PUBLIC LAW BOARD NO. 2366

DOCKET NO. 45
AWARD NO. 33
CASE NO. 1445 MW
FILE: K-209-T-81

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM

"(1) The dismissal of A. L. Swift, D. R. Turner, J. L. Centers, M. D. Pearce, S. D. Fentress, D. O. Tate, W. P. Pitcock, M. L. Luper, T. L. Lamb, R. O. Wilson and J. L. Asher for alleged violation of Rule 'G' on December 29, 1980 was without just and sufficient cause and on the basis of unproven and disproven charges.

(2) The Carrier violated the effective Agreement in that the investigation was not timely held in accordance with Rule 33(a).

(3) For either or both of the above the claimants shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered."

OPINION OF BOARD

On January 16, 1981, eleven employees received notification of a formal investigation to ascertain if any or all "...used or was under the influence of intoxicants or narcotics while performing duty on Gang 221 on or about December 29, 1980..." Subsequent to the investigation, each employee received a written notification stating that based upon certain testimony and statements, he was judged to be in violation of Rule G "...during the period December 29, 1980, to January 9, 1981." Each employee was dismissed from the Carrier's service as a result.

Initially, the Organization has asserted that the Carrier violated the provision of the agreement which mandates that notice of hearing (stating the known circumstances involved) shall be given to the employee, in writing, within 10 days of the date that knowledge of the alleged offense has been received by the Division Engineer or his authorized representative.

The Carrier has stated that it had no concrete evidence that violations occurred as early as the Organization suggests it did, and it has presented evidence indicating that at first, the appropriate Officials merely had certain suspicions of possible improper actions. The Carrier states that, obviously, the 10 day period does not commence to run based solely upon certain suspicious action, and here the Company insists that it forwarded the required notifications within the 10 days, as contemplated by the rule.

We tend to agree with the Carrier that the 10 day rule must be considered in light of all of the circumstances of record. However, in this case, we feel it unnecessary to devote an extensive amount of time to the timeliness considerations, because we have sustained the claims on the merits of the dispute.

The gang in question consisted of approximately 50 employees. The Carrier utilized the services of Special Agent, Elder (and other Company Officials) to observe the gang when it became suspicious that alcohol and/or marijuana and narcotics were being used by employees while they were on duty and/or by employees who were subject to duty. The Carrier Officials watched the rail gang on January 5 and 6, 1981, but they did not "...observe any action that was suspicious in nature." on those two days. Because they became aware that the rail gang was to be "cut off" on January 9, 1981, they began interviews with various members of the rail gang on January 6, and apparently a total of 10 employees were interviewed concerning the matters under investigation.

One of the Claimants here (A. L. Swift), advised Elder at 2:00 p.m., on January 9, 1981, in answer to a question of whether he knew anything about any of the employees "smoking dope or drinking while on the job", that he knew that 7 employees (including himself) smoked dope while on duty. He identified Claimants Lamb, Turner, Fentress, Pearce and Pitcock as the other offending individuals. When Swift testified at the investigation in this matter, he confirmed that the seven named individuals (including himself) had "smoked dope while on duty."

Elder further testified that he interviewed Claimant, Turner, who stated that he had smoked marijuana on one occasion "prior to coming to work", and that he thought seven

or eight other employees were involved in smoking marijuana while at work or after leaving work, but he did not know the names of all of the employees. After he identified two individuals by "nickname" - which individuals are not Claimants in this case - he was unable to identify any other individuals. At the investigation, he denied that he ever smoked marijuana or used alcohol while on duty, or immediately prior to reporting for duty, and he stated that he only had suspicions concerning the other "seven or eight." In any event, he did not implicate any of the Claimants.

According to Elders, Claimant Centers stated to him that certain individuals, including Claimants, Swift, Wilson, Pitcock, Pearce, Turner and himself had used dope or pot just prior to, or after, work. However, at the investigation, he denied that he signed any statement which contained the words "just prior to work and after work."

The Company presented into evidence, over the objection of the representative of the employees, statements from two individuals who are not Claimants in the case, and who were not present to testify. The statement of Clark related that he had observed Robert Wilson smoke pot, and that he was with Wilson when he bought pills from a man and took "2 black pills" just before starting to work. The statement from Burnworth indicated that Pearce, Fentress, Wilson, Asher, Pitcock, Luper and Centers smoked pot on the job. He also stated that he had seen Luper and Pitcock take a drink of whiskey on the job.

Claimant, Swift, conceded at the investigation that he had smoked dope while on duty, but denied utilization of alcoholic beverages. All of the other Claimants denied that they had ever used alcoholic beverage, marijuana or narcotics while on duty, or while subject to duty within a reasonable time frame of their reporting hour. All (except Swift) denied that they had ever seen, or known of, any other employee who was a Claimant in this case doing so on duty, or while subject to duty.

Based upon the record, the Carrier insists that it presented substantive evidence, and that this Board should uphold the terminations. Concerning the statements of the two employees who were not present at the hearing and who were not Claimants, the Company insists that they were properly admitted into evidence, and cites certain Awards, such as Third Division No. 16308, in that regard. The Carrier then points out, in its Submission, that certain implicating evidence was presented concerning each of the employees, based upon the statements of the two absent employees, as well as the statements of Swift and Centers.

The Organization is equally vocal in its counter assertion indicating that on the merits of the dispute, this Board should sustain the claims. It points out that the notice of investigation referred to an asserted use of intoxicants or narcotics while performing duty on or about December 29, 1980, and it argues that there was no competent, credible evidence introduced to support such a charge. Further, it states that all of the evidence was hearsay, and some was taken from statements of individuals who were not present at the investigation for examination and cross examination, or from individuals who altered the contents of their statement, with one exception.

At the oral presentation to this Board, the Organization's representative pointed out that the investigation which was conducted did not, in reality, relate to charges "on or about" December 29, 1980; but rather, it seemed to be a highly general fishing expedition.

The Board has fully considered this record in its entirety, and we are inclined to set aside the terminations and restore the employees to duty, because we are unable to find that the Carrier proved the charges against these individuals. It should be fully understood, however, that in making that determination we do not, in any manner, indicate that we minimize the severity of a proved violation of Rule G by the employees working for a rail carrier. Clearly, we do not encourage any situation where individuals with such significant responsibility perform duty with foreign agents in their system. Nonetheless, it is our duty, under the Railway Labor Act and the pertinent regulations and agreements, to assure that the Carrier has carried its burden of proof.

In reaching our determination, we have recognized the Awards cited by the Carrier, indicating that hearsay documents may, indeed, be received and considered. Without, in any manner, doing violence to that concept, it is still the role of the Board to determine the materiality of the evidence presented. While it may be admissible, even though hearsay, its materiality may be suspect when viewed in consideration of all of the other evidence.

The only direct evidence and testimony presented at the hearing was a statement by Claimant, Swift, who implicated himself and six others as having smoked marijuana while on duty. But, there is absolutely and totally nothing in the record to demonstrate when, and under what circumstances, that may have occurred. There was not even an attempt to isolate the particular period of time between December 29, 1980 and January 9, 1981 when the offenses may have occurred. That void may very well have been the reason why the notifications of termination from employment each referred to the twelve day period from December 29 through January 9 as the

period of time when the alleged offense occurred.

Boards such as this often struggle with the amount of time contemplated within the phrase "on or about." But in this kind of a situation, where serious charges are made against an employee, it would appear that some evidence is needed to show a much closer proximity to the time originally charged than we find here.

The statement of Centers - which was denied by him in certain part - as well as the statements of Clark and Burnworth, were hearsay as they apply to the other employees. Yet, even if they are considered as probative evidence, the fact remains that they did not, any more than Swift's statement, identify times or places with any degree of certainty. Carrier has the burden of proof, and each employee (with one exception) denied any improper use whatsoever. The Carrier Officials who conducted the two day surveillance saw nothing suspicious. Thus, we question that broad generalized statements that employees may have smoked marijuana on duty at some totally unidentified time is substantive evidence, as required by the Railway Labor Act and the agreements between the parties.

That leaves us only with the question of Claimant, Swift. He alone, among all of the employees, admitted use of marijuana while on duty. Clearly (as indicated above) we have no desire whatsoever to encourage or abet that type of activity, but even in the case of Swift, there was absolutely and totally no showing of any time frame concerning his use, and whether or not it fell, in any manner, reasonably close to the date of December 29, 1980.

Under all the circumstances, we will sustain the claims, and order the employees restored to service with back pay. We understand that certain of the employees may have been on a furlough status, and obviously that will have a bearing on the computation of any back pay which may be due.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper

notice of hearing thereon.

AWARD

1. The terminations are set aside.

2. The employees shall be restored to service with full retention of seniority and other rights, and shall be reimbursed for any compensation lost during the period of the suspension, if that lost compensation relates to the charges here under review.

3. Carrier shall comply with this Award within thirty (30) days of the effective date hereof.

Joseph A. Sickles
Chairman and Neutral Member

J. S. Gibbins
Carrier Member
DISSENT

Hugh A. Harper
Organization Member

1-29-82
DATE