

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **20055**
Docket Number SG-19824

Irving T. Bergman, Referee

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(The Indianapolis Union Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on The Indianapolis Union Railway Company that:

(a) Carrier violated provisions of Rule 43(a) of the current working Agreement when Mr. F. T. Smith, Superintendent, arbitrarily removed Signal Maintainer Robert L. Humble from service of the Carrier at approximately 8:15 A. M., Thursday, May 6, 1971, without first according him a fair and impartial hearing as provided in Rule 43(a).

(b) Carrier failed to sustain charges against Signal Maintainer Robert L. Humble as alleged in Carrier's letter of May 10, 1971, at a hearing that was held over the protest of the **Organization** on May 21, 1971--such protest made due to the violation of Rule 43(a) as referred to in paragraph (a) above.

(c) Carrier, in a letter dated May 28, 1971, advised Robert L. Humble that he was being assessed, as discipline resulting from the protested hearing, sixty (60) days actual suspension; such discipline to include time he was held out of service pending the hearing that was held, and he was to return to duty on date of July 5, 1971.

(d) Carrier now be required to compensate Signal Maintainer Robert L. Humble for all time he is held out of service of the Carrier beginning May 6, 1971, inclusive, and continuing through July 5, 1971, if he is not restored to service before the latter date; the compensation to cover all holiday pay and punitive pay, as well as pro rata pay, he would have earned, account violation of Agreement referred to in paragraph (a) and failure to sustain charges as referred to in paragraph (b).

OPINION OF BOARD: This is a discipline case in which it is alleged that claimant could not be found on the job during his hours of work. The Superintendent and the Supervisor of the Electric and Signal Department went looking for him. They found him off the property sitting at the bar of a nearby tavern. A partially empty bottle of beer and a glass were on the bar in front of or next to the claimant. The Superintendent took the bottle of beer as an exhibit and, when outside the tavern, told claimant that he was out of service.

Claimant was later charged with violation of Rule G, and a hearing was held. The transcript discloses that neither the Superintendent nor the Supervisor saw the claimant handle the bottle or the glass and they did not

see him drinking anything. They testified that they could smell beer on claimant's breath when he spoke but that he showed no signs of intoxication.

The bartender testified at the hearing that claimant had come in to cash a Five dollar check and he produced the check as an exhibit. The bartender further testified that he had cashed small checks for claimant on prior occasions but knew him only as a customer. In addition, the bartender stated in answer to questions that he was the only one serving customers at the time, that there were three or four other customers in the tavern at the time, that claimant did not ask for and was not served any beverage on that morning. In fact, the bartender identified the bottle as one sold to a customer whom he identified by name; that the entire incident took less than a minute. He did say that claimant had been in the tavern about five minutes. Claimant testified that he sat at the bar to write the check but that he did not order, was not served and did not drink any beverage.

The Organization claims that the Carrier violated Rule 43 (a) of the Agreement by holding claimant out of service before a hearing was held. The pertinent part of the Rule states that an employee in service more than 90 days, "will not be disciplined or held out of service without a fair and impartial hearing,---."

The Carrier has argued that this rule does not require that the hearing be held first; before an employe may be held out of service, only that a hearing be held before discipline is imposed.

It is within the realm of possibility that an employe may act in such manner as to require that he not be permitted to continue work pending a hearing. Two prior cases are cited in which this was done and no objection was made by the Organization. The prior examples are not disputed. Bearing in mind that the Carrier is responsible for the safety of the public and that damage to equipment may be involved, it would not be realistic to make a decision on this point other than on the facts of this case.

In this case, there is no compelling reason or urgency shown to immediately remove the claimant from service. He was in the employ of the Carrier for about twenty four years. There is nothing in the record to show that he was a menace to the operation. He was not intoxicated and could have been sent back to work pending the hearing. The record shows that it was his job to change light bulbs in the terminal. He could have continued to perform this work with no danger to anyone. There is no evidence to the contrary.

Claimant was obviously in violation of his duty to the Carrier by being off the property. He testified that he cashed the check to get cigarette and lunch money. It was wrong to do this off the property and on working time. He could have waited until his lunch time or attended to it the night before or prior to his starting time. He should not have gone to a tavern. The Superintendent testified that he and the Supervisor looked for the claimant in the tavern because there had been reports that claimant, "--has been spending more

time in bars than he has on the job--."

Nevertheless, the charge against claimant was that he had violated Rule G, which prohibits, "the use of intoxicants or narcotics by **employees** available for or while on duty." It is axiomatic that this Board will not disturb the decision after hearing if there is substantial evidence or a preponderance of the evidence in the transcript of the hearing to substantiate the charge; nor will this Board determine conflicts in testimony. In this case the Carrier has failed to sustain the burden of proof and the testimony favors the claimant's statement that he had not used intoxicants as charged.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Carrier improperly applied Rule 43(a) and claim is sustained on the merits.

A W A R D

- (a) Disposed of **as stated** above.
- (b) Sustained as to the charge against claimant.
- (c) Letter assessing discipline was improper.
- (d) Claim sustained as stated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.