

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

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

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinist D. S. Swansegar 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 D. S. Swansegar 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 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.

The Claimant, Mr. D. S. Swansegar, was removed from service as a Machinist at the Carrier's Collingwood Diesel Terminal as of 8:00 P.M. August 29, 1980. He was notified that he was being held out of service by letter dated September 2, 1980. Also by notice dated September 2, 1980, Mr. Swansegar was given notice of the charges against him and a trial date. The charges were as follows:

"Violation of Conrail Safety Rule 4002 for M of E Employees  
on 8/29/80 at approximately 8:00 P.M.

Violation of Rule 'G' of the Rules that Govern the Locomotive  
Department Employees issued by J. J. Butler, Chief Mechanical  
Officer and reissued 7/7/80; on 8/29/80 at approximately 8:00 P.M."

The trial was held on September 19, 1980. By notice dated October 10, 1980, the Carrier notified Mr. Swansegar that he was dismissed from service because it had found him to be in violation of Safety Rule 4002 and Rule G. This decision was appealed by the Organization and is now properly before this Board.

The Organization cites numerous awards setting forth the Carrier's burden of proof in a discharge case. For example, the Organization refers to Second Division Award No. 4046 (Anrod):

"This case turns on the question of whether the Claimant was discharged for just and sufficient cause as contemplated in Rule 3<sup>4</sup> of the applicable labor agreement. For the reasons hereinafter stated, we are of the opinion that the answer is in the negative.

It is firmly established in the law of labor relations that the burden of proof squarely rests upon the employer convincingly to prove that an employee committed the offense upon which his discharge is based. In meeting this burden of proof, an employer is free to rely on circumstantial evidence. However, irrespective of whether circumstantial or direct evidence or both types of evidence, is relied upon, the employer still has the burden to prove convincingly that the employee involved is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take place of such proof..."

In the instant case substantial evidence of record, not mere suspicious circumstances, supports the Carrier's finding of responsibility for violations of Conrail Safety Rule 4002 and Rule "G". Shop Superintendent Gustavson testified that he observed a can of beer in Mr. Swansegar's hand. Shop Superintendent Waller also testified that he observed a can of beer in Mr. Swansegar's hand; and testified that Mr. Swansegar had a strong odor of alcohol about his person. Assistant Shop Manager Haas testified that he also observed a can of beer in Mr. Swansegar's hand; and further testified that he smelled alcohol on Mr. Swansegar's person. It is true that none of the three Carrier officers observed Mr. Swansegar actually drinking beer. However, Mr. Swansegar was found in the P-I-A downstairs locker room bathroom with five other employees near a trash can with approximately twenty beer cans in it, holding a half empty can of beer; and two of his supervisors testified concerning the smell of alcohol about his person. We find that such is substantial evidence of record not only that he possessed intoxicants while on duty in violation of Rule G, but also that he had used alcoholic beverage while on duty in violation of Rule 4002 and Rule G.

Under the above circumstances the Carrier did not violate Rule 6-A-1(b) of the controlling Agreement by removing Mr. Swansegar from service.

The record indicates that Mr. Swansegar had four years of service as of the date of the incident now before the Board; and that he was a quality employee who had been offered a foreman's position but turned it down until he had sufficient knowledge that he could govern men and explain jobs to them when they had questions.

We believe under the narrow facts of this particular record that the discipline has served its purpose, and that Mr. Swansegar should be reinstated to his former position with all seniority rights unimpaired but without back pay.

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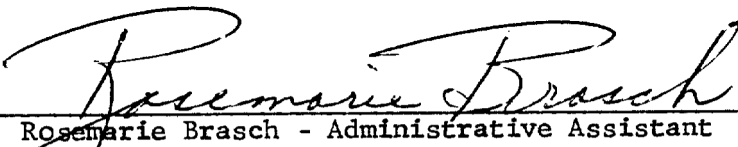
Award No. 9528  
Docket No. 9549  
2-CR-MA-'83

A W A R D

Claim sustained in accordance with the Findings.

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 15th day of June, 1983.

