

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
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(Duluth, Missabe and Iron Range Railway Company

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

(1) The dismissal of Mr. G. R. Sippo for alleged violation of Rule No. 9 of the General Rules and Code of Conduct and Rule "G" of the Consolidated Code for allegedly being under the influence of alcohol on February 10, 1988 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File 9-88).

(2) The Claimant shall be reinstated to service with seniority and his record expunged of the discipline assessed against him. He shall be compensated for all wages, benefits and vacation to which his seniority would have entitled him absent the violation in Part (1) hereof."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant has twelve years of service with the Carrier. At the time of his dismissal, he had been on furlough approximately one and one-half years. Claimant received railroad unemployment compensation, which required him to sign-up on a weekly basis at the Carrier's yard office at the Proctor Yard.

On Wednesday, February 10, 1988, Claimant went to the office and signed up with the Claims Agent. That procedure consisted of Claimant presenting himself to the Claims Agent and answering a few questions. After signing up, Claimant went downstairs to use the telephone and bathroom. A janitor observed Claimant downstairs and, not recognizing him, informed the Trainmaster of his presence. While Claimant was using the telephone, he was approached by the Trainmaster, who did not recognize him as an employee and challenged him to show identification. Claimant responded that he worked for the railroad, but was not on duty and that it was none of the Trainmaster's

"damned business". The Trainmaster instructed Claimant to remove his sunglasses. Claimant did not comply at once, but replied "I have to piss" and entered the restroom. The Trainmaster followed, again demanded that Claimant remove his glasses, looked at him, accused him of being intoxicated, and ordered him to leave the property. Claimant responded profanely, then left. The Trainmaster testified that Claimant was "staggering" and had a "strong odor of alcohol;" and he testified that Claimant spoke in a vulgar and insubordinate manner.

Claimant denied being intoxicated or having been drinking at the time he was on the Carrier's property, although he acknowledged having had several drinks the evening before. The Organization presented testimony from the taxi driver who drove Claimant to and from the Company Office. He testified that Claimant talked and behaved normally, with no symptoms of intoxication. The Claims Agent, to whom Claimant had reported, testified that he did not observe any symptoms of intoxication. He testified, further, that the Trainmaster came to him after having confronted Claimant and asked him whether Claimant had been drinking, to which he replied that he wasn't sure.

Claimant, in 1981, had been charged with being intoxicated on duty and had waived hearing and enrolled in the Employee Assistance Program. In August 1984, he was charged with using marijuana on duty and, again, waived hearing and enrolled in the EAP, with a three month suspension while undergoing treatment. In May 1986, he received a written warning for being absent from duty without permission.

The Carrier convened an Investigation for alleged violations of Rule 9 of the General Rules and Code of Conduct, subsequently amended to include violation of Rule G of the Consolidated Code of Operating Rules. Each of the rules include prohibitions on use of alcohol on Company property and reporting for duty under the influence of alcohol. At the hearing, the Trainmaster and the witnesses testified as above. Following the hearing, the Carrier found Claimant guilty of the charges and dismissed him from service.

The Carrier argues that being intoxicated on Company premises constitutes a serious offense. It asserts that Claimant was subject to the rule against such intoxication, even while on furlough status. The Carrier points out Claimant's history of chemical dependency and urges that it was not obligated to wait until he returned to service for adverse consequences of Claimant's intemperance. The Carrier urges that being intoxicated while on Company property are undeniable forms of "use" and "possession" and, therefore, prohibited under the cited rules.

The Carrier asserts that the Trainmaster's testimony that Claimant was intoxicated was credible, substantial, positive and precise evidence from an experienced witness with no reason to lie. It points out that the Trainmaster's accusation was undenied by Claimant at the time he was confronted. The Carrier argues, by contrast, that the testimony of the Claimant and that of the Cab Driver should be discounted. It points out that the Cab Driver made no attempt affirmatively to evaluate Claimant's intoxication; and it points out that his fare and tip was being paid by Claimant.

The Carrier points out that the Claims Agent's testimony is limited in use; he only testified that he was not certain if Claimant was intoxicated, having had only limited opportunity to observe him and to observe Claimant's speech, see his eyes, observe his breath, or see him walk.

The Carrier urges that Claimant's own testimony was self-serving and implausible. It points out that a sober person would have not behaved in such a vulgar, insubordinate manner and would have protested the accusation and demonstrated his sobriety. Indeed, it points out that Claimant admitted having drunk alcohol the night before, despite his prior chemical dependence treatment.

The Carrier urges that the record of hearing indicates no bias or prejudice against Claimant. It urges that the date of the event as February 9 or 10, 1988, is unimportant. It urges that the Hearing Officer's characterization of Claimant's behavior as "belligerent" merely characterized the testimony and was qualified by the term "apparent."

The Carrier characterizes Claimant's offense as serious, committed by an employee with a history of similar offenses. It argues that his actions demonstrate the unacceptability of his continued employment. It urges that the claim be denied.

The Organization argues that the Carrier failed to prove by substantial evidence Claimant was intoxicated. It points out that only the Trainmaster testified that Claimant was intoxicated and that his testimony as to Claimant's extreme manifestations of intoxication was contravened by testimony of Claimant that he had not been drinking and by testimony of the Claims Agent and the Cab Driver, the latter a disinterested witness, that they observed none of those symptoms. The Organization also points out that the Trainmaster insisted that the incident took place on February 9, 1988; all other evidence indicates that it took place on February 10, 1988. The Organization urges that the Trainmaster's motive was to assert his authority over Claimant, who had spoken "gruffly" and vulgarly to him. It points out that he was not charged with that offense and that his language must be viewed in light of language commonly used in the environment involved. The Organization argues that vulgar language does not prove, or directly support, the charge of intoxication.

The Organization also argues that the Carrier failed to afford Claimant a fair and impartial investigation. It urges that the Hearing Officer had preknowledge of the case and demonstrated prejudgment against Claimant. It asserts, in particular, that the Hearing Officer disregarded the discrepancy in dates in the Trainmaster's testimony, permitted the inclusion of testimony concerning unrelated events two weeks after the date of the violation's acceptance of testimony, permitted the Trainmaster to call a witness, and exhibited bias against him in the phrasing of questions (e.g., Claimant's "belligerent behavior") and otherwise exhibiting prejudgment. The Organization argues, in addition, that the cited rules only apply to employees on duty or subject to duty, which Claimant was not. The Organization urges that the Claim be sustained.

Of the Organization's argument that neither Rule 9 and Rule G cover the circumstances of Claimant's alleged conduct the Board is not persuaded. The cited Rules prohibit, in part, "possession or use of alcohol while on Company property." Claimant was clearly on Company property. Whether he was on duty or not is not relevant to that prohibition; and dangers to Claimant, other employees, and Company property from alcohol use are the same, whether or not Claimant was on duty. The cited Rules also prohibit employees from reporting for duty "under the influence" of alcohol. Whether the offense charged - intoxication - is viewed as a form of possession or use, as the Board found in Third Division Award 19303, or whether Claimant's reporting to the Carrier for purpose of qualifying for unemployment benefits is a form of "duty," the Board is persuaded that Rules 9 and G are broad enough to prohibit Claimant from being on Company property under the influence of alcohol.

Of the Organization's arguments that Claimant was not afforded a fair hearing, the Board is also unpersuaded. The apparent inconsistency in dates does not negate the testimony of either party that an incident took place between the Trainmaster and Claimant when Claimant signed up at the Company Office that week. There is no contention with respect to the incident which makes the discrepancy in dates significant, and the Board is not prepared to conclude that the discrepancy so undermined the Trainmaster's credibility as to require his testimony to be discredited. Of the arguments that the Hearing Officer prejudged the case the Board is also unpersuaded. His use of "apparent belligerent behavior" is merely a qualified description of what the Organization concedes to have been Claimant's conduct. There is no indication that the Hearing Officer relied on testimony concerning the follow-up incident which is alleged to have taken place on February 23, 1988. A review of the record indicates that the Hearing Officer's determination to allow the Claims Agent to be called was not only at the suggestion of the Trainmaster, but also the Organization.

The sole evidence supporting the Charge came from the Trainmaster. His observations and accusation followed Claimant's rude and vulgar response to him. Those responses might well constitute disciplinable offenses, but Claimant was not charged on the basis of his statements to the Trainmaster. The use of vulgar, disrespectful language does not establish intoxication.

The Trainmaster did not offer Claimant the opportunity to be tested following his accusation, as was the Carrier's obligation under its Company Policy ("Employees not in covered service will be afforded the opportunity, but will not be required to have urine or blood samples taken when charged with a Rule G violation by a supervisor."). Such a test would have confirmed or refuted the Trainmaster's accusation. Indeed, he did not attempt to obtain other witnesses to Claimant's alleged symptoms of intoxication. The janitor who apparently observed Claimant and reported his presence to the Trainmaster was not called by the Carrier as a witness. No reason was given.

Claimant's previous Rule G violations took place in 1981 and 1984. While they would certainly influence the Board's determination of the appropriate penalty to be imposed if Claimant were found to be guilty of the present charges, the prior offenses are not evidence to prove the offense of which Claimant is accused.

Against the Trainmaster's unsupported and uncorroborated testimony stands the testimony of Claimant and two witnesses each of whom stated that they observed Claimant and had conversation with him without noticing any of the symptoms reported by the Trainmaster. While it is true, as the Carrier argues, that neither of the witnesses was specifically examining Claimant for signs of intoxication, it is difficult to believe that the extreme and severe symptoms (strong odor of alcohol, staggering walk) reported by the Trainmaster would have gone unnoticed even on relatively casual observation. Neither Claimant's testimony nor that of the other witnesses corroborated the Trainmaster's testimony.

The Board is persuaded that the evidence offered by the Carrier was not substantial and convincing and is further persuaded that the evidence, on the record as a whole, is insufficient to support the charges. The Carrier's failure is underscored by the fact that it was possessed of the ability, at the time of the incident, to obtain additional evidence of Claimant's alleged intoxication (e.g., by offering to test Claimant) and to present additional evidence at the hearing (e.g., the testimony of the janitor), but did not do so. The Board's determination is not based on a mere conflict of testimony or credibility, which is for determination by the Hearing Officer but is, instead, a failure of proof. The Carrier's failure to obtain and produce substantial and convincing evidence to support the charge requires that the claim be sustained.

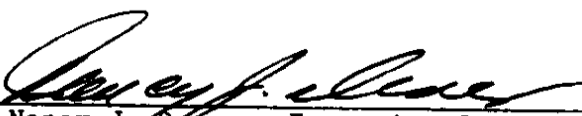
The record indicates that Claimant was furloughed at the time of the incident. He is entitled, by way of remedy, to reinstatement to employee status and to such rights as that status and his seniority would entitle him. He is entitled to be made whole for only such pay and benefits, if any, as he would have earned, but for the Carrier's dismissal action.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.