

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26391  
Docket Number CL-26707

Edwin H. Benn, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,  
(Freight Handlers, Express and Station Employees  
(  
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood  
(GL-10053) that:

1. Carrier violated the Clerks' Rules Agreement when it issued discipline of actual dismissal to Operator/Leverman C. J. Pickett on March 5, 1985, following investigation held on February 25, 1985, Claimant being withheld from service effective February 19, 1985, pending investigation.

2. Carrier's action violated Rules 23, 24, 26, 27, 28, 29 and 53 of the Clerks' Agreement in effective between the parties.

3. Carrier shall now be required to reinstate Claimant Pickett to service with pay for all time lost, seniority, vacation and all other rights unimpaired and his personal record cleared of the investigation and all references thereto effective February 19, 1985, and continuing five (5) days per week until allowed."

OPINION OF BOARD: Claimant has a seniority date of February 23, 1963. During an Investigation held on February 19, 1985, concerning Claimant's alleged responsibility for a train delay and falsification of station records, the Hearing Officer in that matter, Senior Trainmaster B. P. Sheeley, detected what he considered to be an odor of alcohol on Claimant's breath and instructed Claimant to breathe in the faces of other Carrier Supervisors. Claimant ultimately refused to follow Sheeley's instruction on the asserted basis that he felt that Sheeley's instruction was "illegal." Claimant was removed from service and charged with insubordination and violation of Rule G which concerns the use of possession of intoxicants while on the Carrier's premises. At the time of the February 19, 1985, Hearing, Claimant was not on duty, nor was he receiving pay for attending the Hearing. Claimant testified that he laid off in order to attend that Hearing.

The Hearing on the insubordination and Rule G charges was held on February 25, 1985. At the commencement of the Hearing, the Hearing Officer, General Superintendent B. O. Matthews, asked Claimant to identify his Representative. Claimant designated Local Chairman A. Scholbe and District General Chairman O. Burger. The Hearing Officer then refused to permit Scholbe to act as Claimant's Representative since Scholbe (who was also a Carrier employee) was a witness to the events on February 19, 1985. The Organization protested that exclusion.

During the Investigation on February 25, 1985, Sheeley, Scholbe and other Carrier witnesses testified that they did not see Claimant possess or consume alcohol on the date of the first Hearing. Trainmaster J. A. DiPaola testified that Claimant had red eyes and swollen features, but that condition did not lead him to suspect that Claimant was under the influence of alcohol. Those testifying specifically stated that Claimant did not act in a manner that indicated that he was under the influence of intoxicants at the February 19, 1985, Hearing.

During the second Hearing, Claimant testified that he did not consume alcohol on that date of the first Hearing and further did not have alcohol in his possession at that time. Claimant testified that he was under medication for a physical condition at the time of the first Hearing and had taken the medication for his heart just prior to the commencement of that Hearing.

By letter dated March 5, 1985, the Carrier dismissed Claimant from service for being insubordinate and violating Rule G.

With respect to the Organization's argument that the charge was not precise within the meaning of Rule 23, we find that position to be lacking in merit. Rule 23 requires that the employee be "furnished with a letter stating the precise charge at the time the charge is made." Here, the letter dated February 19, 1985, charged Claimant with "an alleged violation of Terminal Railroad Association of St. Louis Operating Rule G and insubordination when you were removed from service at 11:20 A.M., February 19, 1985, when you failed to comply with direct order issued you by Senior Terminal Trainmaster B. P. Sheeley." Under the circumstances presented, we find that letter sufficiently precise so as to inform Claimant of the nature of the allegations against him to allow Claimant or the Organization the ability to adequately prepare a defense. The fact that Rule M is not specifically mentioned in the letter does not change the result since nothing in the Agreement requires such specificity and the word "insubordination" is found in the letter, which conduct is specifically prohibited by Rule M. See Third Division Awards 26276, 24295. Further, there is no evidence that Claimant was surprised by any of the allegations or evidence at the Hearing. See Third Division Award 19396.

The Organization's argument that the appeals process was fatally defective thereby denying Claimant due process in that the Hearing Officer, the Carrier Official assessing the discipline after the Hearing and the Carrier Official at the first level of appeal were all the same individuals cannot be considered. This procedural argument concerning the multiplicity of roles of a Carrier Officer in the appeals process was not raised on the property and consistent with our prior Awards, where this procedural argument is not raised on the property, we cannot consider it. Third Division Award 24357; Fourth Division Award 3167.

With respect to the Organization's argument that the Carrier improperly denied Claimant representation, our close reading of the Rules 26, 27, 28 and 53 shows that although Claimant is entitled to representation by the

Organization, those rules do not provide that Claimant is entitled to a specific individual of his choice. Second, we note that at the outset of the Hearing on February 25, Claimant was asked to identify his representative. Claimant responded that he desired to be represented by Scholbe and Burger. Although Scholbe was not permitted to act as Claimant's representative, Burger was permitted to serve in accord with Claimant's request. Hence, we cannot say that Claimant was effectively denied representation. Third, an examination of the record shows that the Hearing Officer's preclusion of Scholbe from acting as Claimant's representative did not ultimately prejudice Claimant in light of the thorough examination and presentation of Claimant's case by Burger. All of the facts and arguments were brought out by Burger. Although the Hearing Officer's determination to exclude Scholbe may have been unnecessary since Scholbe's testimony was redundant on the facts concerning the charges, and indeed, given the appropriate set of circumstances exclusion of Scholbe as a representative could have resulted in a denial of representation sufficient to justify our setting aside the disciplinary action, balancing of the above factors persuades us that no effective denial of representation occurred here.

With respect to the alleged Rule G violation, the Carrier is correct that it is not necessary that Claimant be on duty in order for the prohibitions of Rule G to apply. Rule G states:

"The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, or while on Company premises, whether subject to duty or not, is prohibited."

However, even though Rule G applies to Claimant by virtue of the fact that he was on the premises, the Carrier nevertheless must carry the burden of demonstrating by substantial evidence in the record that Claimant used or possessed alcohol or narcotics prohibited by the Rule. Our close review of the record leads us to conclude that the Carrier has not met that burden. The evidence detailed above shows that Claimant allegedly smelled from alcohol. All witnesses questioned on the subject denied seeing Claimant use or possess an alcoholic beverage. Claimant denied the use or possession of alcohol on the date of the first Hearing and explained that he was taking medication for a heart ailment and had done so just prior to the commencement of the Hearing. Further, all witnesses testifying on the subject agreed that on the day of the first Hearing Claimant showed no outward manifestations of being under the influence of alcohol or otherwise exhibited abnormal behavior. According to the evidence in this record, Claimant was acting in an alert and rational fashion and had no difficulty with physical movements. The only evidence in the record to the contrary is testimony such as DiPaola's that Claimant had red eyes and a swollen face. Even DiPaola concluded that such features were insufficient to establish that Claimant was under the influence. Similarly, we cannot conclude under the circumstances of this case that such a physical description, in and of itself or even when coupled with the contention that Claimant smelled of alcohol, amounts to substantial evidence sufficient to sustain the Rule G Claim. The circumstantial evidence relied upon by the Carrier cannot be considered substantial. Substantial evidence means more than a scintilla and more than a suspicion. We find that the evidence in this record only raises a suspicion and is not of the level to be considered substantial and sufficient to sustain the Rule G violation. See Second Division Award 7187.

The remaining question concerns whether the Carrier has shown by substantial evidence that Claimant's refusal to comply with Sheeley's instruction to breathe in the faces of Carrier Officers amounted to insubordination within the meaning of Rule M which prohibits insubordination. Once again, a strict reading of the Rule does not require the employee to be on duty for the prohibitions of the Rule to apply. Obviously, we do not hold that a refusal of an employee to follow an instruction given while the employee is off duty in all cases amounts to insubordination. However, in this case, Claimant was on the premises at the time the instruction was given and upon balance we do not consider the instruction given to be so unreasonable so as to justify Claimant's outright refusal to comply. Refusing a direct order is insubordination. The time tested axiom of the work place is for the employee to comply with the instruction and if it is felt that the instruction is improper or violative of the Agreement, a subsequent grievance is the vehicle for protesting the order. See Third Division Award 21059. Here Claimant clearly refused the instruction given and hence, substantial evidence exists to justify the Carrier's conclusion that Rule M was violated.

Finally, we conclude that with respect to the amount of discipline assessed, the penalty of discharge is too severe in this case. First, the Carrier based its decision to assess a dismissal from service on the basis of violations of Rule G and insubordination under Rule M. We have found that the Rule G violation has not been proven. Second, for the insubordination involved in this case, we feel that dismissal is sufficiently unfair, arbitrary and capricious so as to amount to an abuse of the Carrier's discretion. Third, we have taken into account Claimant's past record, which shows a number of prior suspensions. We can consider Claimant's past disciplinary record for reviewing whether the amount of the discipline imposed was arbitrary or capricious as opposed to a determination of guilt on those charges. See Third Division Awards 26276, supra, 26180. Considering these factors, we conclude that Claimant should be returned with seniority unimpaired, but without compensation for time lost.

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 Employee involved in this dispute are respectively Carrier and Employee 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

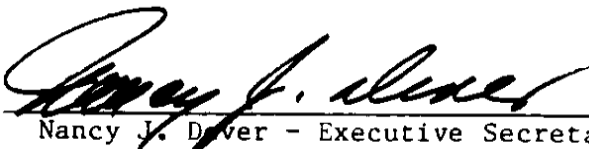
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois this 13th day of July 1987.