

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24818
Docket Number MW-24693

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Seaboard Coast Line Railroad Company

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

(1) The dismissal of Bridge Tender W. W. Farmer for alleged violation of "Rules G, 1132" and Rules "16, 26 and 27" was without just and sufficient cause and on the basis of unproven charges (System File 37-SCL-81-1/12-39 (81-14) G).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record be cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: The Claimant, a Bridge Tender of three years service at the time of his dismissal, was removed from service after a hearing on the following charges: "...It appeared you were using and possessed what appeared to be narcotic while on duty; had permitted others to use a narcotic while trespassing on company property not reporting it to your supervisor and did not properly inspect a train.

You are herewith charged with violating Rules G, 1132, and 1134 of the current Operating Rules of the company and also with violating rules 16, 26 and 27 of the Company's Safety Rules for Engineering and Maintenance of Way Employees, effective September 1, 1967.

It has also been determined that the remains of a cigarette and ashes found on the table in the bridge control house on the early morning of November 25, 1980 were the remains of marijuana. This appeared to have been used by you during your tour of duty the afternoon and evening of November 24, 1980. For this you are also charged with violation of the rules referred to above."

The Organization, on behalf of the Claimant, assert that the dismissal was without just and sufficient cause and was based upon improper and unproven charges.

They also assert that, pursuant to Section 7 of Rule 39, charges must "be filed within ten (10) days of the date the violation becomes known to management." Since the incident of November 25 was not raised until the Carrier's notice of December 10, this charge is barred.

It is argued also that the Claimant can only be charged with violating Safety Rules 26 and 27 dealing with unauthorized persons on the premises, trespassing and the requirement to report such incidents and such charges do not warrant discharge.

Finally, it is alleged that the hearing was neither fair nor impartial and that the recording tapes' lapses are indicative of a lack of fairness.

Several of the issues in dispute should be disposed of first to allow the Board to concentrate on the heart of this case.

1) The Organization is correct in its assertion that the incident of November 25, 1980 cannot be considered since the time limit cited under Section 7 of Rule 39 is controlling. Moreover the Conducting Officer, Division Engineer Laws states to General Chairman Medders, "I agree that he was not charged within this within the ten days..."(sic). Thus any discipline contingent upon this incident is inappropriate and void.

2) By the Claimant's own admission he is in violation of Rules 1132, 26 and 27: Rule 1132 reads in part "Bridge Tenders...must not permit unauthorized persons to trespass upon the bridge". The Claimant's testimony is as follows: "Mr. Burke...looked in ashtray and found a little cigarette. And he asked me what it was. And I told him that a friend stopped down and he was smoking a joint and put it in the ashtray and he left...". Also Mr. Laws questioned Mr. Farmer:

"Q. Is that in accordance with company rules?

A. I told Mr. Medders the only charges that the company legally had me for was allowing someone to stop by the bridge..."

Again,:

"Q. ...Now you do admit that you had a friend in the house and your friend left the marijuana butt in the ashes.

A. Yes sir..."

"Q. ...You admit you did have a friend in who was smoking marijuana.

A. Yes sir..."

"Q. All right Rule No. 27 that you were charged with reads, trespassers should be requested to leave the premises and report made to supervisor. Did you not consider this person visiting you as a trespasser?

A. No sir. I consider him as a friend.

Q. He was an unauthorized person, wasn't he?

A. Yes he was an unauthorized person..."

Thus the Claimant admits that he violated Rule 1132 - "Bridge tenders... must not permit unauthorized persons to trespass upon the bridge"; Rule 26 - "Unauthorized persons and others not having legitimate Company business to transact are prohibited from entering or loitering about railroad offices, stations, warehouses, yards, shops, equipment, trestles and other properties. Persons so observed must be reported to supervisor", and Rule 27 - "Trespassers should be requested to leave the premises and report made to supervisor."

3) That the hearing was both fair and impartial is born out by a careful study of the transcript. Both the Claimant and his representative had ample opportunity to call witnesses, testify, cross examine witnesses and to introduce evidence. The lapses in the tapes were occasioned by necessary change-over or unexplained interruptions at non-critical moments:

(a) The first interruption is on Page 10 of the transcript while Mr. Medders, the Organization's Representative is questioning Special Agent Burke. It is marked "(End Tape 1)." Page 11 begins "Mr. Medders questions Special Agent Burke - (Begin Tape 2)."

(b) The second interruption is on Page 20 while Mr. Medders is speaking to Mr. Laws, the Conducting Officer.

"Mr. Medders to Mr. Laws - ...I object to this line of questioning and I request that we refrain from it because it, because I'm speaking specifically about the third paragraph of the charges which (tape cut off - continued on tape 3)

(End of Tape 2)

(Begin Tape 3)

continued - because it was not filed properly in accordance with Rule 39 of the current agreement..."

Having disposed of the violation of Rule 39 in favor of the Claimant this is non-critical material.

(c) The third interruption is on Page 33. Mr. Medders questioning of Mr. Burke continues on Page 34 noted only "(End of Tape 3)", "Formal Hearing (Begin Tape 4)."

(d) The fourth interruption - page 43 the questioning is by Mr. Laws to Mrs. Cobb, a Carrier witness "End of Tape 4" - Begin Page 44 "(Begin Tape 5)". Nothing is lost in the continuity.

(e) End of Tape 5 is on Page 58 "(End Tape 5)."

(f) The first mid-tape interruption occurs on Page 64.

Mr. Laws is questioning the Claimant Mr. Farmer.

"Q....Now you do admit that you had a friend in the house and your friend left the marijuana butt in the ashes.

A. Yes sir (tape cut off and then on in conversation)... children down at the bridge house?

Q. No, they should not have children at the bridge house."

Apparently the Claimant alleged that others had brought their children to the bridge house on occasion. This is irrelevant to the prime issue at hand and, since the claimant has admitted his guilt to this offense, his assertion of similar offenses on the part of others is irrelevant. The lapse on the tape could be a defect in the tape or the machine and had nothing to do with the fairness or impartiality of the hearing.

(g) The final lapse occurred on Page 68 when Mr. Laws announced "Hearing concluded at 6:00 p.m. Mr. Farmer, you will remain out of service until a decision is reached.

Mr. Farmer - How long will that take?

Mr. Laws - Well I'm gonna try to make it within the rules - 10 days.

Mr. Farmer - Well, the last time it took a lot longer...What about pressing charges...

Tape was cut off

Tape was cut back on

Mr. Laws - I neglected to do one thing. This hearing is not concluded at 6:00 p.m. I told you Mr. Farmer, at the conclusion of the hearing that your personal record would be reviewed..."

This is certainly non-critical material dealing with the aftermath of the hearing.

The most serious charges, however, are proscribed by Rule G in the Operating Rules and Rule 16 in the Safety Rule Book. Both forbid the use of intoxicants and drugs while on duty and Rule G also states that possession of these and other substances "while on duty, while on Company property...is sufficient cause for dismissal."

The hearing elicited testimony from two witnesses that on the night of December 5, 1980 the Claimant had in the Bridge Control House "a partially-smoked marijuana cigarette...along with various portions of stems and a marijuana seed." Also it was testified that "...it was obvious that there was something apparently wrong with Mr. Farmer's faculties inasmuch as he was very nervous. His eye pupils were dilated and he did not appear to be in any control of himself 100%". Further testimony was to the following effect:

"Q. And give me your opinion of Mr. Farmer's condition when you got to the bridge on the afternoon or evening of December 5th.

A. One of the signs, the surest signs that they taught us on drug use is the dilation of the pupils of the eye. When they are under the influence of any type of narcotic or hallucinogenic or anything like that, the pupils of the eye will not constrict when exposed to light. It stays dilated.

"Q. Did you notice this about Mr. Farmer?

A. Yes, sir, his eyes were dilated and when we approached into the bridge house under the neon lights where he was in the office, the pupils of his eyes would not constrict at all.

Q. In your opinion, he was under the influence of some type of drug?

A. Yes, sir, at that time, I would think so."

Further the two Carrier witnesses testified that while there was no illegal substance in sight earlier, when the Claimant reentered the bridge house after retrieving his coat and inspecting the train, a plastic bag containing marijuana was seen on the steps of the bridge house.

The two witnesses accompanied by a law enforcement officer simultaneously noted the bag and it was picked up by the officer who remarked to the Claimant, "Mr. Farmer, you dropped your bag of pot."

While the Claimant denied that he either dropped or threw the bag on the steps, the conclusion is inescapable that he had it in his possession and left it on the steps. This is circumstantial evidence but probative, persuasive and conclusive. If one lands on a desert island and finds there the remains of a campfire, such circumstantial evidence is clear and convincing enough to force one to conclude that someone has been on the island before. In this case, the steps were unobstructed according to two peoples' testimony, (and the hearsay testimony of a third), but the bag of marijuana appeared there after only the Claimant stepped over them and no one else was close or had been near the steps. That evidence is sure, certain and conclusive even if circumstantial.

Although in the Claimant's testimony he denies having the substance in his possession or depositing it on the steps, it is not for this Board to resolve conflicts in testimony. The Hearing Officer must do so since he is the one who must judge the credibility, honesty and integrity of the witnesses from first-hand observation at the hearing.

Therefore, the Carrier had substantial reason for concluding that the Claimant violated Operating Rule G and Safety Rule 16 and the Board concurs in that judgement and will not upset the discipline for so serious an offense.

The claim is denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1984