

SPECIAL BOARD OF ADJUSTMENT No. 957

AWARD No. 1

CASE No. 1

GRIEVANCE 83-4-F12

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees
(BMWE)

and

SouthEastern Pennsylvania Transportation Authority
(SEPTA)

ISSUE:

Did the discharge of Grievant Rufus Caldwell on November 7, 1983 violate the Agreement? If so, what shall the remedy be?

OPINION OF BOARD:

Rufus Caldwell, a General Helper-Flagman, was removed from service on November 7, 1983 for "violation of Rule 'G' of the Operating Rules, Rule 3010 of the Safety Rules, and Rule 'T', Leaving the job site without permission..." Rule G provides that "The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited." Rule T in pertinent part reads "Employees will not absent themselves from duty...". The relevant portion of Rule 3010 states "Narcotic (medication or

drug) and/or alcoholic beverage must not be used while on duty or within eight hours before reporting for duty."

A hearing was held in the SEPTA offices in Philadelphia, Pennsylvania on November 21, 1984 at which representatives of the Parties appeared. Full opportunity was afforded to them to offer evidence and argument and to examine and cross-examine witnesses. Section 401(k) of the May 13, 1983 Agreement between SEPTA and BMWE provides that "In any case where the matter or dispute involves the question of...an employee having been under the influence of intoxicating liquor or drugs...the only question which shall be determined shall be with respect to the fact...having been under such influence..., and if it is determined that in fact there was...such influence...then the action of SEPTA based thereon shall be sustained."

The Carrier contends that the evidence establishes that Caldwell was under the influence of alcohol when he was relieved of duty by his foreman on November 5, 1983. That the Grievant was fully aware of and qualified in the Rules involved, and that under the Contract the Carrier's decision to terminate Grievant must be upheld. The Organization contends that the Carrier has the burden of proof which it has not sustained. The Foreman's

testimony is at variance with his written statement at the time of the incident; there is reliance on the written statements of two non-Carrier persons who were not at the hearing; at no time did the Company give Caldwell a medical examination to determine intoxicification. Therefore the Organization seeks to have Caldwell reinstated with full back pay and benefits.

The pivotal issue is whether Flagman Caldwell was under the influence of alcohol on that November 5th. The Board concludes from this record that he was. Foreman T.W. Duckworth did add details that were not in his written statement. However, when the entire record is considered he remains a credible witness. He testified that a contractor's employee told him that he thought he noticed that the Flagman at Byberry Road crossing was drinking. Duckworth went to the crossing and saw that Flagman Caldwell had something in his hand. They met half-way and Caldwell asked Duckworth not to go down any farther to where he was performing his duties. According to Duckworth, Caldwell had a slurred voice, was staggering, talking loudly, and stumbled at one point. At the flagging location Duckworth found two minor boys and he asked if they were drinking and they said they were not.

Duckworth then pulled two coats from the ground and saw some bottles of beer underneath. The boys then admitted that they were drinking and offered him a beer. He then saw a case of beer and a pile of empty bottles. The Foreman took Caldwell's radio and stop boards and told him he "was done for the day" and to get into the truck. Duckworth dropped off a contractor's employee who was in the truck and then took Caldwell to the Station where another Flagman was working. Caldwell was instructed to stay on the truck. Instead he got out of the truck, sat down on the Station platform and put his feet on a live rail. A train was coming and Duckworth told him to remove his feet. Caldwell responded "The hell with it, let it stop." The train was about 150 feet away when the Foreman and the other Flagman pulled Caldwell from the track. Duckworth then informed Caldwell that he would write him up as being under the influence of alcohol and would call his immediate superior about it. He asked Caldwell if he wanted to be taken to headquarters. Caldwell said no, he would grab the next train, and took his bag out of the truck and left. Certainly Duckworth testified as to strange behavior requiring explanation.

In the Board's opinion Caldwell's explanation was not persuasive. Although he denied drinking beer or offering beer

to Duckworth he did concede that the two boys were on the property from 8 AM to 3:30 PM and were drinking beer. He did not order them off nor did he call the Carrier about them. He stated that Duckworth ordered the boys off the property, took his radio and boards and told him to get into the truck. He explained "stumbling" as tripping because of new boots. He did not refute Duckworth's testimony about what occurred at the other station and remembered being told that he was going to be charged with being under the influence of alcohol. There is no need to consider the written statements of the two contractor's employees who were not present at the hearing, for the testimony of direct witness Duckworth is reinforced by Caldwell's testimony. In responding to his discharge interview on November 7, 1983 he wrote in his own hand "I did it, but not the way they say. Will try to get things back on the right track" and placed his signature thereafter. As the interview and the report dealt with Rule 9, Rule 3010 and Rule T, Rules of which Caldwell was aware, his claim at the hearing that he meant this admission to be limited to leaving the job without permission is not credible. Indeed, this writing

by Caldwell supports the testimony of Administrator H.D. Armstrong that at the November 7th interview Caldwell admitted to him that he was drinking and had acted improperly. In view of this evidence any question about whether the Foreman should have referred Caldwell for medical examination is moot.

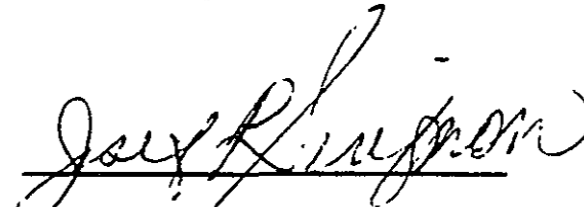
FINDINGS:

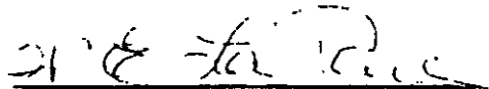
Special Board of Adjustment No. 957, upon the record as a whole, finds and holds as follows:


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 herein;
3. That the Agreement was not violated.

AWARD

The Claim is denied.


Josef P. Sirefman
Chairman


William LaRue
Employee Member


Frank X. Hutchinson
Carrier Member

Dated: September 18, 1985