

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25170  
Docket Number MW-25082

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Consolidated Rail Corporation

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

(1) The dismissal of G. W. Rehl for alleged "violation of Safety Rule 3002" was without just and sufficient cause and upon the basis of unproven charges (System Docket #640).

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

OPINION OF BOARD: Claimant G. W. Rehl was employed by the Carrier as a Trackman. On the evening of November 4, 1980, Claimant was on duty and a passenger in a Company vehicle driven by his Foreman, R. E. Craft. Claimant apparently experienced an urgent need to relieve himself, whereupon Craft pulled over to the side of the road. Two of the Carrier's police officers came upon Claimant during the course of their inspection of the worksite. They noticed Claimant standing at the edge of a pile of ballast with a beer can within a few inches of his foot. The patrolmen smelled alcohol on Claimant's breath and observed that he appeared unsteady and had partially slurred speech.

Following notice and an investigatory hearing on November 12th, Claimant was dismissed for violation of Safety Rule 3002, which provides in relevant part:

"Narcotic medication and/or alcoholic beverage must not be used while on duty or within 8 hours before reporting for duty."

Appeals on behalf of Claimant were denied, and the claim was brought before this Board.

The Organization contends that the Carrier has failed to meet its burden of proof. The Organization argues that there was no testimony presented which indicated that Claimant had been observed drinking, that Claimant was not given a blood test, and that testimony given by the patrolmen was "opinionated and not based on concrete facts or evidence." The Organization points out that Claimant denied that he had been drinking and that, following his apprehension, Claimant returned to service and completed his tour of duty that night.

The Board finds substantial and sufficient evidence in the record to support the finding that Claimant violated Rule 3002. The patrolmen's testimony that "A heavy odor of alcohol/beer was noted about his person. He was unsteady, partially slurred of speech" and "He had a strong odor of alcohol about his person. His speech was slurred, and he was swaying as he was standing" describes the classic symptoms of intoxication. The "odor of alcohol/beer...about [Claimant's person]" is a strong indication that, intoxicated or not, Claimant had been drinking.

The observations of Claimant's person and demeanor were further substantiated by circumstantial evidence. A half-full can of cold beer was found standing upright within inches of Claimant's foot. Two additional cans of beer were found within four feet of the vehicle, and when the vehicle was searched, a large wet spot with the odor of beer was found on the passenger side. Claimant's stop to relieve himself a scant 500 yards from the toolhouse which had toilet facilities also points toward participation in a prohibited activity.

There is little disagreement that the observations of lay witnesses are sufficient to establish intoxication. See, e.g., Alcohol and Drugs: Issues in the Workplace, T. S. Denenberg and R. V. Denenberg (1983), p.p. 68-69. The observations made by the Carrier's officers clearly point toward intoxication. However, the Carrier need not prove actual intoxication in order to make out a violation of Rule 3002. It may be readily inferred from common experience that if Claimant displayed signs of intoxication while on duty, he must have consumed an alcoholic beverage either on duty or within eight hours of reporting for duty. In this case, the Carrier was able to produce strong circumstantial evidence which indicates that the violation occurred while Claimant was actually on duty, and the Board so concludes.

The Organization asserts that the Carrier's willingness to let Claimant continue his shift contravenes its assertion that Claimant violated Rule 3002. The Board disagrees. To establish a Rule 3002 violation, it is not required that Claimant be shown to be so intoxicated as to require his immediate withdrawal from service. Indeed, the violation of the rule was established as a result of the hearing, not prior to it. In addition, Claimant's foreman, who would presumably have had primary responsibility for removing Claimant from duty, had been present when Claimant was apprehended and had himself been accused of a similar offense. Under the circumstances, the Board declines to draw any inference from Claimant's continued service after his apprehension.

The Organization also argues that Claimant was denied a fair and impartial hearing because the Carrier failed to call Foreman Craft as a witness. However, the Organization could have called Craft as a witness if he believed that his testimony would be helpful. The Carrier is not required to call as Carrier witnesses employees whose only purpose might be to offer testimony in aid of the Claimant's case.

Finally, the Organization urges that Claimant's dismissal be set aside because Foreman Craft was cleared for lack of proof of the Rule 3002 and Rule G charges which had been brought against him. Under Board precedent, significant disparities in treatment for the same offense might be grounds to alter disciplinary action. Here, however, it is clear from the record of the investigatory hearing in Claimant's case that the facts on which the charges against Claimant and his foreman were based were not identical and that the Carrier was unable to prove that Claimant and his foreman had committed the same violation. The difference in disposition of the cases in the absence of proof that similar offenses were committed does not constitute grounds to set aside the discipline.

For the reasons indicated and based upon the entire record, the claim must be, and is, denied.

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

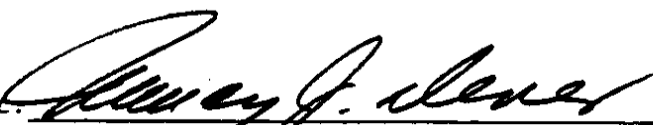
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest.

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 30th day of November 1984.