.m. Wednesday, October 1, 1975, to develop all facts and place your responsibility, if any, in connection with report that you failed to protect your regular assignment as train dispatcher, without proper authority for lay off, at 7 a.m. Monday, September 8, 1975, account reportedly confined by local authorities in connection with charges concerning automobile accident and intoxication Sunday, September 7, 1975, to determine whether or not Rules C, G, 752(A) and 752(C), Rules Operating Department 1975, had been violated.

It was the decision that you are responsible in your failure to comply with Rules 752(A) and 752(C), Rules Operating Department 1975, and for your responsibility and failure to comply with these rules you are hereby dismissed from service."

During the processing of the subsequent claim, the Carrier reduced the dismissal action to a 30-calendar-day suspension, Thomas was reinstated on November 1, 1975, and the claim was further processed based on the suspension.

The rules involved in the disciplinary action are as follows:

"752(A). Employees must report for duty as required and those subject to call for duty will be at their usual calling place, or leave information as to where they may be located. They must not absent themselves from duty, exchange duties or substitute other persons in their places without proper authority."

752(C). Employees must not be dishonest, immoral or vicious. They must conduct themselves in a manner that will not bring discredit on their fellow employees or subject the railroad to criticism or loss of good will."

It is to be noted that charges in reference to Rule C ("Employees must know and obey rules") and Rule G (use of intoxicants) were not included in the Carrier's findings following the investigation. Thomas' use of intoxicants, in and of itself, is therefore not before the Board for consideration.

As to Rule 752(A), it is the Carrier's position that Assistant Chief Train Dispatcher Russell merely received the information about Thomas' proposed absence; that he was neither asked for nor did he grant permission for such absence. Therefore, argues the Carrier, the Claimant is in violation of Rule 752(A), for having absented himself "without proper authority".

The Board finds that the Carrier's argument is not supported by the evidence. Notice of absence was given in ample time to obtain a replacement. Russell indicated, in his testimony at the investigative hearing, that he was "the proper authority on that shift" to receive such a request (Hearing Transcript, p. 10) and that if permission had been requested, he would have granted it (Hearing Transcript, p. 11). As to the father's statement that he would separately call the Chief Train Dispatcher, there was no confirmation or denial that this second call was made. Had the Carrier, in supporting its case for discipline, wished to deny that such call was made, it merely had to have the Chief Train Dispatcher so testify. Between 3 a.m. and the 7 a.m. reporting time, it is difficult to see what further steps could have been taken under Rule 752(A) by or on behalf of the Claimant.

This is not typical of the numerous cases in which an employee is not only absent but also fails to make any notification prior to assigned starting time, owing to intoxication, incarceration, or both. At this point, it must again be noted that violation of Rule G (intoxicants), part of the original charge, was excluded by the Carrier in its disciplinary notice after the investigative hearing.

As to Rule 752(C), it is the Carrier's contention that the actions of the Claimant subjected "the railroad to criticism or loss of good will." This is based on the fact that Thomas' car carried a "Santa Fe" automobile sticker, leading to a possible identification of his car as having some relationship with the Carrier (i.e., as an employee); that the Claimant was identified as a "dispatcher" in the police report; and that he pleaded guilty to charges involving an automobile accident and intoxication and was fined \$250 and placed on six months' probation.

This is not one of the cases in which an employe, through theft or other similar acts, becomes publicly known and, at least by implication, adversely affects the employer if the employer condones or ignores the act. There is no evidence that Thomas was perceived to have acted during his escapade as an employe or representative of the Carrier. For example, the fact that an automobile carrying a "Santa Fe" sticker is involved in a serious accident does not, by itself, identify the driver as an employe of the Carrier, nor even that the car's driver was at fault.

The reasoning in Award No. 20874 is instructive:

"The crux of this dispute is the question of whether Carrier has the right to discipline an employe for conduct away from the place of work. Each of the parties have cited numerous Awards and authority, review of which leads to a qualified 'yes' in answer to the central question herein. Carrier has placed great reliance on Award 20703 of the First Division which states in pertinent part as follows:

'The question of an employer's right to dismiss an employe for conduct away from the place of work has not yet been answered with finality by industrial arbitrators. As a general rule, they have held however, that such conduct constitutes just cause for dismissal if the employer's reputation may conceivably be damaged by the notoriety of the employe's conduct. See Frank Elkouri & Edna A. Elkouri, How Arbitration Works, Rev. Ed., Wash. D.C. B. NA Incorporated, 1960, pgs. 414-415 and cases cited therein and Orme W. Phelps, Discipline and Discharge in the Unionized Plant. Berkely, California University of California Press, 1959, p. 107 and cases cited therein.' (Emphasis added).

Our consideration of this matter and especially study of the authorities cited in Award 20703 leads us to conclude respectfully but firmly that the general rule is mistated therein. The correct standard is that an employe's off duty misconduct may be the subject

"of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. In this latter connection mere speculation as to adverse effect upon the business will not suffice. Elkouri & Elkouri, How Arbitration Works, 3rd Ed. B.N.A., Inc. Wash. D.C. 1973 pp. 616-618. (Emphasis added)

In applying the foregoing principles to the instant case we must conclude that under different circumstances Claimant's off duty conduct might have presented grounds for discipline but the record in this case is not sufficient to permit our endorsement of Carrier's discipline. There is no showing whatever that Carrier's reputation was connected in any way to Claimant nor that the employer - employee relationship was a matter of public record let alone notoriety. \*\*\*"

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 Agreement was violated.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of February 1979.

