

Award 19699

Docket 36291

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

SWITCHMEN'S UNION OF NORTH AMERICA

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

STATEMENT OF CLAIM: "Claim for the reinstatement with seniority rights unimpaired, and compensation at switchman helper's rate, November 14, 1957, and each SUBSEQUENT date thereto until restored to service, favor of switchman helper M. P. Goodell, Denver Terminal, account dismissed from the service of the Denver and Rio Grande Western Railroad Company, as a switchman, November 29, 1957, for his alleged responsibility in connection with alleged charges made subject of alleged formal investigation on November 25, 1957."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Petitioner asks that carrier's decision to discharge claimant be set aside on the following grounds: (1) The investigation was not timely held, as required by Article 16 (d). (2) Claimant was improperly held out of service before formal investigation and was in effect disciplined before said investigation and not as a result thereof. (3) The interrogation of claimant on November 13, 1957, was prejudicial to him. (4) The charge was not specific, as required by Article 16 (a) of the parties' Agreement. (5) The charge of physical unfitness, and even of intoxication upon reporting to work, was not proved. Carrier's decision is said to have been based on opinion, preconception, and not facts.

As to timeliness, Article 16 (d) says that "ordinarily" the investigation will be held within five days after the offense has occurred. It is true that this is a directive rather than a mandatory provision. The carrier has some leeway to go beyond five days. But the Division is in full accord with the construction

of said clause set forth in Award 7064: Carrier has the burden of showing a valid reason why the investigation was not and could not be held within the five-day period. This, the Division finds from the record, carrier did, stating in its letter of February 10, 1957, to General Chairman Tamaska that witness Woods was ill on Monday, November 18, 1957, five days after the occurrence leading to the investigation.

As to the second contention set forth above, Article 16 (f) says that "ordinarily" a switchman will not be held out of service prior to investigation. Here again is a directive rather than a mandatory provision. Carrier may sometimes hold a switchman out of service pending investigation. Since the circumstances under which it may do so are not specified in the Agreement, the Division finds that here also the carrier is "the moving party" and has discretion but must establish a valid rather than capricious reason for such action. The record shows that when on November 13, 1957, claimant was given a written notice of being held out of service pending investigation, said notice contained no reason. However, the record as a whole shows carrier's belief that claimant was unable to do his job properly that day because of reporting in an intoxicated condition. The Division finds that carrier here has a valid reason for its action.

As to the interrogation of claimant on November 13, 1957, the record reveals no rule prohibiting same, nor does it establish that same was prejudicial to claimant's rights. Carrier's agents had a right and duty to discover the true nature of claimant's physical condition. It is not shown that their questions and actions resembled anything like a "third degree".

Was the charge against claimant sufficiently specific? This question must be approached from the standpoint of the intent of Article 16 (a). It must be inferred that the parties wished a charge to be specific in order to make sure that any accused employe would not come to the hearing unprepared to defend himself and without opportunity to obtain witnesses who could testify in his defense. A precise and definite charge insures this desired result. But there are varying degrees of specificity. The real test of whether the wording of a particular charge is sufficiently and reasonably precise is whether, under the recorded circumstances of the individual case, the accused could have had rational doubt as to what he was being tried for.

Viewed in this light, the above-posed question requires an affirmative answer. It is difficult if not impossible to see how, given the tenor of the interrogation of November 13, 1957, and given claimant's immediate preinvestigation suspension, he could have come to the inquiry of November 20 without knowing exactly what the subject thereof was going to be. The Division is compelled to hold that Article 16 (a) was not violated.

The kind of unfit physical condition that claimant must have known he was being tried for was that caused by intoxication—a degree thereof that raised serious doubts as to whether he could perform his duties safely and efficiently. The Division finds that the testimony of five witnesses at carrier's investigation was of probative value and substantially established claimant's being under the influence of alcohol. It may not properly be concluded that this testimony was mere opinion; rather does it appear to have been inference based on first-hand observation of claimant's behavior. Claimant, moreover, admitted that he had been drinking up to two and one-quarter hours before reporting for work. Given all this evidence, it may not be ruled that carrier's conclusion therefrom was arbitrary or unreasonable. Neither may car-

19699—3

rier's decision to discharge be found unreasonably related to the seriousness of the proven offense.

AWARD: Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 28th day of November 1960.