

PUBLIC LAW BOARD NO. 1844

AWARD NO. 45

CASE NO. 60

PARTIES TO THE DISPUTE

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

"(1) The thirty (30) day suspension of Track Foreman Carlos Elizondo was without just and sufficient cause and wholly disproportionate to the alleged offense. (Carrier File D-11-238)

"(2) Track Foreman Elizondo be compensated for all time lost and the discipline be stricken from his record."

OPINION OF BOARD:

On the night of August 30, 1977, Claimant was assigned, along with Mr. Manuel C. Medina, to guard certain Carrier equipment. Both employees had worked a full shift from 7:30 a.m. to 5:30 p.m. that day but they came back at the direction of Roadmaster Larson to guard the equipment from 9:00 p.m. to 2:00 a.m. the next day. During the course of that evening, at about 10:30 p.m., Mr. Medina fired his automatic pistol at some trespassers. Medina's actions resulted in the arrest of himself and Claimant by Chicago police. The details of that incident are described in our Award No. 44.

Carrier's Police Department received a report of the incident and relayed the information to Roadmaster Larson. Both Larson and Carrier Police Lieutenant Grimmes went to the police station and talked with the employees, after which Larson bailed out Claimant Elizondo. The next day, following further

conversations with Claimant, Carrier served him with a Notice of Investigation into the following:

"Your responsibility in connection for violation of Rule G and violation of Rule 7 of the General Regulations and Safety Rules on August 31, 1977, 12:40 A.M. at Des Plaines and Grand Avenues, Chicago, Illinois."

The Rules referenced in the Notice read as follows:

Rule G:

"The use of alcoholic beverages or narcotics by employes subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on the company property is prohibited. Use or possession of alcoholic beverages or narcotics while on duty or on company property is prohibited."

Rule 7:

"Employes are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, gruesome or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations."

Following the investigation Claimant was found guilty as charged and assessed discipline of thirty days' suspension without pay.

The severity of the penalty and the propriety of the investigation both are challenged herein but are not found fatally defective. However, in addition to those two elements Carrier bears the burden of proving by substantial persuasive evidence on the record that the employe was culpable of the offenses charged, i.e., that he is deserving of some discipline. Failure of proof on that essential point renders any discipline, however "lenient," null and void. See Awards 3-13240, 3-13206, 3-14479. In our considered judgment Carrier in this case has failed utterly to adduce convincing evidence that Claimant violated either Rule G or Rule 7 on August 30, 1977.

On the former point, both Carrier witnesses/<sup>who</sup>saw and spoke with Claimant on the night of the arrest conceded that they could not testify under oath that he was under the influence of alcohol. The entire case against Claimant on

that point apparently consists of the alleged hearsay conversation between the arresting officer and Carrier witness Grimmes, regarding the officer's impressions at the time of the arrest. Claimant's admission that he had two or three beers with his dinner prior to coming back on duty does not establish that he was in violation of Rule G.

As for the alleged violations of Rule 7, there is even less persuasive evidence. The record shows that Claimant remained in his automobile from 9:00 p.m. until he and Medina were arrested at approximately midnight. He heard Medina's gunfire but had no part in it. Apparently he was the first to be arrested at the scene and the arresting officers at first thought Claimant had the gun. He was not informed at the scene of the arrest nor afterwards why he was being arrested. If, under those circumstances, Claimant was "uncooperative and disoriented" his behavior was in our judgment normal and understandable. For Carrier to impose any discipline at all on the basis of the evidence on this record is arbitrary, unreasonable and capricious. The claim is sustained. See Awards 3-16166, 3-17228, and 3-17314.


FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:


1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was violated.

AWARD

Claim sustained. Carrier is directed to comply with this Award within thirty days of issuance.

  
Dana E. Elschen, Chairman

  
H. G. Harper, Employee Member

  
R. W. Schmiede, Carrier Member

Dated: May 17, 1979