

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12452
Docket No. 12475
92-2-91-2-284

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: ((International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

Appeal of discipline of dismissal from service in all capacities assessed Electrician J. A. Simmons on May 27, 1991 by the Consolidated Rail Corporation (Conrail).

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On February 28, 1991, the Claimant was involved in a motor vehicle accident with a tractor trailer while driving a Conrail truck in Dunkirk, New York. The accident took place at 8:18 P.M., while he was off duty. According to the police department's accident report, the Claimant was transported to a local hospital, where he was administered a blood alcohol test at approximately 9:00 P.M., which registered a .19% blood alcohol level. He was subsequently arrested by the Dunkirk police and removed to the local police station, where three Conrail officials interviewed him in the early hours of March 1 and advised the Claimant that they were removing him from service for driving a Company vehicle while under the influence of alcohol and for being involved in a motor vehicle accident which caused extensive damage to that vehicle.

By notice dated March 7, 1991, the Claimant was instructed to attend an investigative Hearing on March 13, 1991, involving, among other things, charges that he used a Conrail vehicle in the vicinity of Dunkirk, New York, without authority, was involved in an accident causing extensive damage to that vehicle, and was operating that vehicle while under the influence of alcohol.

After several postponements by mutual consent, the Hearing was rescheduled for 1:00 P.M. on May 3, 1991. The Claimant and the Organization's International Vice President were notified of all rescheduled dates for the Hearing and, following the Organization's written request of April 9, 1991, a copy of the final rescheduling of the Hearing for May 3, 1991, at 1:00 P.M., was also sent to the General Chairman of the Organization's System Council No. 7. On May 3, 1991, the Hearing Officer waited until 2:15 P.M. and, having been advised that the Claimant had not requested another postponement, held the Hearing in absentia.

On May 27, 1991, Claimant was notified of the discipline assessed as dismissal from service in all capacities, effective immediately.

The Organization claims that the evidence relied upon by the Carrier at the Hearing on the property was invalid, since the Carrier relied largely on police reports, and because there is no evidence to show that the police ever proved the charges against the Claimant: that is, that he failed to yield the right of way when making a left turn and that he was driving while intoxicated. The Organization also questions the fact that the police did not make the Claimant take a blood alcohol test at the time of the accident but only sometime later at the hospital. It raises the possibility that the Claimant might have consumed alcohol between the time of the accident and the time of the blood test and/or that he might have been administered medications by the rescue crew or the hospital which contained alcohol or a substance that would show up later as a blood alcohol level of .19% in the blood sample taken from the Claimant. It also implies that the Carrier failed to establish the reliability of the methodology of the testing procedure and its results at the Hearing.

The Organization states that the Carrier cannot use the Claimant's past record to decide the issue, to support or prove the charges, or to determine the degree of discipline in the instant claim. In sum, the Organization charges that there is nothing in the record to support a conclusion that the Carrier has met its burden of proof either with respect to the charges made by the Dunkirk police or with respect to the charges the Carrier made in its advance written notice of Hearing and asks that the Claimant be restored to service in accordance with Rule 7-A-1(e).

The Carrier states that the Claimant was authorized to use the Conrail truck to and from his motel and headquarters and for meals in the immediate vicinity of Dunkirk, New York. Since the Claimant told a Company official in the early hours of March 1 that he was returning from Silver Creek, a locale some ten miles distant from Dunkirk, New York, the Carrier claims that the Claimant had no authorization to travel such a distance in a Company vehicle for his evening meal.

With respect to its claim that the Claimant was under the influence of alcohol at the time of the accident, the Carrier produced police documents showing that he had bloodshot eyes and smelled strongly of alcohol on the night of the accident and that the Claimant's blood alcohol level was .19% on that night and points out that police action is taken in the State of New York when the blood alcohol level reaches .10%. The Carrier discounts the Organization's attempt to downplay the Claimant's responsibility by raising the possibility that he could have consumed alcohol between the time of the accident and the time of his arrest, pointing out that the accident occurred at 8:18 P.M. and that he was arrested by the police at approximately 9:00 P.M., after the blood test had been taken. In the Carrier's view, this left neither the time nor the opportunity for the Claimant to drink alcohol between the time of the accident and the time of the blood test.

Finally, the Carrier recounts the Claimant's past discipline record, which includes a previous dismissal for an almost identical incident in 1982, (although he was later reinstated without backpay by PLB No. 3358 in 1983). It asserts that the seriousness of the charges in this instant claim, coupled with the Claimant's poor prior discipline record, warrants nothing less than outright dismissal.

The Carrier also calls the Board's attention to a case on the Carrier's property which involved the dismissal of an employee with long service and a good prior discipline record (Third Division Award 19721), in which the Board denied the claim of an employee who had been arrested while driving a company leased vehicle with the Carrier's consent, while off duty, and whose blood alcohol level registered .21% two hours after the collision in which he had been involved occurred. In addressing the question of excessive discipline in that decision, the Board considered both the Claimant's 20 years of service and the off-duty use of the vehicle in making its decision, but ruled that the Claimant's imprudent use of intoxicants while driving a company vehicle, thereby causing a collision with another vehicle, merited discharge, and denied the claim.

The Board has reviewed the entire file, including the transcript of the Hearing and the Awards cited by both parties in support of their positions.

The Organization has recently raised the question of improper service by the Carrier, in that the copies of notice of Hearing dates were not sent to the appropriate Organization officer on the property. However, this question was not raised at anytime during the appeals procedure on the property. In addition, as noted above, the copy of the rescheduling notice for the final Hearing date was sent to the General Chairman of the Organization's System Council No. 7 at the General Chairman's own request.

Although the Organization raises certain questions about the reliability of the evidence adduced by the Carrier at the Hearing, particularly the reliability of the blood test methodology and its results and the Carrier's reliance on police reports to prove its case, the fact of the matter is that both the Claimant and the Organization were properly notified of both the initial Hearing date and all rescheduled dates, and yet chose not to appear. The Hearing Officer delayed the opening of the Hearing for an hour and 15 minutes beyond its scheduled time on May 3, 1991. The fact that he then proceeded to hold the Hearing in absentia is no bar to the proceeds. The Board ruled in Second Division Awards 7844 and 8225 that there is nothing improper with the Carrier's holding an Investigation with the Claimant in absentia, provided the Carrier gives proper notification of the Hearing and advises the claimant of his rights. In addition, SBA No. 894, Award 313, stated that the Claimant who chooses not to attend an Investigation is nonetheless bound by the record established at such Hearing and that "failure to attend constitutes a waiver of the procedural rights to which [one is] entitled under the applicable discipline rule."

This Board finds that the fact that the Claimant reportedly drove to Silver Creek, a point some 5 to 10 miles distant from Dunkirk, New York, in the Company vehicle earlier in the evening, is not germane. The accident took place in Dunkirk, New York, an area in which there is no doubt that he was authorized to use the Conrail truck. The fact that he was off duty at the time is also irrelevant. The crux of this case lies in the fact that the Claimant was driving a Carrier vehicle while under the influence of alcohol (DWI) and that this DWI was a significant factor in causing the collision with the tractor trailer, which in turn caused extensive damage to the Conrail truck.

The Organization's claim in the appeals procedure on the property that the Carrier should have awaited the decision of the civil proceeding before imposing discipline and that the Board should not consider any evidence other than that developed during the Carrier's independent Investigation, trial or Hearing, is invalid. PLB No. 2546 has established that the Carrier need not delay its decision on discipline to conform to the calendar of civil criminal proceedings. The fact that the Carrier rendered its decision to discharge this employee without waiting for the conclusion of civil proceedings does not render its discipline decision arbitrary.

This Board finds that the preponderance of evidence adduced by the Carrier in this instant claim is sufficient to warrant the discipline imposed by the Carrier.

A W A R D

Claim denied.

Form 1
Page 5

Award No. 12452
Docket No. 12475
92-2-91-2-284

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1992.