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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6373
Docket No. 6220
2-P&LE-EW-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 1, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers) (The Pittsburgh and Lake Erie Railroad Company

Dispute: Claim of Employes:

1. That Hoist Operator J. W. Newhouse, the Claimant, was unjustly dealt with when he was dismissed from service of the Pittsburgh & Lake Erie Railroad Company on August 19, 1970, without just cause.

2. That accordingly Claimant Newhouse should be restored to service and compensated for all time lost and all benefits unimpaired.

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 waived right of appearance at hearing thereon.

Claimant's regular assignment was from 12:00 midnight to 8:00 A.M. He then continued to work until 4:00 P.M. in place of a vacationing employe. The next day claimant reported for his regular assignment at 12:00 midnight but then reported to the assistant supervisor at 12:20 A.M. that he could not perform his job as a crane operator and had shut off the crane. The assistant supervisor called the supervisor. Both supervisors testified at the hearing that claimant's speech was incoherent, his walk unsteady and that alcohol could be smelled on his breath. Claimant testified at the hearing that he had a few beers earlier in the evening and had little rest before reporting to work because of a fight with his wife.

The Organization objected to the hearing on the grounds that the notice was not by letter to the committee as in previous cases, and did not provide sufficient time to prepare.

We note that the notice given to the claimant did not include the committee as required by Rule 36 of the Agreement. The intention to involve the committee is spelled out by the "NOTE" to Rule 36 which provides that the committee is required to be present even when an employe chooses to appear in his own behalf. However, the representative of the Organization did appear at the hearing and took an active part in questioning witnesses. No request was made to adjourn the hearing to provide more time to prepare. On page 5 of the hearing, Employes' Submission Exhibit B, the Organization representative stated in making his objection that the hearing was not in complete order, "But I just want to remind you that our agreement is different than the Transportation Agreement." The written notice to the claimant was specific as to the charges and the Organization was apparently satisfied to proceed with the hearing and to complete it; noting only that it was not in "complete order", as a reminder.

The Organization objected to the decision on the merits and also to the penalty imposed. It was argued that no medical evidence of the claimant's condition was submitted at the hearing; that claimant was exhausted from sixteen hours work the day before with lack of adequate rest before again reporting to work.

It is fundamental that an employe must report for work in condition to perform the duties assigned to him. If claimant was not fit for work, he could have notified his foreman under Rule 22 of the Agreement. The fact that he gave up after twenty minutes indicates that he was not fit when he reported. In addition, his defense at the hearing was that he was exhausted and sick. If this were true, he had "good and sufficient cause" for not appearing for work. At the hearing, his supervisors testified that claimant made no reference to either exhaustion or sickness when he shut down the crane although it is conceded that he did say that he didn't have any rest.

Prior Second Division Awards have held that laymans' observation of an employe's conduct, appearance, smell of his breath and manner of walking are sufficient to determine that he is under the influence of alcohol. Prior Second Division Awards have established that the Board will exercise corrective measures only if the carrier's decision is arbitrary and unreasonable, capricious, fraught with bad faith, all amounting to an abuse of discretion. Also, a prior Second Division Award has held that where evidence is conflicting, "it is not the province of this Board to determine the weight of the evidence", in the absence of bad faith.

An employe's past service record is usually not material to proof of a specific charge. It is relevant to the degree of discipline to be imposed. Prior Second Division Awards have made this clear. Reference to claimant's shortcomings was made by the Carrier in its letter, Employes' Submission Exhibit D. Examination of the attached service record shows thirty nine latenesses in six months. It is interesting to note that two months before his dismissal, claimant had, "passed out at the controls", after three hours work and was sent home.

We conclude that the Organization waived its objection to the notice and time for holding the hearing that there is no evidence of bad faith of the carrier or of malice demonstrated by the record of the hearing; that there was testimony at the hearing sufficient to support the decision reached; that the penalty imposed is not arbitrary or capricious in the light of claimant's service record.

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In reaching the conclusion, we have reviewed Second Division Awards 2207, 5704, 4533, 4457, 1251, 1323, 5885 and 5925.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1972.