

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25670  
Docket Number MW-25869

John W. Gaines, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(National Railroad Passenger Corporation

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

(1) The dismissal of Trackman N. Godinez for alleged violation of Rule "C" was without just and sufficient cause and on the basis of unproven charges (System File BMWE-D-026).

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

OPINION OF BOARD: Claimant, a Trackman, was dismissed after a due hearing, of which he had received notification as follows from Carrier's letter dated October 18, 1982:

"You are hereby directed to appear for a formal investigation as indicated below:

"CHARGE: 'Your responsibility for your alleged failure to comply with that portion of the National Railroad Passenger Corporation Rule of Conduct "C", in that on October 18, 1982, while on your lunch hour, you were in Klimek's Korner Bar partaking of an alcoholic beverage.'

"RULE 'C' Reporting for work under the influence of  
"STATES: alcoholic beverages or narcotics, or the use of alcoholic beverages while on or subject to duty or on Company property is prohibited...."  
(Carrier's Exhibit "A")

This case turns on a matter of proofs. The Transcript makes evident a conflict between the testimony of Carrier's first and second witnesses on the one hand and the testimony of Claimant on the other hand, the latter tending to show that he just happened to be there, an innocent victim of circumstances.

Carrier's Resident Engineer, Robert A. Nedzesky, testified as follows:

"On the day in question I received a telephone call advising me that three Amtrak (Carrier) trackmen were at Klimek's Korner Bar eating lunch and drinking beer. They mentioned three names; they were: (Claimant) Mr. Godinez; Mr. Bijarro, B-i-j-a-r-r-o; and Mr. Castillo, C-a-s-t-i-l-l-o.

"After I received the phone call, I requested Officer Munoz to accompany me to the bar to investigate.

"Upon walking into Klimek's Korner, I observed Mr. Godinez sitting at a dining table, facing me, with a lunch in front of him and approximately a half empty glass of beer on the table. There were no other beverages on the table.

"I approached Mr. Godinez and I stated that, 'Nick, you should know better. You can get in trouble this way, being in a tavern.' And he replied, 'Yes, I know.'

"And I asked him how much of the beer he had drank and he pointed to the half empty glass and he said, 'That's all.'

"I asked him where Mr. Castillo and Mr. Bijarro were, if they were present, and he said, no, they weren't, that they just dropped him off.

"I told him not to drink any more beer, to finish his lunch, and to report back to my office as soon as he returned."

After testifying as to Claimant's reaction as to how much of the beer Claimant drank, Resident Engineer Nedzesky stated:

"He pointed to the half empty glass of beer, the mug of beer, and stated, 'Just that.'"

Testimony continued, on redirect and cross:

"There were no other beverages on the table at the time and Mr. Godinez was in the middle of eating his sandwich."

"There was no problem with noise. But, on a couple questions, I had to repeat them because Mr. Godinez was a little apprehensive at being approached in the bar and so he was extremely nervous and stuttered a little bit. But I did repeat all of the questions until I heard a clear answer and I made sure that he understood the question."

Carrier's Police Officer, Angelo Munoz, testified as follows:

"On October 18th, at about 11:00 o'clock, I met with the Resident Engineer, Mr. Nedzesky, and he asked me to come along with him to this Klimek's Korner at 552 West 18th Street to investigate some employees drinking there.

"So we both went along and arrived there five minutes later. We walked in and observed Mr. Godinez sitting by himself at a dining table and having his lunch. The engineer, Nedzesky, stated to him that he can get in trouble drinking, because there was a bottle of beer on the table in front of him and at least about three-quarters full. And there was juke box music playing. I couldn't hear what Mr. Godinez's reply was.

"And I heard something like, because I was standing a few feet away, I heard something like Mr. Nedzesky asking Mr. Godinez where his co-workers were and I didn't hear the reply to that either.

"They were having words, but towards the end Mr. Nedzesky told Mr. Godinez to come to the office, after he had lunch, when he was done eating lunch."

Claimant admitted to his confrontation with the witnesses, admitted presence of a part glass of beer, denied there was a beer bottle, denied the beer was his, and several times denied drinking the beer. It is not to say that denial by itself is inappropriate for the innocent until proven guilty; we nonetheless scrutinized the testimony to otherwise account for the beer's presence but, for aught that we find, there is no explanation attempted for when it appeared, or how, whether witnessed or not. Claimant, when confronted, was halfway through his lunch; no beverage was on the table for his lunch, other than beer halfway consumed in the beer glass.

Considering the opposed positions taken by the persons testifying according to the Transcript, and taking into account all attendant circumstances, we resolve the conflict on what impresses us as a preponderance of the evidence. There is a sufficiency of such evidence in the record for us to find, and we so find, that Carrier has made out its case of Claimant's guilt in drinking some beer with his lunch in direct violation of Rule "C". But the discipline imposed is dismissal by the Carrier which is severe indeed, when measured against pay loss for time out of service as more commensurate with the particular offense proven. Claimant has four years of satisfactory service.

In sum, therefore, discipline was warranted but permanent dismissal was excessive.

So, we will award that Claimant be reinstated with seniority and all other rights unimpaired. However, we will not award any compensation for time lost while out of service.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1985.