Public Law Board No. 4747

Claimant - M. Nelson, Sr.
Award No. 4

Case No. 4

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes and Union Pacific Railroad

STATEMENT OF CLAIM:

The dismissal assessed Laborer M. Nelson, Sr. for alleged violation of company rules as indicated in Hearing Officer T. J. Worthington's letter of October 9, 1989, was arbitrary, capricious and unwarranted.

The claimant's record shall be cleared of the discipline referred to in Part (1) and he shall be reinstated with seniority and all other rights restored unimpaired including those specified in Article V Section 5. of the December 11, 1981 National Agreement and shall be made whole for all losses sustained.

FINDINGS

Upon reviewing the record, as submitted, the Board finds that the Parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended, and that this Special Board of Adjustment is duly constituted and has jurisdiction of the Parties and the subject matter; with this arbitrator being sole signatory.

On September 22, 1989, a formal investigation was held to determine whether or not the Claimant had violated General Rules B and G of Form 7908 "Safety, Radio and General Rules for all

Employes", effective April, 1985, as revised April 27, 1986.

The rules cited read as follows:

B. Employes whose duties are prescribed by these rules must have a copy available for reference while on duty.

Employes whose duties are affected by the timetable and/or special instructions must have a current copy immediately available for reference while on duty.

Employes must be familiar with and obey all rules and instructions, and must attend required classes.

If in doubt as to the meaning of any rule or instruction, employes must apply to their supervisor for an explanation.

Rules may be issued, canceled or modified by general order, timetable or special instructions.

When authorized by superintendent, general orders or special instructions may be canceled, modified or issued by train order Form Q or track bulletin.

G. The use of alcoholic beverages by employes subject to duty, when on duty or on company property is prohibited.

The illegal use of any drug, narcotic, or controlled substance is prohibited at any time, either on duty or off duty. Employes are expected to know those drugs, narcotics, or controlled substances which are illegal to use.

Employes must not report for duty or be on Company property under the influence of or use while on duty any over-the-counter or prescription drug or medication which will in any way adversely affect their alertness, coordination, reaction, response, or safety. If an employe is in doubt as to whether an over-the-counter or prescription drug may have an adverse effect on his alertness, coordination, reaction, response, or safety,

he should make sure that the following steps are taken:

1. Physician or dentist licensed or otherwise authorized to practice by a State of the United States or a physician designated by the Railroad makes a good faith judgment, in writing, with notice of the employe's assigned duties and on the basis of the available medical history, that use of the substance by the employe at the prescribed or authorized dosage applicable is consistent with the safe performance of the employe's duties; and

2. The substance used at the dosage prescribed or authorized; and,

3. The employe notifies the Railroad, in writing, prior to the use of on duty: (a) of his need to use the prescribed or authorized drug or medication; and, (b) of the medical practitioner's judgment as set out above; and

(4) The Railroad gives approval, in writing, to the employe for use on duty of the drug or medication.

The Carrier concluded that the evidence presented at the above hearing was sufficient to determine the Claimant's responsibility in violating the above rules. On October 9, 1989, they notified him by letter of his dismissal from the service of the Company.

On September 6, 1989, the Claimant was working with Gang 9000 at Castle, Oregon. He was supposed to take the 7:00 a.m. bus to his work site, but missed that bus. Instead he boarded the 7:30 a.m. bus and was encountered by the Assistant Foreman, John Hinker who asked him why he was late. He responded he had gone to eat breakfast and the bus left without him. The

Assistant Foreman then told him the Foreman, Mr. Lara was looking for him, to which the Claimant reportedly replied, "That's his fucking problem". Mr. Hinker believed the employe's behavior was contrary to his normal demeanor and believed he was possibly intoxicated. Not only were his actions unusual, but the Assistant Foreman said the Claimant was slurring his words rather badly at first, although his speech seemed to improve as he awaited the arrival of Mr. Lara. Mr. Lara came after the Employe approximately an hour later and took him to the job site.

At the job site, the Claimant met with the Gang Supervisor, Mr. Kerwood. Mr. Kerwood testified that during this discussion he believed he smelled liquor on the breath of the Claimant, Mr. Nelson, but, he did not say anything until another employe, Mr. Woody came over to the car and indicated he smelled alcohol on the Claimant's breath.

Following this, the Claimant was sent to the Office car and subsequently to the Tool car where he could be observed and prevented from injury. At some point he wandered off on his own. In the meantime, the Supervisor reviewed his record and discovered a previous Rule G violation for which the Employe had been referred to the Employe Assistance Program. Since it was allegedly the Claimant's second Rule G violation while on duty, he was removed from service.

It is not unusual in cases involving alleged intoxication to have to rely on the expertise of supervisors in determining whether the employe involved was actually under the influence of

alcohol when he reported to work. Certainly credence is given such testimony unless there is some evidence the supervisor(s) is/are biased towards the employe involved. There is no such evidence here. The supervisors had no apparent axe to grind with the Claimant. If they had, evidence of their prejudice would have surfaced far sooner than the five year interim between the Claimant's first Rule G violation and the current incident.

On the other hand, the Claimant has a very strong vested interest in promoting his position. He has already been through the Employe Assistance Program and was well aware a second proven offense would cost him his job. Even the Claimant's closing statement seemed to indicate a recognition that he had made a very costly error. And while this Board would like to provide second and even third chances, it is simply not appropriate to do so. An employe is given an opportunity to modify his/her behavior through the Employe Assistance Program. If they fail to comply with the rules after this, they are unfortunately left to suffer the consequences.

While the Employe's previous record cannot be used to prove his guilt in this instance, it can be used to determine the appropriateness of the penalty issued once his guilt is determined. This Board believes the evidence against the Claimant in this case is convincing. The Claimant violated Rules B and G. He was provided a full and fair hearing. The dismissal was appropriate.

AWARD

The claim is denied.

Carol J. Zamperini
Neutral

Submitted:

December 21, 1989
Denver, Colorado