

Award No. 3930
Docket No. 3679
2-RF&P-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD
COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Car Inspector T. N. Johnson was unjustly dealt with when he was unjustly suspended on August 28, 1959, and unjustly dismissed from the service of the Richmond, Fredericksburg and Potomac Railway Company, effective September 5, 1959.

2. That accordingly the Carrier be ordered to restore Mr. Johnson to service with the Company, with seniority unimpaired and compensated for all time lost beginning August 29, 1959, until he is restored to the service, and further that the Carrier be ordered to compensate him for vacation earned in 1958, and any vacation he may have earned in 1959, and was unable to take account such action of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: Car Inspector T. N. Johnson, regularly assigned to Potomac Yards, RF&P Railroad, Alexandria, Virginia, with hours of assignment from 3:00 P. M. to 11:00 P. M. On August 28, 1959, Car Inspector Johnson reported and worked his regular assignment in transportation yard and was compensated for 8 hours on that date. Mr. Johnson performed his regularly assigned duties on the trains in transportation yard and arrived at his place of reporting at approximately 10:40 P. M., and while he was making out his report, which was in connection with his duties, Special Officer Fleming took exception to an odor on Mr. Johnson's breath by leaving Johnson blow his breath in his face. (Mr. Fleming's face). Car Inspector Johnson continued his duties and made out his report which was made out correctly and no complaints were made about the report being made out correctly, nor was any complaint made about the claimant's performance of his duties as car inspector by anyone in charge of the shift.

was reasonably related to the seriousness of the proven offense and the claimant's past record was considered only for the purpose of determining the discipline to be imposed.

Under the circumstances, the Second Division should deny this claim.

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 employe 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 Position of Employes is that the Carrier's action "amounted to an abuse of discretion, as there is no evidence to prove beyond a reasonable doubt" that claimant was in an unfit condition for work.

There is no requirement of proof beyond reasonable doubt, as in criminal prosecutions. It is well settled that this Board is not in a position to resolve conflicts in evidence, and that the Carrier's action, if supported by substantial evidence, will not ordinarily be disturbed even if there is a conflict of evidence. Awards 1809, 1817, 3151, and many others. In this instance the supporting evidence was ample and there was no substantial conflict.

Special Officer Fleming saw Claimant get out of his automobile about 10:30 and walk to the shanty; he talked to him about five minutes later, decided that he was not fit for duty, and called Assistant Special Agent Ball, Master Mechanic Kidwell and General Car Foreman to see him. Their statements show that his breath was strong with alcohol, that he was unsteady on his feet and that in their opinion he was not fit for duty; that Claimant denied having anything to drink but a bottle of beer at 2:00 o'clock, before coming on duty, but refused to take any test on the ground that he had been drinking heavily during a sixty days suspension from which he had returned six days before; that the Lead inspector was called and stated that the odor of alcohol was strong and that Claimant was unsteady on his feet.

At the hearing the Lead Inspector denied making these statements and said that he didn't know whether the odor was alcohol, beer, whiskey or something else; he refused to state whether in his opinion Claimant was fit for service or not; that he "couldn't say definitely" because he was there only a few seconds.

The only conflicting evidence was Claimant's denial and his statement that his last drink was a bottle of beer eight and one-half hours before. He confirmed his refusal to take a test and the reasons stated for his refusal. Another witness testified that Claimant was all right up to 10:20, but that he know nothing of his condition or conduct thereafter.

The Carrier's action is fully supported by the record and is not based on the special officer's prejudice or on breath odor. In fact, the record leaves no room for a reasonable doubt.

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AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Harry J. Sassaman
Executive Secretary**

Dated at Chicago, Illinois, this 31st day of January 1962.