Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7958
SECOND DIVISION Docket No. 7806
2-ICG-CM-'79

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (System Federation No. 99, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Illinois Central Gulf Railroad

Dispute: Claim of Employes:

1. That under the current Agreement, Carman Fred Jones was unjustly dismissed from the service of the Illinois Central Gulf Railroad on April 29, 1977.

2. That accordingly the Illinois Central Gulf Railroad be ordered to reinstate Carman Fred Jones to service with seniority unimpaired, be paid for all time lost from April 9, 1977, until he is restored to service, and claiming all other benefits such as vacation rights, and all other benefits he would be entitled to as a condition of employment had he been permitted to work, and 6% annual interest for all monetary loss incurred.

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 charged with "possession of an intoxicant while on duty ... using an intoxicant while on duty ... and leaving the Company property while on duty without permission ..." at about 7:30 P.M. on April 9, 1977. Claimant's assigned hours were from 3:45 P.M. to 11:45 P.M.

Following an investigation, Claimant was dismissed on the basis of the first and third charges listed supra, the charge of "using an intoxicant while on duty" having been dropped.

As gleaned from a reading of the record, Car Foreman Kamedula and General Car Foreman Veldhuizen, during a routine inspection, approached Claimant at which time they detected an odor of alcohol on Claimant's breath. Mr. Veldhuizen testified that he just saw Claimant and another employee "working train in C Yard. They walked through a couple of cabooses and stopped and there was one bad order caboose". Mr. Veldhuizen also stated that "there was a slight staggering in his (Claimant's) walk"; and that "in my judgment (Claimant) was in an unsafe working condition".

A Special Agent was called to the scene and accompanied Claimant to his car. At the Special Agent's request, Claimant "willingly" opened the trunk of his car in which was found a plastic bucket with ice cubes, a two-thirds filled pint of Canadian whiskey and a half-filled can of RC Cola. Claimant, having been notified that he was being held out of service pending an investigation, was permitted to drive his car home.

At the hearing, Claimant acknowledged having had two shots of rum and coke at a bar at about 3:00 P.M. He denied any knowledge of the liquor, ice bucket and cola found in the trunk of the car. He stated that he had gotten the car from his brother at about 2:45 P.M. that day. He also denied drinking after reporting to work.

The Special Agent testified that it was about 8:35 P.M. when the car trunk was opened and he found the plastic bucket, uncovered, filled with ice cubes "type kept in C Yard caboose shanty", which were starting to melt. The outside temperature was about 60 degrees, he reported. Claimant, at the hearing, stated the outside temperature was 55 degrees.

Petitioner bases its appeal on the grounds that the precise charges were not proven; indeed, that the Carrier in its dismissal letter failed to mention the charge of "using an intoxicant while on duty".

Petitioner asserts that Carrier has submitted no proof that Claimant was intoxicated; that the company's witnesses were not competent to determine whether he was intoxicated or not; and that the company's witnesses disagreed as to his condition. Car Foreman Kamedula, when questioned at the investigation, stated that he was not sure whether Claimant staggered or not. The Special Agent, who interviewed the Claimant for about 17 minutes, testified that "As subject appeared to be in charge of his faculties, other than the smell of alcohol on his breath, and bloodshot eyes, he was allowed to drive his auto home". The Special Agent also testified that he observed no staggering or speech impairment at the time he questioned Claimant; nor did he consider Claimant was drunk ("not having full faculties") at the time. Petitioner holds that this conclusion of the Special Agent indicates that "Claimant was not incapacitated either mentally or physically".

The dismissal letter states that Claimant "left the Company property while on duty on April 9, 1977 at approximately 7:30 P.M. without permission". The record bearing on this charge is less than crystal-clear.

Claimant was questioned at the hearing as to the removal of his car "from the C Yard Caboose shanty to the North end of C Yard". The North end is the Company's parking lot. His reply was that he drove his car to the North end between 6:50 P.M. and 7:15 P.M. When questioned by the Special Agent on the day of the incident, he stated that he drove his car to the North end at about 6:45 P.M. The hearing officer's questions concerning the shifting of Claimant's car from one area of the Yard to another point in the Yard suggests that the movement of the car may have involved leaving the company property during the course of the move, but this was never made explicit, the company stating only: "Claimant ... openly and freely admitted that he did not have permission from a responsible company official to move his car".

The two foremen encountered Claimant at about 6:55 P.M., and he was in their charge until the Special Agent arrived on the scene at about 7:30 P.M. Claimant left the company property, after being interviewed by the Special Agent, at 8:25 P.M., having been notified by his supervisors that he was being taken out of service.

Petitioner also cites the fact that Claimant worked without mishap from 3:45 P.M. to 7:30 P.M. when he was released, as indicating that he was not intoxicated.

Finally, Petitioner asserts that no evidence has been presented that the liquor in the car trunk belonged to Claimant.

During the handling of this case on the property, Carrier's Labor Relations Manager maintained that the evidence supports the finding that "the Claimant was under the influence of an intoxicant while on duty on April 9, 1977", citing Claimant's testimony to both Foremen and to the Special Agent that he had drunk two shots of rum and coke shortly prior to coming to work. This charge was not included in the original listing of charges nor in the company's dismissal letter of April 29, 1977.

Although we recognize that expert testimony is not necessary to prove that an employee is under the influence of intoxicants or is intoxicated, we are confronted here with differences in judgment and assessment of Claimant's condition by the two foremen and by the Special Agent. Accordingly, we can not credit their statements as evidence of probative significance.

Although Claimant was known to stutter, he did not at the time. No reference was made by any of the Carrier's witnesses to such indicia of "being under the influence" as garbled speech or lack of body control. Evidence as to Claimant's manner of walking, i.e. whether he was staggering, was contradictory.

The testimony adduced at the hearing about the appearance of Claimant's eyes and his conduct may or may not be significant. Except in extreme cases it is not always a simple matter to determine whether an individual is under

the influence of alcohol. The fact that one can detect the odor of alcohol on a person's breath does not, in and of itself, furnish grounds for concluding that the person is under the influence nor does it necessarily denote any impairment of that person's physical and mental faculties.

The fact that Claimant had an odor of intoxicants on his breath alone, without any other observable or demonstrable manifestations of inability to perform his duties with the degree of efficiency and safety that could reasonably be expected by the Carrier, although violative of company rules, does not, in this instance, warrant the discipline of discharge. There is no evidence that Claimant had actually suffered loss of control of his physical and mental faculties to any appreciable degree. There is no real evidence of his status except for the odor on his breath and his eyes being bloodshot. Neither of these physical attributes were shown to have affected his ability to perform his work on the day in question. In fact, the General Car Foreman testified he saw Claimant and another employee working a train when they approached.

The company has the right to issue and enforce rules relating to the use of intoxicants, including drinking prior to reporting for work. Such right is unquestioned, especially given the nature of the work in this industry. But in this case, while the odor of alcohol on Claimant's breath may constitute sufficient cause for the Carrier to find that a rule has been violated, and some discipline could be properly imposed, we believe the circumstances involving this charge do not justify the penalty of dismissal.

In our judgment, the determining factor as to whether the discipline imposed was justified relates to the charge of "possession of an intoxicant while on duty".

With respect to the issue of "possession", Carrier cites Second Division Award 7234 (Roadley) which dealt with the issue of possession of intoxicants or narcotics, and referred to the Webster Dictionary definition of possession:

> "The act of having or taking into control; control or occupancy of property <u>without regard to ownership.</u>" (Emphasis added)

The Board, Award 7234, referred to prior First Division Award 22 294 which included the following statement:

> "The Board notes that 'having possession' includes having under one's control. This means in one's home, in one's automobile, or any other place where the claimant would have control over the articles inquestion."

Given the dictionary definition of possession in that it is "without regard to ownership", Carrier accordingly argues as irrelevant Claimant's statement he did not know that the bucket and whiskey were in the trunk of

his car and was responsible for the contents of the car; that the articles were found in his car; and that this alone constitutes possession of an intoxicant which is sufficient evidence to sustain the charge.

With respect to the charge of "possession", and Carrier's citation of Award 22 294, on which it relies, that case involved theft of Carrier property, which is not at issue here.

In the instant case, the Special Agent testified that Claimant "willingly" opened the trunk of his car when so requested by the Special Agent. No one saw Claimant take ice or put it in the trunk. The record, although showing some variations in times, would appear to indicate that Claimant drove his car from the caboose shanty where the ice was kept to the company's parking lot before he was approached by the two Foremen. Claimant denied knowledge of the contents of the trunk.

No evidence has been offered to establish that Claimant personally placed the bucket and its contents in the trunk of his car, nor has a showing been made that Claimant took ice from the shanty. At best, Carrier's case rests upon opinion and circumstantial evidence. Carrier's chief witnesses differed in their opinions as to Claimant's condition and the extent to which if at all, his drinking before he came to work affected his ability to do his work property and safely. No evidence was submitted to rebut Claimant's testimony that he had received his car from his brother about one hour before he reported for duty. We must conclude, therefore, that the burden of proof has not been met, even if we were to apply the term "possession" rigidly and strictly.

On the basis of the record considered as a whole, we find that Claimant's dismissal was an excessive penalty. True, Claimant reported for work shortly after having taken two drinks. But he had worked half his shift without any apparent problems. When first observed by the two Foremen, he was engaged in "working a train", and no adverse criticism was entered into the record as to the manner of his work performance when so observed. He freely admitted having had the two drinks prior to entering on duty and did not demur when asked by the Special Agent to open the trunk of his car. Finally, there is no evidence of prior discipline being meted out to the Claimant.

Under these circumstances, we hereby set aside his dismissal. But Claimant is not without fault regarding the incident under consideration. The Carrier has the right to expect its employees to report for work in a sober manner. Employees, correspondingly, have a responsibility to do so. Claimant's conduct in drinking within an hour or so prior to reporting for duty, in an industry in which safety is paramount, constitutes an action akin to misconduct, which calls for discipline. But as we have indicated, we do not believe, under the facts shown in the record, that the gravity of the offense warranted the ultimate penalty of dismissal. We must be guided by the quality of reasonableness in any consideration of modifying the penalty imposed by Carrier. In other words, was dismissal appropriate to

the offense? Here, reasonable and honest men may differ as to what constitutes an appropriate penalty. In the instant situation we find the penalty imposed to breach the boundaries of reasonableness.

In short, we find that disciplinary action was indicated in the case before us, but one short of dismissal. Accordingly, we conclude that a 60 day suspension would be in line with the nature of the infraction, and we so order. Such lesser penalty, in our judgement, is called for in terms of reform and deterrence and as an example of constructive use of management discipline.

Claimant is to be restored to service with seniority rights unimpaired, and compensated for all time lost subsequent to the 60-day suspension, less amounts received in other employment. Further, payment for time lost, if any, shall not be made unless Claimant accepts the offered reinstatement to work with Carrier.

Claimant is hereby put on notice that any similar occurrence will constitute just cause for immediate dismissal.

A W A R D

Claim sustained to the extent indicated in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.

DISSENT
TO
AWARD 7958, DOCKET NO. 7806
(Referee Weiss)

The Majority in this case failed to limit itself to the two central issues to be addressed in discipline cases under the Railway Labor Act. There was no question that the hearing was conducted in a fair manner, and rather than limiting the remainder of its review to the question of whether there was substantial evidence to support the Carrier's decision, the Majority exceeded its authority by weighing the evidence, resolving evidentary conflicts and credibility issues. Not only is the award misguided on points of law, but the treatment of the evidence is equally erroneous. Perhaps the most glaring defect of all is that the Majority concludes by imposing discipline for something with which the employee was not charged. The Majority acknowledges from the outset that the charge relating to the use of an intoxicant while on duty was dropped when the discipline was assessed, yet it goes on to dedicate a significant portion of the award to an analysis of the evidence as related to intoxication and the weakness of such evidence. However, the Majority decided the claimant was in violation of Rule G insomuch as claimant had admitted to having had two drinks before coming to work. It then stated the Carrier has a right to expect him to report in a sober condition, and that the claimant should have some discipline for having drunk before coming on duty but that somehow his degree of intoxication did not warrant discharge. This was all done with total

disregard to the fact that the reasons for discharge had nothing to do with intoxication while on duty or at the time of reporting for duty.

1. The Majority clearly exceeded its authority when it failed to limit its review to a question of substantial evidence and proceeded instead to weigh the evidence, assess witness credibility and resolve conflicts in testimony. The proper function of the Board in discipline cases has been correctly stated in hundreds of awards and has been repeated by this referee in at least two awards.

In Second Division Award 7473:

> "The scope of our Board's review in a discipline case is well defined. As an appellate Board, we may not substitute our judgment for that of the Carrier or decide the case as we might have done were we to consider it de novo. We can only decide, from the record, whether there is substantial evidence to support the charge. If the record contains such substantial evidence, then the assessment of discipline rests in the Carrier's discretion and we are not authorized to disturb the penalty imposed unless it can be clearly shown that the Carrier's actions were unjust, unreasonable or arbitrary. These sound principles have been upheld by all Divisions of this Board, in awards too numerous to cite."

and in Second Division Award 7812:

> "We are thus confronted with a conflict of testimony. Numerous awards of this Board have ruled that it is not the Board's function to review a Carrier's determination of the credibility of witnesses or to resolve conflicts in evidence unless it can be demonstrated that the evidence is insufficient or that the Carrier acted in a capricious manner. The transcript in this case contains substantial evidence in support of the charges against the Claimant. No arbitrary action on the part of Carrier is here shown."

The Majority clearly assesses credibility in the claimant's favor. When discussing the excessiveness of the discipline the Majority openly attached special significance to the claimant's candidness. It was stated in the Award:

> "He freely admitted having had the two drinks prior to entering on duty and did not demur when asked by the Special Agent to open the trunk of his car. Finally, there is no evidence of prior discipline being meted out to the Claimant."

It is more reasonable to conclude that this "willingness" was not candidness at all but a self-serving ploy.

Earlier on Page 3 the Majority simultaneously resolves a conflict in testimony and makes a credibility judgment:

> "Although we recognize that expert testimony is not necessary to prove that an employee is under the influence of intoxicants or is intoxicated, we are confronted here with differences in judgment and assessment of Claimant's condition by the two foremen and by the Special Agent. Accordingly, we can not credit their statement as evidence of probative significance."

It is clear from the balance of the award that the Majority did not care to consider the question of substantial evidence, but simply weighed the evidence in an erroneous and biased manner. The fact was there was substantial evidence to support the Carrier's conclusion, particularly that the claimant was in possession of an intoxicant while on duty. It is unrefuted in the record and perfectly clear that at 8:35 P.M., over five and one-half hours after reporting for duty, an uncovered bucket of ice, 2/3 of a pint of Seagrams V.O. Canadian Whiskey and 1/2 of a can of R. C. Cola was found in the trunk of claimant's car. It was further established that the ice cubes were similar in shape to those made in the ice machine in the caboose shanty near where the claimant had parked his car. Further, it was established it was 60 degrees at the time. The claimant's defense was that he had no knowledge of the trunk's contents, having picked up the car from his brother at 2:45 P.M.

the same day. The Hearing Officer did not find this credible in the face of the incontrovertable physical evidence, believing instead the scientific fact if the ice were in the trunk when he picked it up almost six hours prior, on a 60 degree day it would have melted completely or at least to a much greater degree than observed. The Special Agent testified that the ice had only started to melt. The Hearing Officer weighed the evidence and assessed positive credibility to the Agent's testimony. The Agent testified:

> "Q. Mr. Moylan you observed the ice bucket and cubes in the trunk of Mr. Jones' car. What was the condition of the ice cubes."
>
> "A. The ice cubes were in a red pale [sic] approximately 8"wide and 8" deep. They were starting to melt. I would say it would only take a matter of a few hours to melt at about 60 degrees outside. It would be much warmer in the trunk. The ice cubes were in a bucket with no top on it, no protective covering such as styrofoam that would keep it from melting.
>
> "Q. What time of day was it when you observed this?
>
> "A. It was at 2035 hours 4/9/77 that would be 8:35 P.M."

This testimony is substantial evidence in any sense of the phrase. Under the Rules of this Board the Majority exceeded its authority when it failed to accept it and assessed credibility to the claimant's statement that he had no knowledge of its existence as supported by his candidness. Even if we accept the Majority's proposition that the evidence was circumstantial, it must be recognized that nonetheless it is substantial and probative. As stated in Third Division Award 21419:

"We believe the better view is expressed in Award 12491 (Ives) where this Division said:

> "'The mere fact that the evidence is circumstantial makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial.'
>
> "The main difference between circumstantial evidence and direct evidence is that the former requires inferences to be drawn from the facts disclosed. The probative value of such proof depends upon the compelling nature of the inference required. In his journal of November 11, 1850, Henry Thoreau talked of watering milk and said:'Some circumstantial evidence is very strong, as when you find a trout in the milk.'"

In addition the Majority ignores valid statements in Second Division Award 7234 and First Division Award 22294 that hold ownership is irrelevant to possession, that control is the determining factor.

Award 7234 held that:

> "The Board notes that 'having possession' includes having under one's control. This means in one's home, in one's automobile, or any other place where the claimant would have control over the articles in question." (Emphasis added).

Under this award and others like it, if properly applied to this case it should have been found that the claimant was in possession of an intoxicant, even assuming the alcohol was owned by his brother, insomuch as it was in the claimant's car and the car was in his control. But mystically the Majority states:

> "We must conclude, therefore, that the burden of proof has not been met, even if we were to apply the term 'possession' rigidly and strictly."

Admittedly, there may be cases under a definition of possession such as found in Award 7234 where possession would be merely technical.

However, as pointed out to the Majority in oral argument, this is not a case of an employee who bought a bottle of cooking sherry for his wife's use at home the next day while on his way to work and innocently left it in his car. It is clear that not only was the claimant (1) in control of the auto, (2) aware of the presence of the liquor in the trunk, but that (3) he had gone to great efforts to make the whiskey readily available and suitable for use. The claimant's trunk was a veritable portable bar complete with fresh ice, good whiskey and mixer.

The facts in this case clearly established actual possession and at very least constructive possession. Constructive possession may exist without personal dominion over alcohol, drugs, weapons or other contraband but where there is the intent and ability to retain control or dominion. See the Supreme Court's recent decision in County Court of Ulster New York v. Samuel Allen, decided June 4, 1979, where constructive possession was found to be evidence beyond a reasonable doubt of possession of firearms. This Board has also found constructive possession sufficient evidence in Rule G cases. It was stated in First Division Award 22 585:

> "The Board must conclude that the presence or existence of ice cold beer in an engine cab that had been on duty for three hours, leads inexorably to the conclusion that the beer was in the constructive possession of all members of the crew who were in the cab of the engine for an appreciable length of time, absent some affirmative and positive evidence that these crew members, singly or collectively could not or were not aware of the presence or existence of said beer. In view of the fact that a crew member was seen throwing a can of beer out of the window, the Division finds no positive evidence to exculpate the crew members, including the Claimant, from being actually, if not constructively, in possession of the

"bag of beer found in the engine cab. The handling by the crew of only one car in approximately three hours; the throwing of a can of beer from the cab of the engine after the General Yardmaster arrived on the scene, all militate against concluding that the Claimant was unaware of the presence of the contraband liquor, unless one is prepared to find that the Claimant kept his eyes tightly shut during the three hours he was on duty and under pay." (Emphasis added).

When confronted with similar factual situation in recent Award 7912 the Board came to a correct conclusion. It was stated:

"The testimony at the investigation revealed that cold beer was found in Claimant's car, parked on Carrier's premises, some 4.1/2 hours after the start of his shift. This finding was correlated (on a rather tenuous basis) with the discovery of the same type of beer in a paper bag in another employe's possession after he came from the vicinity of the parked car belonging to Claimant. These facts were evaluated in the context of Carrier's discovery of evidence indicating significant current consumption of beer and other alcoholic beverages on its premises during working hours.

"Claimant's explanation for the beer found in his car took the form of three conflicting stories. His Mexican origin and language difficulties do not explain the obvious and major discrepancies. As we have held consistently over a long period of time, credibility findings are within the prerogatives of the Carrier hearing officer and not this Board's. Based on the credibility findings, at minimum, Claimant was in possession of alcoholic beverages on Carrier property on the night in question. Thus, the evidence supports Carrier's conclusion as to Claimant's guilt. Further, we find no basis for questioning Carrier's decision as to the penalty imposed."(Emphasis added).

2. From the outset, the Majority acknowledged that the Carrier dropped the charge relating to the use of an intoxication while on duty upon the assessment of discipline. At the point it was dropped, the issue whether claimant was intoxicated was no longer relevant as a charge, and it did not need to be treated. However, for some unapparent reason the Majority dedicated eleven full paragraphs to the issue of intoxication. The drift of this discussion was to the effect that the evidence of

intoxication while on duty was not strong. To include extensive discussion on an irrelevant issue is perplexing. We can only speculate as to the reason. Perhaps the Majority was setting up straw men, shooting them down, to help disguise the felling of the Carrier's case on other counts which could not stand alone.

3. Not only has the Majority assumed the function of the trier of facts, but it is clear it has also taken upon itself the function of preferring charges too. In the penultimate paragraph the Majority makes the following statements:

> "But Claimant is not without fault regarding the incident under consideration. The Carrier has the right to expect its employees to report for work in a sober manner. Employees, correspondingly, have a responsibility to do so. Claimant's conduct in drinking within an hour or so prior to reporting for duty, in an industry in which safety is paramount, constitutes an action akin to misconduct, which calls for discipline." (Emphasis added).

What is incredible is that the Majority finds the claimant guilty of reporting to duty in an un-sober condition although he was never charged or disciplined for reporting to duty in an intoxicated manner. The Majority prepared its own charges, in effect conducted its own hearing on the evidence and assessed its own brand of discipline, a practice at which the Brotherhood should also shudder. This Majority simply decided another case other than the one presented in Docket 7806.

To compound this error the Majority implies in the above quoted paragraph and on Page 4 of this Award that there are varying degrees of intoxication deserving of varying degrees of discipline. This is a disturbing concept. It had already concluded that claimant was not sober, or

in other words, he was intoxicated, and it has long been held that intoxication of any degree is grounds for dismissal. For example, Third Division Award 15023 said in dealing with a similar contention:

> "The degree of impairment is not essential and the Board will not condone the performance of work by those under even the slightest alcoholic impairment."

See also Third Division Awards 20828 and 20100. This portion of Award 7958 is reminiscent of the famous half drunk-half pay case (First Division Award 3512). Even if we accept the validity of a finding of evidence that was not part of the charge, can we accept the Majority's reduction of discipline? It had already been found by the Majority that the claimant was intoxicated. Sixty days is not the appropriate quantum of discipline for an intoxicated employee working in and around a train yard where his life and the lives of others is immediately threatened by such behavior.

The Carrier members voice their vigorous dissent to this Award which is inconsistent with the facts in the case and the law of the Board and to the actions of a Majority which has totally exceeded its authority in this case. The Award is without foundation in reason and fact.

G. H. Vernon

J. W. Gohmann

J. E. Mason

B. K. Tucker

P. V. Varga