

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That, in violation of the current agreement, Laborer Chris A. Weaver was unjustly dismissed from service of the Carrier following trial held on July 11, 1979.
2. That, accordingly, the Carrier be ordered to make the aforementioned Chris A. Weaver whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been held out of 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.

Claimant, a Laborer, with seniority date of August 17, 1976, at Carrier's Stanley Diesel Terminal, Toledo, Ohio, was charged with:

"Violation of Rule 4002 of the Maintenance of Equipment Safety Rules in that you were observed drinking alcoholic beverages at Stanley Diesel Terminal approximately 5:40 p.m. and 6:15 p.m. on June 25, 1979 while you were on duty and under pay ..."

and

"Violation of Rule 4002 ... in that you were observed smoking marijuana at Stanley Diesel Terminal at approximately 6:30 p.m. on June 25, 1979, while you were on duty and under pay ..."

Pursuant to an investigatory hearing which was held on July 11, 1979, Claimant was adjudged guilty as charged and was terminated from Carrier's service. Said termination is the basis of the instant claim.

Organization's basic position in this matter is that Carrier's termination of Claimant "... was an arbitrary, capricious and unjust action and an abuse of managerial discretion ..." because "... Carrier failed to sustain its burden of proof concerning the alleged charge levied against the Claimant" (First Division Award No. 20471; Second Division Awards Nos. 1178, 1222, 3138, 3562, 4046 and 4135; Third Division Awards Nos. 12252, 14120 and 15412). More specifically, Organization argues that the totality of Carrier's charges in this matter is limited to the testimony of undercover Patrolman Bedra who allegedly observed Claimant smoking marijuana and drinking beer while on duty on the evening of June 25, 1979. According to Organization such limited evidence is insufficient proof of Claimant's guilt. Additionally, Organization charges that Carrier's contention that Claimant was drinking alcoholic beverages on said evening is based upon "vague and questionable" facts of record "... as to whether the Claimant has served the Carrier for four-plus years, and with an abundant lack of substantial proof the supreme penalty of dismissal is not warranted."

Carrier's position in the instant dispute is essentially the same as that which was articulated in Second Division Awards Nos. 9300 and 9301: (1) Claimant's hearing was fair and impartial; (2) Carrier's action herein was not unreasonable, arbitrary or capricious and the discipline which was imposed was commensurate with the gravity of the offense involved; (3) Carrier's Rule 4002 prohibiting the drinking of alcoholic beverages and the smoking of marijuana "... while on duty or within 8 hours before reporting for duty ..." is a reasonable rule which "Carrier has the fundamental right and responsibility to enforce"; (4) "... there is substantial evidence of a probative nature to support the charges and the Carrier's assessment of discipline as well"; (5) even when there is conflicting testimony, Carrier as the trier of facts has the right to make the determination as to whose testimony to believe and the Board may not upset such findings (First Division Awards Nos. 13356, 14690, 16265 and 20645; and Third Division Award No. 10113); (6) Claimant's defense was limited merely to a denial of guilt and he failed to present any other corroborating witnesses or evidence which would support his position, whereas Patrolman Bedra's testimony was straightforward and "far more plausible"; and (7) cases involving similar fact situations have been adjudicated favorably in support of Carrier's position as presented herein (Awards Nos. 1 and 2 of Public Law Board No. 2613; Award No. 175 of Public Law Board No. 2141; Second Division Awards Nos. 9170, 9288, 9289, 9290, 9291 and 9292).

Upon a complete and careful analysis of the total record which has been presented by the parties in support of their respective positions, the Board is led to the inescapable conclusion that Carrier has adduced sufficient evidence to support the charge that Claimant was smoking marijuana while on duty on the evening of June 25, 1979, as charged; but Carrier has failed to produce the requisite quantum of proof regarding the second charge -- that Claimant drank alcoholic beverages while on duty on that same evening. Suffice it to say that in arriving at the above posited conclusion, the Board has taken judicial note of its previous awards in Second Division Awards Nos. 9300 and 9301, as well as

Referee Yagoda's decision in Award No. 1 of Public Law Board No. 2613, and can find no good reason to depart from the rationale and direction which was articulated therein.

Absent any further evidence or testimony, other than Claimant's mere denial that he was smoking marijuana on said evening, the testimony of a single witness (undercover Patrolman Bedra), who has considerable experience and formal training in the area of Drug and Narcotics Enforcement, who was himself a first-hand observer of Claimant's actions on said evening, and whose testimony was consistent, specific and unimpeached in any way -- said testimony indeed satisfies the minimum evidentiary quantum of proof which is required in such matters. The fact that the "drinking of alcoholic beverages" portion of Claimant's charges has been rejected by virtue of this award or that Claimant may have "served Carrier for four-plus years" as Organization asserts, these considerations do not warrant a mitigation of the penalty which has been assessed since the Board would then be substituting its judgement for that of Carrier, which is improper; and, more importantly, Claimant's proven offense -- the smoking of marijuana while on duty -- is a most serious offense which alone can warrant termination of an employe for a single infraction. The significance of the latter conclusion is perhaps most succinctly and cogently summarized by Referee Hogan in Second Division Award No. 9170 in which he concluded:

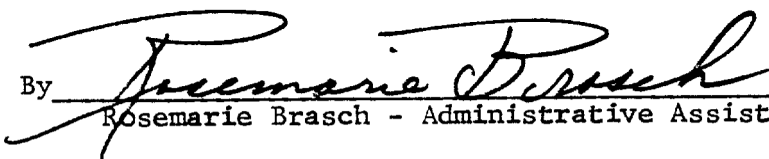
"The safety of all employees is jeopardized by the consumption of drugs or alcoholic beverages on the Carrier's property during working hours. To permit this activity, or to treat it lightly, would not only be a disservice to the Carrier, but also more importantly, to the hundreds of other employees in the employ of the Carrier."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of September, 1982.