Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8903
SECOND DIVISION Docket No. 8854
2-CR-EW-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That the Consolidated Rail Corporation (ConRail) was arbitrary, capricious and unjust in their action of removing Electrician M. W. Oswald from service on July 3, 1979 in violation of Rule 6-a-1.

2. That the Consolidated Rail Corporation (ConRail) was arbitrary, capricious in their subsequent action of dismissal from service of Electrician M. W. Oswald on July 28, 1979.

3. That accordingly the Consolidated Rail Corporation (ConRail) be ordered to restore Electrician M. W. Oswald to service with compensation for all wages lost along with seniority rights, insurance, vacation and all other benefits unimpaired as outlined in the controlling Agreement.

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, an electrician, was alleged, by an undercover police officer, to have been drinking alcoholic beverages while on duty on June 25th and June 26th, 1979, in violation of Rule 4002 of Maintenance of Equipment Safety Rules. Claimant was removed from service on July 5, 1979 and dismissed on July 28, 1979 as the result of an investigative hearing conducted into the matter on July 19, 1979.

It was alleged by the Organization that since the incident in question occurred on June 25th, while Claimant was not removed from service until July 5, 1979, and since Rule 6-A-1-(b) provides: "When a major offense has been committed, an employee ... may be held out of service ... only if their retention in service could be detrimental...," it was implicitly acknowledged by Carrier that Claimant had not committed a major offense and was not a detrimental influence in the work situation.

However, this rule speaks in permissive rather than mandatory terms. It says "may be held out of service..." rather than "must be held out of service". Thus an employee might commit a major offense but the Carrier might elect not to hold the employee out of service. Such election therefore, ought not to be considered an acknowledgement that the offense is not major or does not indicate that the employee is a detrimental influence in the work situation. Other motivations for not immediately removing the employee may be present. That may well have been the case here as there are indications that because of the considerable number of employees being disciplined, at the same time that Claimant was being so disciplined, Carrier, before removing from service such employees, had to arrange for replacements for them.

In any event there is authority to support the position that Rule 6-A-1-(b) permits a holding out of service, when major offenses have been committed, rather than requires it. Award No. 1 of Public Law Board No. 2613 states:

> "Rule 6-A-1-(b) provides that an employee 'may' be held out of service at the time that the alleged offense is committed; it does not mandate such immediate action, provided that inordinate delay does not ensue or there is not clear evidence of actions by Carrier in the interim which might be interpreted as a commitment of exculpation."

Carrier alleges that there is direct evidence from the testifying police officer to the effect that he physically observed Claimant consuming alcoholic beverages at the times in question and that self-serving denials by Claimant are not sufficient to impair the credibility of this officer. Carrier contends it has only to prove its case by substantial evidence and the decision of the Carrier officers to credit the testimony of this officer, in preference to such self-serving denials, is not reviewable by the Board. The Carrier points out that the Board has often held that where there is a conflict in testimony, at a disciplinary proceeding, the Carrier, as the trier of facts, has the prerogative of resolving such conflict, and that the Board, in its appellate capacity, may not disturb such findings as long as they are based on competent and credible testimony. For example, Award No. 1809, Second Division, states: "There was direct conflict in the evidence. The board is in no position to resolve conflicts in the evidence." Also, Award No. 6372, Second Division states: "Prior Awards of this Division have made it clear that it is not the function of this Board to substitute its judgment where there is conflicting testimony so long as there is substantial evidence to support the result of the hearing."

However, it seems reasonable to guage the substantiality of the evidence, asserted as carrying Carrier's burden of proof, in the context of the total evidence in the record. There is strong evidence in this record which detracts from a finding of guilt, on the part of this particular Claimant, in this situation. Much in the record erodes the sense that enough secure evidence has been complied against this Claimant, in these particular circumstances, to confidently warrant a finding that the charges have been adequately proved.

The undercover officer's observation that the Claimant was imbibing alcoholic beverages was based, in each instance, (one on June 25th and two on June 26th) on

the appearance of the can from which Claimant was drinking. And, in only one of these instances, (the second one of June 26th) did the officer see the brand name of a beer on the can from which Claimant was drinking. The officer never obtained any of the cans he saw in use nor did he smell or taste the contents of any of them.

Nevertheless, the fact that the officer, who had experience regarding alcoholic detection, was able to directly observe the brand name of a beer in one of these instances might be sufficient to establish substantial evidence of Claimant's guilt absent other problematical factors in his testimony. However, the evidence does suggest that there is reason to believe that the officer may have been mistaken in identifying Claimant as the beverage consuming individual at the times in question. For example, one of the characteristics the officer said he remembered about Claimant was that he was wearing a gray hat bearing dark vertical pin stripes. But this is certainly a most common hat amongst railroad employees. Indeed by the officer's own admission, it is worn by "a lot of railroaders". Additionally, and perhaps raising even more doubt, that the hat factor, about the officer's identification of Claimant, the officer testified that he believed Claimant, at the time of the incidents at issue, to be wearing coveralls. (But he admitted that he could not remember their color.) Yet Claimant presented strong evidence to the effect that he could not have been wearing coveralls on June 25th and June 26th. He testified that when he was given the notice to the effect that he was being held out of service his work clothes were to be found in his locker but that no coveralls were amongst them. The Claimant denied wearing either a hat or coveralls on June 25th and June 26th and asserted that he never wore coveralls in June, although he would wear them in the winter months. Additionally, a co-worker of Claimant stated, at the investigation, that Claimant did not wear coveralls on June 25th and June 26th and asserted that this matter involves a case of mistaken identity.

Even putting aside Claimant's self-serving denials that he did not consume alcoholic beverages on June 25th or June 26th and that he never saw, on June 26th, the officer who testified that he was facing Claimant, with only a four feet distance between them, there is considerable evidence which raises the possibility that the identifying officer may have pointed out the wrong man to be withheld from service.

In this context, of the conjectural nature of the accuracy of the officer's identification of Claimant as the offending party, it is not clear that the charge against Claimant has been made out by substantial evidence. For a similar view see Award No. 1 of Public Law Board No. 2613 respecting the charge that Claimant, in that case, imbibed alcoholic beverages.

Claim sustained, Claimant to be reinstated to service and compensated for wages lost since he was held out of service on July 3, 1979, minus any wages he has otherwise earned since then and to be made whole regarding all loss of seniority rights, insurance, vacation and other benefits, since that time.

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Claim sustained in accordance with the 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 10th day of February, 1982.