NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29488
Docket No. SG-30219
93-3-92-3-66

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Belt Railway of Chicago

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Belt:

Claim on behalf of J. M. Hicks, for reinstatement to service with all lost wages and benefits restored, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 52, when it did not find him guilty, prematurely removed him from service and failed to allow or permit him an appeal hearing." BRS case No. 8476.BELT.

FINDINGS:

The Third Division of the Agreement 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.

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

Parties to said dispute were given due notice of hearing thereon.

At 7:30 A.M. on February 12, 1991, when Claimant's supervisor spoke to him over the phone, Claimant sounded agitated and out of character. When Claimant later reported to the supervisor's office, the supervisor smelled liquor on his breath. At 9:45 A.M., the supervisor, accompanied by Carrier's Chief of Police and a trainmaster, observed Claimant slouched in his truck, his eyes closed. After observing Claimant for several minutes, they woke him and informed him they suspected him of being in violation of Rule G.

Claimant was given three breath tests between 9:55 A.M. and 10:33 A.M. These tests reported a blood alcohol content of .025% on the first two tests, and .020% on the third. Claimant was thereupon removed from service pending Investigation, at which he was charged with "sleeping while scheduled to perform service and being unfit to perform service as a result of being under the influence of alcohol." Claimant's Investigation was originally scheduled for February 15, 1991, but was postponed, at the request of Claimant's representative, until April 3, 1991. It is evident the postponement was requested because Claimant was in an alcohol rehabilitation program.

At the Investigation, Claimant submitted the results of a blood test he had taken after being removed from service. According to that report, Claimant's blood was drawn at 1:00 P.M., and no alcohol was detected. Claimant denied he was sleeping and testified he had been ill all weekend and was taking Vicks Formula 44 cough medicine.

By letter dated April 5, 1991, Claimant was notified he was dismissed for sleeping and being under the influence of alcohol. On April 8, 1991, the General Chairman requested an appeal hearing pursuant to Rule 52(c) of the Agreement. Carrier never responded to this request. The Organization then appealed the Claim, asserting Claimant's innocence, as well as a violation of Rule 52(c), which reads as follows:

> "An employee may appeal from discipline imposed on him if he or his duly accredited representative does so in writing to the next higher official of the company within ten (10) calendar days from the date he receives notice of the imposition of such discipline, and if so appealed hearing shall be given within ten (10) calendar days of the date of the appeal. When an appeal from discipline is made to the next higher official, this appeal shall act as a stay of application of discipline in all cases except where the discipline has been dismissal. A decision will be rendered within ten (10) calendar days after the completion of hearing."

With respect to the merits of the case, the Board finds there is substantial evidence to support both aspects of the Carrier's charge against Claimant. Claimant testified he had his hat down over his eyes, which is sufficient to establish a violation of the Carrier's Rule against sleeping. We do not find any value in the blood test results proffered by Claimant because of the two and one-half hour time difference. In this time, the alcohol in Claimant's system would have fully dissipated. We do not take issue with the Carrier's decision to reject Claimant's testimony about taking cough medicine.

Under normal circumstances, Claimant's discharge in this case would be upheld by the Board. This was his second dismissal for violating Rule G, the first being in 1986. Carrier's failure to afford Claimant an appeal hearing, however, casts a different light upon this case.

Rule 52(c) affords an employee, who has been issued discipline, a right to a hearing before the next highest Carrier official before the regular appeal process is commenced. In the event the discipline is less than dismissal, the filing of a request for a hearing under this Rule stays the discipline until a decision is rendered following the hearing. Carrier has argued that this Rule is inapplicable in dismissal cases. The language of the Rule clearly indicates otherwise. The Rule contains only one exception, namely that discipline will not be stayed in the event the employee is dismissed. This exception does not deny the dismissed employee the right to a hearing, however. If the Rule, in its entirety, were inapplicable in dismissal cases, the exception regarding the staying of discipline would be unnecessary.

This is not a case of first impression. In Third Division Award 23308, involving these parties and this Rule, this Board considered a dispute involving a ten day suspension. Carrier had denied the request for a hearing on the basis the employee had already begun serving his suspension. In sustaining the claim, the Board wrote:

> "The language of Rule 52(c) is clear and unambiguous. Its import is unmistakable. It provides for an appeal hearing if requested by the employe or his representative within ten (10) calendar days from the date he receives the notice of the imposition of discipline. Rule 52(c) further provides that the hearing be held within ten (10) days of the request and that the request will act as a stay of discipline in all cases except dismissal.
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> "Nothing in the language of Rule 52(c) allows Carrier the discretion of whether it wishes to provide such a hearing."

The above quoted Award makes it clear Carrier was obligated in this case to grant Claimant the hearing. A timely request was made on his behalf, and nothing more was required of him. Neither the strength of the evidence against Claimant, nor the fact that this was his second dismissal, should affect Claimant's right to a hearing under Rule 52(c). The Rule does not require Carrier to change its decision, but it does require Carrier to hear Claimant's plea. When Carrier failed to afford Claimant this hearing, it violated the Agreement.

Following the precedent established by Award 23308, we will direct that Claimant be reinstated to service, subject to his ability to pass any necessary rules and/or medical examinations, and the discipline entry be removed from Claimant's record. We will not, however, award backpay. As we noted above, there is uncontroverted evidence in the record Claimant entered a rehabilitation program following his dismissal. We cannot, however, determine if or when Claimant would ever have been qualified to return to service.

We strongly urge Claimant to take full advantage of this opportunity. As we noted above, his dismissal would have been permanent, but for the Carrier's failure to comply with Rule 52(c). Although Claimant is to be restored to service, this Award should not be taken as his vindication.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.