

Award No. 5298
Docket No. 4990
2-S&NW-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold W. Weston when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 12, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)**

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Chicago and North Western Ry. Co. unjustly treated Machinist L. Lutz, Chicago, Illinois, Bldg. M-19-A, when said Railroad removed him from service on April 2, 1965, and discharged him on April 7, 1965.

2. That accordingly the Chicago and North Western Ry. Co. be ordered to reinstate this employe with seniority rights unimpaired and compensate him at Machinist's pro rata rate for all time lost plus six percent (6%) interest for all wages deprived of. Also, fringe benefits (vacations, holiday, premiums for hospital, surgical, medical and group life insurance) deprived of since April 2, 1965 until restored to service.

EMPLOYEES' STATEMENT OF FACTS: Mr. L. Lutz hereinafter referred to as Claimant, was employed as a Machinist by the Chicago and North Western Railway Company, hereinafter referred to as the Carrier, on March 17, 1947 at Chicago, Illinois. On April 2, 1965, the claimant was notified to appear on April 6, 1965, for investigation on the charge that he reported for duty under the influence of liquor. A copy of the notice is attached and identified as Exhibit A.

The investigation was held as scheduled. A copy of the investigation record is attached and identified as Exhibit B.

In a letter dated April 7, 1965, the claimant was notified that he was disciplined by dismissal from service. A copy of the discipline notice is attached and identified as Exhibit C.

During the investigation the claimant presented a statement from his Doctor stating that he (the Claimant) was under medication on April 2, 1965.

When the Carrier reproduced the investigation record, the statement was

Attention of this Board is called to the fact, as set forth at page 3 of the transcript, that on the date immediately prior to April 2, 1965, or April 1, 1965, Mr. Lutz had also appeared for work under the influence of liquor, and on that date he had been permitted to go home at his own request. It is therefore apparent that April 2, 1965 was not an isolated instance insofar as he is concerned.

The carrier therefore submits that claimant's responsibility for the incident for which investigation was completely and conclusively established at the investigation. The carrier further submits that reporting for duty in an intoxicated condition is clearly justifiable ground for dismissal. The carrier therefore submits that the claim in this case should be denied in its entirety.

The Statement of Claim, in addition to reinstatement with pay for time lost, also requests payment of "* * * six percent (6%) interest for all wages deprived of. Also, fringe benefits (vacations, holiday, premiums for hospital, surgical, medical and group life insurance) * * *."

It will be noted that Rule 35 of the Federated Crafts' Agreement provides:

"35. No employee will be discharged for any cause without first an investigation.

In extreme cases, suspension pending a hearing, which shall be prompt, shall not be deemed a violation of this rule.

If it is found that charges are not sustained, such employee shall be returned to service and paid for all regular time lost."

Under this rule the claimant would be entitled only to time lost less earnings in outside employment (see Second Division Award No. 1638 involving the same rule and the same parties), if he were entitled to reinstatement, which he is not. It will be noted that the rule makes no provisions for payment of six percent interest or the fringe benefits referred to in the Statement of Claim. In this respect, the claim in this case constitutes in part a request for a new rule, which is beyond the jurisdiction of this Board. The Board's authority is limited to interpretation of existing rules, and does not extend to promulgating new rules under the guise of interpretation of existing rules. See Second Division Awards Nos. 3883 and 4793.

All information contained herein previously has been submitted to the employees during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute.

Oral hearing before the Second Division is waived, provided the employees also waive hearing, and with the understanding that the carrier will have the opportunity to file a written reply to the employees' submission, and if a referee is appointed, the carrier will be given a hearing before the Division setting with a referee. (Exhibits Not Reproduced)

FINDINGS: The Second 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 waived right of appearance at hearing thereon.

Claimant, a machinist with eighteen years service, was dismissed for reporting under the influence of liquor on April 2, 1965.

The record is free of material procedural defect. Claimant received proper notice of the charges against him, was duly represented at the hearing held in this matter and was afforded a fair opportunity to present his case.

Carrier's finding of fact are supported by competent credible evidence, consisting of testimony by General Foreman Donati and Wollard as well as Foreman Burney that Claimant was unstable and slurred of speech and appeared to be under the influence of liquor on the day in question. Wollard testified further that he could detect "an odor of some sort of alcohol smell" on Claimant's breath when three feet away from him.

Claimant refused to go to the Company doctor with the foremen on the day in question but subsequently submitted a report dated November 5, 1965, from his physician stating that he "had a head injury (concussion) which disabled him from March 15 to April 15, 1965. At that time he had dizzy spells which may have been caused by medication." He testified at the hearing that he was not under the influence of liquor on April 2, 1965, but was dizzy because of the medication he had taken.

We will not disturb Carrier's findings of fact since they are supported by credible, though controverted, evidence. As numerous awards point out, it is not this Board's function to weight conflicting evidence and determine credibility. Claimant's physician's statement is not impressive, particularly since it was not made until over half a year after the incident in question had occurred.

With respect to the degree of discipline administered in this case, we are of the opinion that the record is not adequate, in view of Claimant's eighteen years service and the absence of any substantial showing of an unsatisfactory prior record of service, to warrant such extreme discipline as dismissal. The only reference to Claimant's prior record is general testimony by Donati that Claimant came to work "in the same condition" on the day prior to that now in question. On that occasion, he was allowed to go home at his own request without, so far as the evidence shows, even a warning or reprimand. There is no indication that Claimant was disciplined or engaged in any other misconduct during his eighteen years in Carrier's employ.

In the light of the foregoing discussion, we will direct Carrier to offer Claimant immediately reinstatement to the position he occupied at the time of his discharge, with seniority and vacation rights unimpaired but without backpay. In directing reinstatement, we have considered Carrier's allegation that two of Claimant's fellow-workers threatened to go home if he was assigned to work with the man April 2, 1965; the point is unimpressive, par-

ticularly since it is based only on a foreman's hearsay testimony and is not supported by direct evidence.

AWARD

Claim sustained to the extend indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October, 1967.