

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29970
Docket No. MW-30054
93-3-91-3-467

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
(
(CSX Transportation, Inc. (formerly The
(Chesapeake and Ohio Railway Company)

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

- (1) The dismissal of Equipment Operator L. Roland for alleged violation of Rule 'G' on June 7, 1990 at approximately 10:00 A.M. at Peach Creek, West Virginia was unwarranted and in violation of the Agreement [System File C-D-7058/12(90-605) COS].
- (2) The Claimant shall be reinstated with seniority and all other rights unimpaired, he shall have his record cleared of the charges leveled against him and he shall be paid for all time lost until such time as he is reinstated to the Carrier's service."

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 employe 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 Claimant was assigned as a Trackman scheduled to work in the vicinity of Peach Creek, West Virginia. On June 7, 1990, Claimant did not report for work at the assigned starting time of the gang. At approximately 9:30 A.M., some two and one half hours after the assigned starting time of the gang, Claimant arrived at

the reporting point. Upon observation of Claimant by three Supervisors, it was their conclusion that he was under the influence of alcohol and unfit to work. Upon making this determination, Claimant was withheld from service. By letter dated June 8, 1990, Claimant was notified to appear for a hearing on June 21, 1990, on a charge of violation of Rule G. On June 21, 1990, the hearing was convened as scheduled. Claimant did not appear for the hearing. Furthermore, he did not, either personally or through his representative, communicate in any way with the Carrier in connection with the scheduled hearing. Inasmuch as Claimant was neither present nor offered any reason for his failure to appear, the hearing was conducted in absentia. Claimant's representative was present throughout the hearing and was accorded the opportunity to cross examine all witnesses who testified. Following the completion of the hearing, Claimant was notified by letter dated June 26, 1990, that he was dismissed from service.

In this case, as in any discipline case which is reviewed by this appellate tribunal, the basis of review is, and must be, limited to the hearing record which is developed on the property. In this instance, the hearing record contains no direct testimony from the Claimant. The testimony of the four Carrier witnesses was offered for cross examination by the representative who was present and took part in the proceeding. In each instance of direct testimony, the representative did not challenge, question or in any way refute the statements of the witnesses. There was no summary statement offered nor testimony of any kind offered by the representative. We are, therefore, forced to accept the uncontroverted testimony of the witnesses as the sum total of the evidence which is available for our review.

During the appeal of the discipline after the dismissal, the representative contended that "When (Claimant) was taken out of service on account of the Rule G charge, (he) indicated that he would like to participate in the Rule G bypass. (He) did contact EAP Counselor John Foley in Chicago and indicated that he would like to participate in the program. Therefore, the hearing on the Rule G charge should have been held in abeyance and conducted only in the event of (his) failure to participate in the program." There is not one scintilla of support for this statement which came for the first time almost four weeks after the hearing had been concluded and almost six weeks after Claimant had been withheld from service.

After Carrier rejected this allegation in their handling of the appeal with the representative on the property, there is nothing further to be found in the on-property record to indicate that this position was pursued with the single exception of an apparent conference on April 5, 1991, at which time the Carrier advised that:

"- - -, we have discussed this matter with the Eap Counselor and have been advised that Mr. Roland has not kept in touch with the counselor and has not followed through with the program. Since he has not complied with the requirements of the EAP program, there is not justification for considering his reinstatement. In fact, when we discussed this matter several days ago with Mr. Dan Bowen, Director of EAP, you advised that Mr. Roland is currently in a treatment program.

Since Mr. Roland has not followed up treatment in the EAP program we cannot consider this matter further. However, we do encourage him to continue in his treatment."

In its Ex Parte Submission to this Board, the Organization has argued strenuously relative to a proper application of the February 14, 1985 Agreement (EAP Program) and Carrier's alleged violation of the provisions of that Agreement. These arguments, however, were not made during the on-property handling of this dispute and cannot be considered at this late date.

On the basis of the record as developed on the property, there is more than substantial evidence to support the action of dismissal. This Board has neither the authority nor jurisdiction to substitute its judgment for that of the Carrier in the assessment of discipline for proven infractions unless the Board can determine from the record that the discipline was arbitrary, capricious or excessive. In this case, on the basis of the record as developed on the property, the Board cannot make such a determination. The claim is, therefore, denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of December 1993.