

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen & Oilers  
 {  
 { Missouri Pacific Railroad Company

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DEC 29 1980

Dispute: Claim of Employees:

P. E. LaCOSSE

1. That Laborer James E. Baines was unjustly dismissed from service on November 2, 1977.
2. That accordingly, the Missouri Pacific Railroad be ordered to return Laborer James E. Baines to work immediately, with pay for all time lost, restoration of full seniority and all benefits he would have been entitled to had he not been dismissed from service.

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.

At the time of dismissal, the claimant was employed as a Laborer with approximately ten year's of service.

On October 21, 1977, the claimant was directed to appear at a formal investigation in connection with a charge that he was in possession of intoxicating beverages on October 19 while on duty. The investigation was originally scheduled October 27, however, it was postponed until November 1, 1977.

The charges specifically relate to three cans of Budweiser beer found in the claimant's locker. The union doesn't dispute that the beer was in fact found in claimant's padlocked locker. They do however argue that this does not prove the beer was in his possession. Moreover, the union points out that the claimant testified he did not place the beer in his locker and was unaware of its existence there. The union speculates that someone else may have removed the hinge pins or by some other means entered the locker and deposited the beer without claimant's knowledge. Even if the beer was found to be the claimant's the organization contends dismissal to be excessive.

The carrier argues there is substantial evidence to believe the claimant was aware of the existence of the beer in his locker and therefore in possession of it. The carrier points out it was established in the investigation that there wasn't any evidence that the hinge pins were removed or that the lock was damaged or any other physical evidence to indicate forceable entry. This was collaborated by the claimant's own testimony. In addition, the carrier argues that it is not credible to believe the claimant was not aware of the beer in his locker because the claimant had never previously complained that his locker was tampered with or entered. It was also established that the padlock used on the locker had no master key.

In reviewing the record it is the Board's conclusion that there exists substantial evidence to support the hearing officer's conclusion that the claimant was in possession of alcoholic beverages on October 19. Although the evidence is of a circumstantial nature, it still is sufficient to uphold a finding of guilt on the basis of substantial evidence. Circumstantial evidence as in this case is sometimes clear and convincing. The circumstantial evidence in this case leaves little doubt that the beer was within the control and possession of the claimant. Mere speculation on the organization's part that someone might have broken into and placed the beer in the claimant's locker is insufficient to rebut the prima facie case as established by the carrier. Speculation of this nature does not overcome carrier testimony that there was simply no physical evidence of unauthorized entrance into the claimant's locker. While carrier witnesses admitted that it is possible to enter a locked locker by removing the hinge pins, they also point out it usually cannot be done without seriously marring the surface of the locker. Nor can the organization's speculation overcome the claimant's own testimony that to his knowledge no one had tampered with his locker.

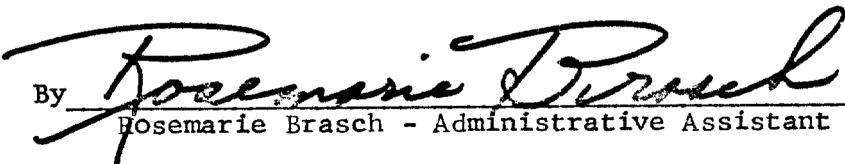
We must also reject the organization's argument that dismissal is excessive for possession of alcoholic beverages while on duty. It is a very serious offense, for which it has often been held, dismissal is neither arbitrary or capricious.

A W A R D

Claim denied.

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 17th day of December, 1980.