

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That Carmen Richard A. Pace and Larry E. Decker were unjustly withheld from service effective November 13, 1978 and subsequently dismissed from service of Burlington Northern, Inc. on December 26, 1978.
2. That accordingly, the Burlington Northern, Inc. be required to reinstate Carmen Richard A. Pace and Larry E. Decker to service with seniority, vacation, pass rights and job protection benefits; that Carrier pay the premiums for hospital, surgical, medical and life insurance benefits for all time withheld from service; that Claimants be compensated eight (8) hours per each workday, commencing on December 26, 1978 and continuing until reinstated to service, and restore all other benefits accruing other employees in active service during period of dismissal.

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.

An investigation was held on December 4, 1978 to determine whether Claimants violated Rules G and 663 of the Burlington Northern Safety Rules on November 13, 1978. Specifically, they were charged with smoking marijuana while on duty on November 13, 1978 at the Northtown Car Shop at approximately 4:50 P.M. and for improperly possessing company property. Based on the investigative record, Carrier determined that they were guilty of the cited violations and dismissed them from service, effective December 26, 1978. This disposition was appealed.

In defense of their position, Claimants deny smoking marijuana and contest the asserted expertise of Car Foremen T. J. Geyer and D. L. Gabriel, who testified at the investigation, that they detected the odor of marijuana when they were close to the Claimants. Claimants argue that no physical evidence was found in the Rip 3 area or the Shop Foreman's office, where they were searched by Special Agents. Carman Decker testified he was burning galvanized

metal during his coffee break at 4:45 P.M., which exuded a strong odor that was most likely detected as marijuana, when Car Foreman Geyer approached them in the shop by Rip 3. They deny the correlative charge that they improperly possessed company property and contend that the record does not establish a Rule 663 violation. They argue that they willingly cooperated with Carrier authorities, when their lockers and vehicles were searched by Division Special Agent Kemp and offered justifiable explanations, when the pieces of brass were found at the bottom of Carman Decker's locker and a first aid kit was found in Carman Pace's vehicle.

Carrier contends that they were smoking marijuana, as evidenced by Car Foreman Geyer's direct observation of them, when he approached them in the Rip 3 area and detected the odor, and Car Foreman Gabriel's subsequent identification of marijuana odor when he entered the Shop Foreman's office at approximately 5:05 P.M. Carrier contends that both officials were competent to determine that Claimants smoked marijuana on November 13, 1978. Car Foreman Geyer testified that he saw them exchange a cigarette when he approached them in the Rip 3 area and distinctly smelled marijuana when he was within one and a half (1½) feet of them. Car Foreman Gabriel testified that he detected the odor of marijuana when he entered the Shop Foreman's office, where the Claimants were detained for preliminary investigative purposes and asserted that he was sufficiently trained to determine that it was marijuana.

As to the second specification, namely, that Claimants improperly possessed company property, Carrier contends that Carman Decker's impermissible possession of pieces of brass in his locker and Carman Pace's unauthorized possession of a first aid kit in his vehicle, clearly establish a Rule 663 violation.

In our review of this case, we concur with Carrier on the Rule G violation, but find no persuasive evidence to support the Rule 663 violation. In reaching our conclusion, we have carefully evaluated the testimony of Car Foreman Geyer and Gabriel to determine whether their perceptions on November 13, 1978 pointedly demonstrate that Claimants were smoking marijuana and the correlative denials advanced by the Claimants. Clearly, if we accept Claimants denials as dispositive of the Rule G specification, we discredit, by definition, Carrier's position that the Car Foremen were trained to detect drug use and more particularly, their asserted observations that marijuana odor was present. On the other hand, the lack of any physical evidence, such as the marijuana cigarette itself or residual fragments thereof, raises a presumption of doubt. Since we are singularly entrusted by the Railway Labor Act 1926, as amended, to exercise appellate jurisdiction only, we are precluded from re-trying the case. Our role is to review the investigative record to insure that the Claimants were afforded a fair and impartial administrative trial. If we find that the Hearing Officer, who is the trier of facts, conducted the trial in accordance with the Board's standards of contractual due process and rendered his decision upon substantial and credible evidence, we will not attempt to reverse or modify his decision in the absence of visible bias or abuse of managerial discretion. We do not find grounds for reversal here. In Second Division Award 7325 (McBrearty), which is pertinent to our findings herein, we stated in part that:

"There is no rule which states that the Hearing Officer is under an obligation to believe the Claimant's testimony, and completely reject that of Carrier's foreman who testified against him. If, as in this dispute, there be a conflict in the testimony adduced, it is the function of the trier of the facts and not the function of this Board to resolve such conflict."

We find this decision on point with the instant case relative to the asserted Rule G violation and we will sustain Carrier's determination on this charge.

Conversely, when we consider the evidence underpinning the Rule 663 specification, we cannot agree that the record supports the purported improper possession charges. Unlike the Rule G violation, which we have discussed above, we are confronted now with factually different circumstances. In the case of Carman Decker, we have no evidence, other than the fact that the pieces of brass were found at the bottom of his locker, that he willfully stole them or acquired them for a wrongful purpose. It is not inconceivable that despite his six (6) months occupancy of this locker, that someone else might have deposited the brass there. Theft is a speculative conclusion. In the case of Carman Pace, there is no evidence that he stole the first aid kit or obtained it from another employee, knowing that it was stolen. To be sure they should not have had such property in their possession to begin with, but it was not theft or pilferage, as these terms are customarily and legally used. We will reverse Carrier's decision on the Rule 663 violation for the aforementioned reasons and as indicated previously in our findings, we will sustain the Rule G violation. We are reluctant to disturb Carrier's dismissal penalty since a Rule G violation is a serious offense in the railroad industry, but we believe that their dismissal to date was sufficient punishment for this offense. We will restore them to service, but without back pay, with the explicit understanding that this is their last chance.

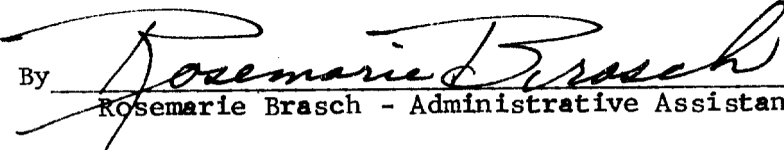
A W A R D

Claim sustained to the extent expressed in the opinion.

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 9th day of December, 1981.