

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

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 { Consolidated Rail Corporation

Dispute: Claim of Employee:

1. That the Consolidated Rail Corporation be ordered to restore Machinist G. W. Hobson to service and compensate him for all pay lost up to time of restoration to service at the prevailing Machinist rate of pay.
2. That Machinist G. W. Hobson be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and were lost during this period, in accordance with Rule 7-A-1(e) of the prevailing Agreement which was effective May 1, 1979.
3. The Consolidated Rail Corporation violated Rule 6-A-1(a) and (b) of the prevailing Agreement effective May 1, 1979.
4. The Consolidated Rail Corporation violated Rule 6-A-3(b) of the prevailing Agreement effective May 1, 1979.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Machinist with seniority date of April 11, 1967, at Carrier's Stanley Diesel Terminal, Toledo, Ohio, was charged with:

- "1) Being out of your assigned work area and leaving company property in a Pontiac automobile, license A64809, at approximately 6:15 p.m. on June 26, 1979, while you were on duty and under pay as a Machinist at the Stanley Diesel facility.

- 2) Possession of alcoholic beverages when you were observed carrying two (2) packages of Miller's Lite Beer under #4 ramp at Stanley Diesel Terminal at approximately 6:40 p.m., while you were on duty and under pay as a Machinist at the Stanley Diesel facility on June 26, 1979.
- 3) Conduct unbecoming an employee in that you were observed participating in illegal and unauthorized activities when you were observed playing cards and gambling in the Stanley Diesel Terminal from approximately 7:50 p.m. to 10:20 p.m. on June 26, 1979, while you were on duty as a Machinist at the Stanley Diesel facility.
- 4) Violation of Rule 4002 of the Maintenance of Equipment Safety Rules in that you were observed drinking alcoholic beverages in Stanley Diesel Terminal at approximately 8:50 p.m., 9:20 p.m., and 9:55 p.m. on June 26, 1979, while you were on duty and under pay as a Machinist at the Stanley Diesel facility."

Pursuant to an investigatory hearing which was held on July 17, 1979, Claimant was adjudged guilty as charged and was terminated from Carrier's service effective July 25, 1979. Said termination is the basis of the instant claim.

The essence of Organization's position in this dispute is that, insofar as Claimant categorically denied all of the charges which were brought against him, Carrier's reliance upon the unsubstantiated testimony of a single witness (Patrolman D. A. Bedra, a Conrail police officer who was working undercover as a Laborer in the Stanley Diesel Shop on the evening of June 26, 1979, and who alleged to have observed Claimant's actions as charged), is insufficient proof upon which to establish Claimant's guilt (Second Division Awards 3869, 4046, 5850, 6522, 6528 and 6580). According to Organization, numerous other sources of proof were available to Carrier to substantiate its position but such evidence and/or witnesses, for whatever reason, were not produced by Carrier in support of its respective position.

In addition to the foregoing, Organization further argues that Carrier committed various procedural infractions in the processing of this matter. Thus, in this regard, Organization specifically charges that Carrier violated Rules 6-A-1 (a) and (b) of the controlling agreement by permitting Claimant to remain in service for one (1) week following his alleged infraction and removing him without a hearing when Claimant had not been charged with committing a "major offense" as specified in the cited Rule. Similarly, Organization also charges that Carrier further violated Rule 6-A-3 (b) by not producing all "actual, pertinent witnesses to the offense" at the hearing. Lastly, Organization alleges that "... Carrier did not give the Claimant a fair and impartial trial because they placed the Claimant's past record into the trial" (Second Division Award 6684).

Simply stated, Carrier's position regarding the merits portion of this dispute is that the testimony of Patrolman Bedra is sufficient evidence to conclusively prove that Claimant was guilty of the infraction as charged. Additionally, Carrier maintains that as the "trier of facts" Carrier has the prerogative to make determinations of fact; and that where there is "... complete, credible evidence to support Carrier's assessment of discipline..." then the Board should not upset such findings (First Division Award 14690). Related to the foregoing, Carrier further asserts that Claimant's defense in this matter was limited merely to a denial of the charges, and that no other witnesses or evidence was presented in support of his basic position.

In reference to Organization's procedural arguments, Carrier maintains that Claimant's removal from service on July 13, 1979, was in compliance with Rule 6-A-1 (a) and (b) because said rules establish that it is within Carrier's discretion and judgement to hold an employee out of service as well as to determine what situations constitute a "major offense". Carrier also contends that Claimant was not immediately held out of service on June 26, 1979, because the applicable rules do not require "immediate action" on the part of the Employer, and the specific set of circumstances involved in the instant dispute warranted Carrier's retaining of Claimant and other involved employees in their positions pending further scheduling arrangements. According to Carrier, such a procedure is proper (Award No. 1 of Public Law Board No. 2613).

As its final argument regarding Organization's procedural objections, Carrier contends that, in view of the sufficiency of Patrolman Bedra's testimony, there was no need to present any other witnesses and/or evidence in support of Carrier's position; and, furthermore, Claimant had the right to call any and all witnesses in his own behalf, but he failed to do so.

The instant case, by and large, focuses upon the question of the sufficiency of the evidence of a single witness, Patrolman Bedra, who was employed by Carrier as an undercover agent and who alleged to have observed Claimant commit the various infractions as charged on the evening of June 26, 1979. Apart from the fact that this Board is cognizant of Carrier's well-established authority to make credibility determinations when there is conflicting testimony in the record (Second Division Award No. 7542; Third Division Awards No. 19696 and 21290), the Board is of the opinion that the evidence which has been adduced by Carrier in this case is not mere "circumstantial evidence" as is the thrust of Organization's particular case citations (Second Division Awards No. 3869, 4046, 5850, 6522, 6528 and 6580; Third Division Award No. 4684). Indeed, Carrier's evidence is not circumstantial evidence but is evidence of the highest order -- the testimony of an eye witness whose offerings have neither been impeached, discredited nor tainted in the least way. Of even greater significance, however, is the fact that insofar as the precise same issue has already been decided by this Board and by several other Boards in a series of companion cases to the instant case, the Board can see no good reason to depart from the decisions which were rendered therein (Second Division Awards No. 9170, 9288, 9289, 9290, 9291, 9292, 9300, 9301 and 9302).

Having resolved the merits portion of this dispute, we turn next to the procedural objections which have been raised by Organization. Here too, the Board determines that Carrier's actions were proper because: (1) Rule 6-A-1(b) gives Carrier discretionary authority either to hold or not to hold an employee out of service pending an investigation when a "major offense" is alleged to have been committed (First Division Awards No. 19477 and 20163; Second Division Award 7574; and Third Division Award 18536); (2) in the instant case, because of the large number of employees who were involved in the incident, Carrier's concern for scheduling difficulties which might, due to numerous suspensions, was a good reason to delay Claimant's suspension; and (3) inclusion of Claimant's past disciplinary record into the trial record was not undertaken to establish Claimant's guilt in the instant case, but rather to determine the proper penalty to be assessed thereafter.

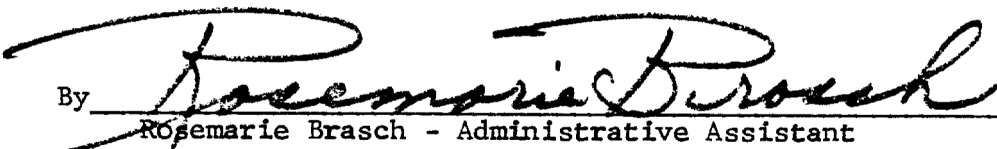
A W A R D

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 2nd day of February, 1983.