

AWARD NO. 316
Case No. 316

File No. Hagaman-GF-09-20-INV/MW-GNVL-20-46-SG-724 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline of Mr. G. Hagaman, in connection with his alleged violation of the Carrier's Safety and General Conduct Rule G, in that on August 10, 2020, supervision discovered that he was allegedly in possession of and used alcohol while occupying a company provided lodging facility in Pittsburgh, Pennsylvania and for allegedly using alcohol prior to reporting for duty was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Hagaman-GF-09-20-INV/MW-GNVL-20-46-SG-724 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant G. Hagaman shall now be reinstated to service with all seniority rights restored and all entitlements to and credit for, benefits restored, including vacation and health insurance benefits and being made whole for all financial losses, including compensation for: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully suspended); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

During the time frames relevant to this case, Claimant G. F. Hagaman was employed as a laborer on the R-3 Dual Rail Gang. On August 10, 2020, a supervisor on the rail gang was informed that the Carrier had received videos which showed Claimant shot gunning two beers while he allegedly was in a company provided lodging facility. The supervisor met with Claimant, and Claimant showed him the two videos on his phone.

By notice dated August 20, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with:

1. Violation of Norfolk Southern's Safety and General Conduct Rule G, in that on August 10, 2020, Supervision discovered that he was in possession of and used alcohol while occupying a Company provided lodging facility on August 10, 2020.
2. Violation of Norfolk Southern's Safety and General Conduct Rule G, in connection with the above charge, in that he used alcohol prior to reporting for duty.

Claimant was withheld from service, and the hearing was held September 8, 2020, at which the videos in question were played, which included commentary from Claimant about what he was doing. Claimant testified that the videos were taken after work on June 23, 2020, and that he was not in a company furnished room when the video was taken, but rather he was in a room paid for by a construction worker he had met there that afternoon.

By letter dated September 11, 2020, the Carrier's labor relations department notified the Organization that it had determined to unilaterally reduce Claimant's dismissal to a 30-day time served suspension, on a leniency basis. A similar letter was sent to Claimant by his supervisor on

September 17, 2020, stating that the return to service was effective September 21, 2020.

The Organization first contends that the Carrier failed to comply with the requirements of the applicable discipline agreement in that the Carrier did not render a decision in writing and furnish it to Claimant and his representative within twenty days after the completion of the investigation. It states that neither the letter from labor relations nor Claimant's supervisor informing Claimant of a leniency reinstatement constitute the requisite notice, as no assessment of discipline had ever been rendered. The Organization asserts that the discipline should be overturned on that basis alone.

With respect to the merits, the Organization argues that the reason no proper discipline notice was provided is because the Carrier failed to meet its burden of proof in connection with any of the charges. Regarding the first charge, it notes that the charging officer could only state that the setting of the videos was a hotel room, but that he could not confirm if it was a room furnished by the Carrier. The Organization contrasts that testimony with that of Claimant, who testified that he was off work and not in a Carrier furnished hotel room, and it maintains that Claimant's testimony in that regard was unrefuted. It asserts that, while Claimant may have consumed alcohol in the same hotel where the Carrier paid for lodging, it was outside of the Carrier's rented rooms, and it posits that the Carrier cannot stretch its rules to apply outside the workplace and outside of spaces not owned or leased by the Carrier.

Regarding the second charge of alleged use of alcohol prior to reporting for duty, the Organization asserts that the charge was proven to be inaccurate. It points to the videos themselves, which were time stamped at 3:52 and 4:06 p.m. on June 23, 2020, which the charging officer confirmed was at a time when Claimant had completed work for the day. The Organization concludes that, in the absence of evidence to prove any violation, the time served suspension was not warranted, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that a discipline decision was properly rendered, as evidenced by the

September 11 and 17, 2021 letters discussed above. It argues that the letters clearly state that Claimant was being disciplined as a result of the hearing, and that they were rendered within twenty days as is required by the agreement.

With respect to the merits, the Carrier concedes that the record does not contain evidence to support a finding of guilt on the second charge of using alcohol prior to reporting for duty. It maintains, however, that the record contains substantial evidence to support the conclusion that Claimant violated Rule G when he was in possession of and used alcohol while occupying a Carrier provided lodging facility on June 23, 2020. The Carrier quotes Rule G, which states in part that “possession, use, or being under the influence of [alcohol] while on Company property or . . . occupying facilities provided by the Company, is prohibited.” It states that the R-3 gang was staying at the Carrier-provided lodging where the videos were recorded, and it notes that Claimant admitted as much.

The Carrier denies that whether Claimant was in a contractor’s room not paid for by the Carrier is relevant, stating that Rule G contains no exception which would make the rule inapplicable to a room not paid for by the Carrier. It asserts that the rule applies to the entire facility provided by the Carrier.

With respect to the level of discipline imposed, the Carrier states that Rule G is crucial and necessary in this industry where there is so much risk and danger to the public and Carrier employees. It cites prior awards which have upheld discipline, including dismissal, for violations of that rule. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that the suspension assessed is appropriate in light of the significance of the infraction.

We have carefully reviewed the record in this case and the parties’ arguments, and we find no procedural barrier to our consideration of the merits. While it certainly could have done so in a more straightforward and clear way, we find that the Carrier’s notification to Claimant and the General Chairman that he was being assessed a time served suspension is adequate to meet the


agreement requirement that notice of discipline be issued within twenty days of a hearing. Although a separate letter first assessing dismissal, and a second letter reducing the dismissal to a suspension could have been issued, we do not find the Carrier's combination of such notification into a single document requires the discipline be set aside on that basis alone.

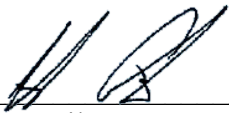
With respect to the merits, however, we find that the record does not support the assessment of discipline. As noted above, although the Carrier initially charged Claimant with violating Rule G by consuming alcohol prior to going on duty, it is apparent that such charge was based on the supervisor's belief that the video was from 5:30 a.m., an assumption which was proven to be inaccurate. It is also apparent that the supervisor believed Claimant could have been in his company provided room, but he conceded he could not tell from the video.


Claimant himself did confirm that he was in the same lodging facility, but on these particular facts, we do not believe it was reasonable to find that Rule G had been violated. We do not hold that an employee may avoid the requirements of that rule simply by leaving his own room to consume alcohol, but we find that the circumstances here, which were clearly not what the charging officer assumed, do not warrant the imposition of discipline. Rule G is undoubtedly one of the most important rules in the industry, but the cases cited by the Carrier involve instances in which employees were found to be under the influence while at work, which is not the case here. While the Carrier may have initially had good reason to assume that its rules had been violated and that Claimant had engaged in dangerous conduct, the evidence produced at the hearing did not support those assumptions. Based on this specific record, we hold that the discipline assessment, even reduced, was not warranted. We therefore must sustain the claim, and Claimant is entitled to

compensation lost during the period of the time served suspension.

AWARD: Claim sustained. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023