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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6494
Docket No. 6310
2-BN-MA-'73

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. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Machinists)

Burlington Northern, Inc.

Dispute: Claim of Employes:

1. That under the controlling agreement Machinist H. G. Eichman was unjustly withheld from service on April 5, 1971, also subsequently unjustly discharged from service on May 3, 1971, at Hastings, Nebraska.

2. That accordingly the Burlington Northern, Inc. be ordered to compensate Machinist H. G. Eichman for all time lost from April 5, 1971, until he is restored to service, including a four hour call for April 5, 1971. This to include premiums for Hospitalization and Life Insurance. An additional amount is claimed for 6% interest per annum commencing on the date of this claim. Also that all rights such as seniority, vacation, sick leave, merger protected status, etc., be restored unimpaired.

3. That the Carrier be ordered to clear this charge from his personal record.

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 was in the employ of the Carrier for twenty years prior to April 4, with a clean record. He was assigned to work as a machinist from 12:00 midnight to 8:30 AM, April 4-5, at Hastings, Nebraska. He failed to protect his assignment at midnight. A phone call made to his home awakened him and he reported at approximately 1:50 AM. A passenger train was delayed as a result.

The foreman who made the phone call suspected from claimants incoherence and manner on the telephone that he had been drinking. Consequently, the foreman had the freight agent with him to observe the claimant when he reported for work.

Both the foreman and the agent concluded that claimant was under the influence of intoxicants when he reported and sent him home. That evening, April 5, claimant was handed an undated notice that he was withheld from service pending a hearing to be held at Lincoln, Nebraska on April 12, for alleged violation of Rule G, and to, "Arrange for representative and for witness if desired." Claimant acknowledged receipt of the notice on the copy of the letter. The investigation was held on April 12; claimant was notified of his dismissal by letter dated May 3.

The objections made by the Organization and the disposition of each is as follows:

1. It was improper to withhold claimant from service prior to the hearing. Rule 35(b) of the Agreement permits Carrier to withhold an employe from service in cases involving serious infractions of Rules. It is serious in the railroad industry for an employe to fail to cover his assignment, especially when it results in a delay in train service and disruption of schedule. Violation of Rule G is a serious offense, if proven, First Division Award No. 15508. We must apply the contract as we find it. A serious infraction of a rule was alleged so that the carrier had the right to suspend claimant pending the hearing and action thereon. If the carrier could not prove its case, the claimant would be made whole.

2. The Organization objected to the fact that the notice was not dated. The date of receipt was acknowledged and the hearing was timely held according to Rule 35(c). There is no merit to this objection.

3. The hearing was to be held at Lincoln, 100 miles away from claimant's work station at Hastings. There is nothing in Rule 35, which supports the Organizationn's claim that the hearing must be held at the work station. Again, we must take the Agreement as we find it. Rule 35(i) provides for postponement of the date of a hearing upon mutual agreement of the parties. Although a protest was made to a higher officer of the Carrier that the distance from home station precluded the presence of witnesses, the record does not disclose that a proper request was made to postpone to a date when witnesses could be available. The objection was also made at the start of the hearing.

The claimant's representative argued at the hearing that it was a hardship for claimant to drive a round trip distance of 200 miles to attend the hearing. The Agreement does not provide for the payment of expenses to attend the hearing. The possibility exists that on a date when the witnesses could attend, all could have driven in one car thereby reducing the expense. In any event, the written statements of the witnesses' testimony were received in evidence by the hearing officer although there was no opportunity for him to question the persons who wrote the statements on behalf of the claimant.

It is possible that a Carrier may schedule a hearing under circumstances which would prevent the possibility of a fair hearing. In this case, the claimant and his representative attended the hearing, were ready to proceed and, with the inclusion of the written statements of the testimony of the claimant's witnesses in the record, the distance did not prejudice his case. In the case of J. W. Edwards vs St. Louis-San Francisco R. R., 53 L.C. 11,232 (7th Cir.), it was held that:

"---the applicable procedure for settling the dispute is governed by the contract---." The Decision offered by the Organization's representative at the discussion at the Board wherein a hearing scheduledat claimant's place of residence was afterward moved 200 miles away when it was rescheduled, is not in point, Second Division Award No. 4255.

4. The Organization's objection that a fair hearing was not afforded to claimant because the examining officer gave the notice holding claimant out of service, held the hearing and made the decision is without merit. This has been decided many times. The Agreement does not say otherwise. The record of the hearing demonstrates that it was conducted in a fair and impartial manner.

5. Objections addressed to the merits are without support in the record. The arguments made and Awards submitted by the Labor Member do not justify claimant's action in this case.

Second Division Award 6373 and Awards before that have held that a layman's observation of an employe's condition due to intoxication is entitled to credit and to be given weight in considering the evidence. An employe's conduct, appearance, speech, smell of breath and manner of walking are all signs which can be observed by a layman in arriving at an opinion as to the use of alcoholic beverages.

It is imperative that an employe report for work in proper condition to work. It is not necessary to specify this fundamental requirement which is found in safety Rule 702, when the violation of Rule G is charged. Rule G, prohibits use of alcoholic beverages by employes subject to duty. Claimant admitted that he drank alcoholic beverages up to several hours before he was to report for work. He slept beyond the time he was to report and until he was awakened by the foreman's telephone call. If he did not appear to be fit for work almost two hours after his reporting time, what condition would he have been it at midnight when he was scheduled to report. We agree that Rule G, is not intended to cover every minute of an employe's time while off duty. In this case there was a direct relation between the time of his drinking while off duty and his ability to report on time to cover his assignment, fit and ready for the responsible work of a machinist in railroading.

The Courts have imposed a duty upon Carriers to enforce safety. A case in point is Caulfield vs Y. & M. W. Rwy. Co., 127 So. 585, in which the court stated that the railroad business demands strict obedience of company rules by employes.

It should not be necessary to list all the Awards of this Board which have made it clear that we will not disturb the conclusion reached by the examining officer if there is substantial evidence to support the result. There is substantial evidence in this case to reasonably reach the decision made. There is no arbitrary or capricious action indicated.

On the subject of penalty, however, there is room to question the dismissal of an employe who has completed twenty years of service without a mark against him. We have noted the Board's record of upholding dismissals in the majority of Rule G, violations as pointed out in the Carrier's submission. There are no mitigating circumstances in favor of claimant. He missed the boat on this occasion. But that should not, once in twenty years, lead us to believe that he is or will become a chronic offender. We believe that a drastic penalty is required but not the ultimate penalty in this case. We find that he should be reinstated with no back pay and with no loss of seniority but that the Carrier shall not be obligated otherwise as demanded in item No. 2 of the claim.

A W A R D

Items No. 1, 2 and 3 of the claim denied except that claimant be reinstated with seniority rights unimpaired.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of May, 1973.