Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35765
Docket No. MW-35331
01-3-99-3-202

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Meridian & Bigbee Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman H. R. Baylor on the allegation of conduct unbecoming an M&B employe on February 22, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.

(2) As a consequence of the above-stated violation, the Claimant shall now ' . . . be reinstated as a Trackman and made whole in accordance with RULE 20 (f).'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The February 22, 1998, edition of The Meridian [Mississipi] Star reported that the Claimant had been arrested for "public drunk." The notice, listed among the law enforcement reports, stated the Claimant's age and address, but did not identify him as an employee of the Carrier. Upon learning of the publication of this notice, the Carrier informed the Claimant that his employment would be terminated effective March 9, 1998. The Claimant thereupon exercised his right under the Agreement, and requested a formal Hearing. The Hearing was conducted on March 30, 1998. On May 26, 1998, the Organization was issued the following letter by the Carrier's Manager, Train Operations:

> "The transcript from the March 30, 1998 hearing was finally received May 20, 1998. The lateness of receiving it was beyond our control.
>
> I just got back from vacation the week of May 18th and I have since read the transcript. Based on witnesses' statements and facts relating to this case, I find no reason to change our original decision, which is the termination of Mr. Herman Baylor as an M&B employee.
>
> I regret it has taken so much time to render this decision, but the court reporter has been on a special assignment by the Lauderdale County School Board."

The Organization first argues that the Carrier's decision to uphold the Claimant's dismissal was untimely. It cites Rule 20(c), which reads as follows:

> "(c) At the hearing a record of the proceedings will be made in writing, and a transcript of same shall be furnished to the employee and to the employee's representative when requested. A decision will be rendered within ten (10) days after completion of the hearing."

The Carrier answers that the Rule contemplates the Hearing being completed upon receipt of the transcript. According to the Carrier, the delay in receipt was due to the court reporter, who is not an employee of the Carrier, being on a special assignment. This, says the Carrier, was beyond its control.

The Organization also argues that there is no nexus between the fact that the Claimant might have been arrested and his employment with the Carrier. It notes that

the newspaper item made no mention of his employment. The Carrier responds by stating the Claimant was on notice that he would be subject to dismissal for this offense, and this was not the first time such action had been taken against him for being arrested for public drunkenness. In 1997, says the Carrier, the Claimant was dismissed after being arrested for public intoxication, and was reinstated on a leniency basis.

The Board finds merit in both of the objections raised by the Organization. There is nothing in the Rule that gives any indication that the parties intended the time limit for the issuance of discipline to commence upon receipt of the transcript. Had that been their intent, it would have been easy to state it in the Agreement. Rather, the parties based the time limit upon "completion of the hearing." The last line of the transcript indicates the Hearing Officer declared the Hearing "closed." This was the completion of the Hearing. Thus, we find the Carrier's decision was rendered 57 days after the completion of the Hearing, rather than within the ten days allowed by the Agreement. This is more than a de minimis violation. The failure to issue a decision sustaining the charge on a timely basis has the same effect as finding that the charge was not sustained. Rule 20(f) then requires the Claimant to be returned to his former position and paid for all time lost.

Even if the Carrier's decision had been timely, the disciplinary action would not be warranted. There are limits to which a Carrier may regulate an employee's off-duty conduct. The mere fact that the Claimant was arrested for public drunkenness has no bearing upon his ability to perform his job as a Trackman. There is no assertion the Claimant's offense occurred on the Carrier's property, and the fact that the Claimant was not identified as an employee of the Carrier makes it doubtful that anyone would think ill of the Carrier as a result. While sobriety is certainly required of Trackmen when they are at work, the fact that one might get drunk on his own time should not be the Carrier's concern. If the Claimant has a propensity for drunkenness, the appropriate action would be referral to an employee assistance program.

We conclude, therefore, that the Carrier violated the Agreement by dismissing the Claimant. The claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of October, 2001.