

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Union Pacific Railroad Company

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

(1) The dismissal of Laborer L. Nez for alleged violation of Rule G on July 8, 1988 was arbitrary, unjust and in violation of the Agreement (System File D-121/880709).

(2) The Claimant shall be reinstated in the Carrier's service with seniority and all other rights unimpaired, he shall be allowed to enroll in a Navajo ADEPT Program and he shall be compensated for all wage loss suffered beginning July 8, 1988 and continuing until his reinstatement with all rights and benefits."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

The basic facts of this case are clear and unmistakable. Claimant was a track laborer who had many years of seniority with the Carrier. The Organization says that the Claimant had "thirty five (35) years of service with this Carrier." Carrier says he "was originally employed - - - on August 31, 1977." Regardless of which number we accept, the Claimant was not a new man in the employ of the Carrier. On July 8, 1988, (a Friday), the Claimant was assigned to a System Gang which was working in the vicinity of Downey, Idaho. The Claimant did not perform service with his gang on July 8, 1988. The Organization says "On July 8, 1988, it was necessary for the Claimant to absent himself from his assignment for that one (1) day." The Hearing transcript which makes up considerable portion of the on-property handling of this case reflects the following:

"Testimony of Heat Control Engineer Woodie

That morning when they did roll call, we were missing him[Nez]. I don't know if anybody tried to look for him. He was absent that day from work - - -."

Later in the hearing transcript, the Claimant answered "No" when asked " - - had you requested to take the day off from anyone of authority on the gang?" It does not appear from the record of this case that the Claimant was authorized to be absent from his gang on July 8, 1988.

The record does indicate that at approximately 5:00 PM on July 8, 1988, the Claimant was found by a Carrier Officer lying face down on the ground in the vicinity of the house track switch at Downey, Idaho. Claimant was aroused by the Carrier Officer who determined from Claimant's appearance, demeanor, speech and smell that he was under the influence of intoxicants. The Claimant was removed from service pending a Hearing which was held on July 20, 1988. At the hearing, the Claimant was present and represented. Following completion of the Hearing, the Claimant was informed by letter dated August 8, 1988, that he had been found at fault for being on Carrier property under the influence of alcoholic beverages and that he was dismissed from the service of the Carrier.

Appeals on behalf of the Claimant have been advanced through the normal appeals processes on the Carrier property. Failing to reach a satisfactory resolution thereon, the dismissal has come to this Board for final adjudication.

The Organization in its presentation to the Board has raised three primary issues, namely:

1. The Carrier violated the Agreement when it failed to furnish the General Chairman notice of the charges leveled against the Claimant.
2. The Claimant was disadvantaged during the hearing and did not understand Carrier's Rule "G".
3. The Claimant should not have been dismissed from service as a result of this alleged violation of Carrier's Rule "G".

The Carrier, on the other hand, insists that there were no procedural errors in its handling of this case; that there is more than substantial evidence to support the charge of a Rule "G" violation; and that the discipline assessed was reasonable in light of the seriousness of the proven charge and especially in light of Claimant's prior discipline record which contained a previous dismissal from service for violation of Rule "G".

We have reviewed the entire record which exists in this case. We have heard and considered the presentations made by the respective advocates at this Board. We are convinced that the record as it exists in this case supports the action as taken by Carrier.

The letter dated July 8, 1988, which withheld Claimant from service and which outlined a charge and scheduled a Hearing thereon clearly shows that a copy thereof was addressed to both the General Chairman and Assistant General Chairman. At the Hearing, this letter was introduced into and made a part of the Hearing transcript. Claimant had representation throughout the Hearing. There was no indication in the Hearing record to suggest the Representative was not prepared to carry forth with his representation of the Claimant. The Representative did not request additional time to prepare his defense. In short, the Representative performed admirably during the Hearing and there has been no probative evidence presented which would indicate that the provisions of Rule 48(c) dealing with notification to the employee and his Representative General Chairman and Assistant General Chairman have not been complied with.

The withholding of Claimant from service pending charges and a Hearing are permitted by paragraph (o) of Rule 48. Such withholding from service in this case was not prejudicial to Claimant. Neither did it constitute a situation in which Claimant was dismissed without a Hearing. The dismissal from service followed the completion of the Hearing at which Claimant was present, was represented and testified on his own behalf.

The fact that the Claimant may not have been able to speak fluent English has been carefully considered by this Board. We note with particular interest the testimony in the Hearing transcript where Claimant answered "Yes" when asked if he was ready to proceed with the Hearing. He answered "Yes" when he was asked if he was conversant with and fully understood the Rules with which he was charged. He answered "Yes" when asked if " - it is okay if he [A. J. Woodie] interprets for you?" In fact he answered "Yes" twice to the same question concerning the use of Mr. Woodie as interpreter. From the evidence of record in this case, we cannot find that Claimant's stated inability to speak fluent English was a deterrent to his receiving a fair and impartial Hearing.

As to the Organization's contention relative to Claimant not understanding Rule "G", we again turn to the Hearing transcript and find that Claimant acknowledged that he was aware of other employees having been removed from service for being intoxicated while on Carrier property. He answered "Yes" when asked if he had been present at gang meetings where Rule "G" was described. The record clearly indicates that Claimant himself was dismissed from service in May 1986 for being in violation of Rule "G" by being in an intoxicated state with alcoholic beverages on his person. Following his previous dismissal, Claimant participated in Carrier's Employee Assistance Program and was reinstated to service. Apparently Claimant's previous dismissal for the Rule "G" violation had no salutary effect on him. We will not overrule the decision of the Carrier to dismiss Claimant for this proven second Rule "G" violation.

However, we have studied with considerable interest the Organization's plea for application of the Discipline/Education Program Agreement of

June 16, 1987, to the Claimant. Of course, it is beyond the jurisdiction of this Board to order such action inasmuch as the Agreement specifically provides that the program "shall be at the discretion of the Division Engineer." We would, however, suggest that consideration be again given to possible application of this program to Claimant who is in his middle 50's agewise; who has considerable service with the Carrier and who, according to the officer who found him and charged him, is "- - right there most of the time."

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 28th day of February 1991.