

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { Sheet Metal Workers' International Association
{ Illinois Central Gulf Railroad Company

Dispute: Claim of Employee:

1. That the Illinois Central Gulf Railroad Company violated the controlling agreement, particularly Rule 38, when they unjustly suspended from service on March 20, 1978, pending an investigation that was subsequently postponed until April 4, 1978 and dismissed from service on April 18, 1978, Sheet Metal Worker, Water Service repairman Jerome Strong.
2. That accordingly the carrier be ordered to reinstate claimant to service, seniority rights unimpaired, and pay him all wages lost as a result of his dismissal.
3. In addition, make claimant whole for all losses.
4. Compensate the claimant for all overtime losses.
5. Make claimant whole for all holiday and vacation rights.
6. Pay premiums on Health and Welfare Travelers policy GA23000.
7. Pay Illinois Central Gulf Hospital Association premiums.
8. Pay all sickness premiums under Provident Insurance policy.

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, who had been in the employ of the carrier for over five years, was dismissed from service on April 18, 1978. He had previously been suspended on March 20, 1978 pending an investigation that was duly held on April 4, 1978. Claimant was charged with being absent from his assignment without proper authority on March 20, 1978, and intoxication while subject to duty on the same day.

The most pertinent facts are that claimant reported to work at 7:00 a.m. on March 20, 1978. At about 11:15 a.m., stating he was feeling sick, the claimant punched out. After punching out, he saw his immediate supervisor and told his supervisor he was ill and that he had already left his assignment. The supervisor did not order the claimant to return to work. About a half hour after the claimant had punched out and when he was no longer on company property, three of the carrier's supervisors observed the claimant walking unsteadily down a sidewalk open to the public. The supervisors confronted the claimant and discovered he was carrying a half empty bottle of vodka. According to the supervisors, the claimant told them he had punched out at 7:15 a.m. and that he had only worked 15 minutes because he was too drunk to continue working.

The union contends the investigation was unfair for two reasons. First, the notice of the disciplinary investigation failed to refer to a specific rule that was ostensibly violated and thus the claimant was not apprised of the precise charges against him within the meaning of Rule 38. Second, the union claims that the hearing officer unreasonably interfered with the union's attempt to examine witnesses. Assuming there was a fair hearing, the union argues that the carrier failed to sustain its burden of proof on either charge. The claimant, according to the organization, was ill and properly punched out according to Rule 24 of the Section B Agreement. Furthermore, the union argues, at the time the carrier's supervisor confronted the claimant staggering down a sidewalk along a public thoroughfare, the claimant was not intoxicated (he was feeling the side effects of medication) and even if he was intoxicated, the claimant was no longer subject to duty. The carrier argues that the claimant failed to procure permission from his supervisor to punch out at 11:15 a.m. (after only four hours on the job) and so when he was observed staggering down the street a half hour later he was still subject to duty. Alternatively, the carrier argues that the claimant was extremely intoxicated at 11:40 a.m. and therefore he must have been intoxicated before 11:15 a.m.

For the reasons set forth below, this Board finds that the claimant did leave his assignment without authorization but under the circumstances of this case the carrier has failed to develop substantial evidence that the claimant was intoxicated while subject to duty.

Absent from his assignment without proper authority

The claimant received a fair hearing. While the notice informing claimant of the charges against him which is dated March 21, 1978, did not refer to a particular rule, the charges were definite and the claimant was able to present an able defense at the hearing. The claimant was aware of the nature of the charges against him. Mere recitation of a numerical rule in such notices would be inadequate and here the carrier specifically spelled out the two violations. Reference to a rule would not have added any substance to the notice. Similarly, the hearing officer only interfered with the organization's questioning of witnesses to the extent necessary to insure the questions were in proper form. At no time did the officer prevent the organization from inquiring into the facts underlying the charges.

Rule 24 of the Section B Agreement requires the employe to obtain the permission from his foreman before he leaves his assignment "... except in case of sickness". So the issue is whether or not the claimant was genuinely ill when he punched out on March 20, 1978. Without repeating a long line of precedent, it is not the function of the board to refrain from reviewing issues of fact. We may not substitute our judgment for the reasonable judgment of the carrier and we cannot weigh the credibility of witnesses. Second Division Award No. 6489 (Bergman). Here, there is substantial evidence in the record as a whole to support the hearing officer's conclusion that the claimant was not ill. He was observed shortly after punching out with all the characteristics of alcohol intoxication. In addition, the claimant did not offer a doctor's excuse showing he was sick. From this fact, it was reasonable for the carrier to infer the claimant was not ill and so the claimant cannot avail himself of the sickness exception in Rule 24. Therefore, the claimant was absent from his assignment without proper permission.

The Intoxication Charge

Company Rule 14 forbids the use and possession of intoxicants while subject to duty. While there is substantial evidence demonstrating that the claimant was intoxicated at 11:40 a.m. on March 20, 1978, there is not even a scintilla of evidence showing that the claimant was under the influence of alcohol between 7:00 a.m. and 11:15 a.m. The claimant's immediate supervisor did not notice any unusual behavior by the claimant at 11:15 a.m. Here, the claimant's immediate supervisor was under the impression, albeit the mistaken impression, that the claimant has properly left his assignment and so the claimant was no longer subject to duty. The claimant was no longer subject to duty and was already off company property. However, the claimant's subsequent intoxicated condition was, as we ruled above, proper evidence to show the claimant was not actually ill when he punched out. The carrier though has tried to use the off duty intoxication observed by the three supervisors to show the claimant must have been drunk before 11:15 a.m. Without a blood test or a doctor's examination, this position is inherently speculative. No witnesses testified that the claimant was drunk before punching out. The carrier failed to meet its burden of proof on the intoxication charge.


Under the circumstances, we rule that discharge was excessive here because the carrier proved only one of the two charges. The claimant shall be reinstated without back pay but with unimpaired seniority rights.

A W A R D

Claim sustained, but only to the extent consistent with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of April, 1980.