

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. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employee:

1. That Carman R. B. Trevino, San Antonio, Texas, was unjustly dealt with by the Missouri Pacific Railroad Company when he was withheld from service starting May 16, 1972, and following investigation dismissed from service effective June 2, 1972.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Trevino as follows:
 - a. Eight hours (8') per day at straight time rate, five (5) days per week, beginning May 16, 1972, until returned to service on April 3, 1973;
 - b. Retain his seniority rights unimpaired;
 - c. Made whole for all vacation rights;
 - d. Made whole for all health and welfare and insurance benefits;
 - e. Made whole for pension benefits including Railroad Retirement and Unemployment Insurance.

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 with six years of service, the last two as a journeyman carman, was working the third trick 11:00 P.M. to 7:00 A.M. on May 15, 1972 when he was suspended from service at 1:30 A.M. pending investigation for violation of Rule G. Rule 32 (a) provides for such action, "in a proper case". Rule 32 (d) provides that if the charge is not sustained, the employee's record, "shall be cleared of the discipline; if suspended or dismissed, the employee shall be reinstated to his former position,---. and shall be compensated for the wage loss, if any suffered." Rule G states: "The use of intoxicants or narcotics is prohibited. Possession of intoxicants or narcotics while on duty is prohibited." The notice for hearing stated as to the charge against claimant: "--- for formal investigation to determine the facts and place responsibility if any, in connection with your being on duty and in violation of General Rule G about 11:50 P.M. May 15, 1972." After hearing, claimant was dismissed from service, "account you being on duty in violation of General Rule G---about 11:50 P.M., May 15, 1972 ---." On March 12, 1973, the Carrier offered to restore claimant to service without back pay on a leniency basis. This was declined because claimant insisted that he was innocent of the charge. By letter dated March 30, 1973, the claimant was notified as follows: "Believing that you have been sufficiently disciplined,---you are hereby reinstated--- as a Carman with seniority rights unimpaired." Claimant resumed service on April 3, 1973, reserving his right to appeal to this Board.

The arguments of the parties in their Submissions indicate that the charge was prompted by what the Carrier's supervisors considered to be unusual conduct of the claimant on the night in question. They seem to agree that claimant had been performing his duties, and that he denied use of intoxicants prior to reporting for work or on the job, when he was questioned on that night. Carrier's Exhibit "N", letter dated October 16, 1972 from the Director of Labor Relations, in denying the claim on the property stated in part: "The transcript of investigation contains substantial evidence to support the charge preferred against Trevino that his conduct while on duty was not normal which was attributed to the use of intoxicants." (Underlining added). This is not a charge of use or possession of intoxicants. Therefore, we have scrutinized the transcript of the testimony of the witnesses to determine whether or not there was substantial evidence of claimant's conduct sufficient to conclude that he had used intoxicants prior to reporting for or while on duty. In doing so, we have been mindful of the policy that this Board will not substitute its judgment for that of the Hearing Officer with regard to the credibility of witnesses.

At the start of the Hearing claimant testified that he received proper notice, understood the purpose of the investigation and was ready to proceed. Adjournments had been granted so that claimant could be properly represented and produce witnesses. At the conclusion of the Hearing claimant testified that he had been afforded the opportunity to make a full statement and to produce any evidence he desired. We find that the Hearing was conducted fairly and impartially.

The first Carrier witness was the Relief Car Foreman who testified in substance as follows: Trevino (claimant) telephoned a little after his trick started to enquire concerning the absence of the fourth man in the work crew. He was informed that the General Car Foreman had blanked one man. The witness thought Trevino, "seemed disturbed because he could not understand why we blanked the job." Ten minutes later Trevino called again and after discussion was informed that with his seniority he would be lead man. He accepted the assignment but still seemed reluctant to accept the blanking of the fourth man. In the same phone conversation, the witness also talked to the Yardmaster about blanking the fourth position. A third telephone call came from Trevino to complain that the men would not recognize him as lead man. Although requested twice to call the men to the phone, Trevino said, "no, you come up here." Trevino was then instructed to go on to work and that the witness would go to him. At that time the General Car Foreman returned a call that the witness had previously made on a different matter and in the conversation the witness referred to the calls from Trevino, stating that Trevino seemed reluctant to go to work and, "reluctant to accept what was going on." In response to questions from the General Car Foreman about Trevino's condition the witness said that Trevino was sweating, was glassy eyed; that an odor of alcohol was detected but that when asked, Trevino denied that he had been drinking. The witness was told to go to the yard and the General Car Foreman would come in.

At the yard, the witness talked with Trevino about the men not following his instructions to work track 6 and to put the air on. They both walked south the length of the train to talk with one of the men. There was discussion about track 5 also being added to the train going out which Trevino was not aware of. Trevino then instructed the man to apply a flag on the north end of track 6 while Trevino would verify with the Yardmaster that track 5 was also to be worked. The witness walked with Trevino to the Yardmaster's office. The work on track 5 was confirmed. Trevino acknowledged and when asked by the witness where he was going he replied, "I have to get my radio." It was now 11:40 P.M. When asked why he did not have his radio, he answered that it was in his locker but that he had left the key home. The witness opened the locker and gave Trevino his radio and Trevino proceeded to go to work on track 6. Trevino applied a blue flag to the south end of track 6. Trevino then used his radio to contact one of the men and some discussion followed which was ended when the General Car Foreman arrived. Both the witness and the General Foreman then located Trevino getting oil for his work. When asked by the General Car Foreman what the trouble was, Trevino said, "no trouble," and when asked whether he was satisfied with his job he said, "yes". The General Car Foreman then told the witness to go to the yard office with him and Trevino to discuss the matter. Trevino said he had to get the train out and would have to speak with his boss, the Yardmaster. Trevino spoke on the radio with the Yardmaster to ask if he was Trevino's boss but when told by the witness that he better do what the General Car Foreman told him, Trevino did so.

When questioned further by the Hearing Officer, the witness stated that Trevino had worked for him for two and one half years and that prior to this night there was no trouble with Trevino understanding and carrying out orders; that Trevino's speech was different this night; that he smelled the odor of alcohol the first time he spoke to him in the yard; that Trevino said he had not been drinking; and that Trevino's eyes were glossy and he was sweating.

On cross examination, the witness stated that Trevino was not in condition to perform his work that night. When questioned further, the witness stated that Trevino did perform his work after discussion, and that Trevino did perform the work he was assigned to do. When asked, the witness described Trevino's condition as, "-- appeared to me to be very nervous and reluctant to accept the instructions. He persisted in discussing the matter and he cast a feeling of mistrust against the other men. Specifically Larry Dunn." The witness also stated that his trick ended at 12:30 A.M.; that he first saw and spoke with Trevino at 11:40 P.M.; that after 12:30 A.M. the carmen would be under the control of a leadman, Trevino on this night, and the Yardmaster; that he did not know what kind of alcohol he smelled on Trevino and that he did not see him consume any intoxicating beverage on that night. The witness also stated that Trevino had an accent which could have been added to if he was a little irritated or excited. When questioned by another union representative the witness said that he had gone out to the yard after Trevino's second phone call before he spoke on the phone with the General Car Foreman, and that Larry Dunn requested to lay off at that time.

The General Car Foreman was the next witness. He stated, in substance, that: He spoke with the Relief Car Foreman on the phone at 11:15 P.M. and came to the yard because the Relief Foreman said that; "there seemed to be some point of disorganization", and felt that it would be necessary for him to come to the yard. He observed Trevino return from an oil station and service journal boxes for approximately three car lengths. Track 5 was moved northward and Trevino walked to catch up with where he had stopped working boxes. Trevino approached where the witness was standing, they spoke briefly, Trevino about 4 to 5 feet of the witness. When Trevino went to fill his oil can again, the witness examined the boxes worked on by Trevino for about two car lengths and, "detected no excessive amount of oil applied." Trevino shouted to the witness, "to go ahead and inspect his boxes; that I would find nothing wrong with them." This was not Trevino's usual action. The witness detected the odor of alcohol on Trevino when they had spoken. When Trevino returned to his work, the witness told Trevino to go to the yard office. Trevino said he had to contact the Yardmaster to find out whether, "to continue his work or what to do." The witness considered this to be argumentative and told Trevino to go to the yard office immediately no matter what the Yardmaster told him. Trevino went to the yard office.

When the witness arrived at the yard office, Trevino was there with the Yardmaster. The Trainmaster was telephoned at his home to also come to the yard office. The witness considered it unusual when Trevino insisted on telephoning his union representative; when Trevino said in an emphatic way that he was going for a drink of water, the witness considered it to be unusual and obnoxious. The witness and the Trainmaster asked Trevino questions which he would not answer while waiting for his union representative to arrive. The Trainmaster decided to remove Trevino from service after the Relief and General Car Foreman said that they had detected the odor of alcohol on Mr. Trevino.

On cross examination, the witness stated that Trevino usually carried out instructions without conflict but that on this occasion he acted differently. Further, this witness said that he was called at 11:10 P.M. by the Relief Car Foreman. He returned the call at 11:15 P.M. and was told that Trevino had called the Relief Foreman twice, and that the Foreman had observed Trevino in the five minute interval between 11:10 P.M. and 11:15 P.M. This witness did not see Trevino consume any intoxicating beverage and Trevino denied drinking or taking medication in the past 7 days. This witness stated that he observed Trevino in the car yard and that he did not weave or sway when he walked but that he was sweaty and wide eyed, not his usual appearance.

The next witness was the Trainmaster who testified in substance that: Trevino would not answer questions while waiting for the arrival of his union representative and that the witness considered Trevino's manner to be sarcastic. The Relief and General Car Foreman had smelled alcohol on Trevino's breath when they were in the train yard. The witness did not smell alcohol on Trevino's breath because he had a cold. The witness did not observe Trevino at work but removed him from service for his safety and that of fellow employees after observing him in the office.

Trevino then testified in substance as follows: He made the call regarding the absence of a fourth man, was told the position was blanked and to do the best they could. Trevino reported this to the Yardmaster. He then told the two carmen that he was the lead man but they laughed at him. Trevino called back the Relief Foreman telling him what happened and that the carmen could not come to the phone because they had gone out to the yard. When the Relief Foreman came to the yard Trevino discussed the situation with him, they walked to the other carman, the Foreman asked Trevino if he had been drinking and he said, "no". Trevino then instructed the two carmen on their work, the placing of a blue flag and blue light at the north end of the train, checked with the Yardmaster the additional track to be worked and then started to work boxes. The General Foreman arrived at this time and started to check the boxes. Trevino told him they were in good shape and not to trouble himself but the Foreman replied that he would check them if he wanted to. The Foreman then asked what the trouble was to which Trevino

replied that the trouble had been taken care of and that he had a train to get out by 12:35 A.M., and that they were doing the best they could with one man short. The General Car Foreman told Trevino to go to the office and Trevino said he couldn't get the train out on time if he went and that he was responsible to the Yardmaster.

At the office, Trevino was calling his representative when the General Car Foreman threatened to get him for insubordination if he didn't come right in. Trevino asked if he could get a drink of water, the Trainmaster said no, but Trevino went for the drink anyway. Trevino wanted to wait until his representative arrived but was told he did not need him at that time. When asked to do so, Trevino gave his birth date correctly but said he was not intelligent enough to recite the whole alphabet correctly. When asked why he did not speak clear, Trevino said he was Mexican and stuttered when excited. He could not give his seniority date but said they had a record of it, at which time the Trainmaster said he was calling an investigation for insubordination. Trevino denied drinking alcohol and said that they might have smelled his shaving lotion.

The next witness was the Yardmaster called by Trevino, whose material testimony in substance was that: Trevino had carried out the assignment he gave him; that he talked with Trevino in his office and could not tell that Trevino was intoxicated and that he did not smell alcohol on Trevino that night.

The next witness called by Trevino was the PICL Clerk who testified that: He talked twice with Trevino on the nite in question, once at 4-5 feet shortly after 11:00 P.M.; the second time, "a matter of one foot or one and a half feet between 12 and 12:30 A.M." He stated that in his opinion, after observing him, Trevino was not under the influence of intoxicants; also that he did not smell alcohol on Trevino's breath, and that he did not see Trevino take any alcohol drink that night.

The next witness called by Trevino was the carman who was called in to relieve Trevino that night. He testified in substance that: He reported at 1:00 A.M., talked for 15 minutes with Trevino within 2 feet of him. He did not smell alcohol on Trevino. In the witness' opinion Trevino was not under the influence of intoxicants and he did not see Trevino take a drink of any kind. The witness stated further that Trevino gave him the line up of what was to be done, told the witness he was to take his place, loaned him his packing knife and flashlight. The witness stated that the only difference in Trevino that night was that he was nervous but, when asked specifically, replied that Trevino did not have a starey eyed look.

The next witness called by Trevino was the Union representative who arrived at the office at 12:30 A.M. on the night in question. In answer to specific questions, this witness stated that he was with Trevino for one hour and talked to him within one foot; Trevino's eyes were not starey-looked no different that any other time; did not see him consume any alcohol. He stated that Trevino could not have been drinking and he fail to notice it, and was absolutely sure that Trevino did not have the odor of alcohol on him that night.

The testimony has been considered and set forth in detail because we do not believe that the Carrier has set forth substantial evidence sufficient to sustain the burden of proof. The Carrier's Trainmaster could not smell alcohol on Trevino and the Carrier's Yardmaster did not smell alcohol on Trevino; nor did the Clerk, the relief carman or the union representatigw. No one saw Trevino drink an alcoholic beverage and he denied taking any alcoholic drinks before coming to work or on the job. There was no testimony that containers of an alcoholic beverage were seen. No one testified that Trevino walked in any manner suggestive of a man who had been drinking an alcoholic beverage. The Relief and General Car Foreman said they smelled alcohol on Trevino's breath between 11:00 to 11:30 P.M. in the yard but did not testify that they smelled it in the office within one half hour later. The General Car Foreman testified that he checked the work Trevino did and found it to be correctly done. There is conflicting evidence as to the starey eyed look of Trevino, and sweating in Texas in May would not be unusual.

The testimony does not provide the proof required for a violation of Rule G, nor is there present in the transcript the testimony that usually is stated by a layman to describe an individual who has violated Rule G, Second Division Awards 6373, 6394, 5925. There is no Testimony that Trevino had imbibed alcoholic beverage anywhere before reporting to work. His namesake in professional golf has many times been described as unusual or unorthodox in his behavior but never has his conduct been "attributed" to drinking alcoholic beverage in professional competition. There may have been conduct or an attitude that was different and annoying to the General Car Foreman and to the Trainmaster who were called from their homes at midnight but not sufficient to justify removal from service, investigation or dismissal for violation of Rule G.

In light of the Carrier's failure to submit substantial evidence of the violation as charged, the discipline was arbitrary and capricious.

The remedy sought in the claim, item 2b. was granted when claimant was restored to service. As to item 2c., d., and e., we shall follow prior Awards which have denied relief because it is not provided for in the Agreement. Rule 32 (d) specifically limits relief in the circumstances of this case to compensation for wage loss suffered: See Awards Second Division 3883, 4793, 4532, 4557, 4866, and Third Division 14497, 14802, 17597.