

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISIONAward No. 9854  
Docket No. 9939  
2-MKT-MA-'84

The Second Division consisted of the regular members and in addition Referee Hyman Cohen, when award was rendered.

( International Association of Machinists and Aerospace  
( Workers - AFL-CIO  
Parties to Dispute: (   
( Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employees:

Claim in behalf of Machinist J. J. Riley at the pro rata rate of pay commencing at 7:15 PM, April 16, 1981 and continuing, for his regular assignment, until such time as the claim is settled. This being due to the Carrier having removed him from service on alleged violation of Rule G without verified support of their action as recorded in the investigation transcript of investigation held April 15, 1981. This action being contrary to Rule 26 of the controlling Agreement effective January 1, 1957, as amended.

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 employees 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.

Machinist J. J. Riley, the Claimant was dismissed from service for violating Rule G on April 6, 1981. Rule G provides:

"The use of intoxicants or narcotics is prohibited. Possession of intoxicants or narcotics while on duty is prohibited."

Prior to this dismissal from service, the Claimant was employed by the Carrier at its Bellmead Locomotive Department in Waco, Texas. He regularly worked the second shift which began at 3:00 p.m. and ended at 11:00 p.m., with Tuesday and Wednesday, as rest days.

The Claimant acknowledged that after reporting to work at 3:00 p.m. on April 6, 1981 he left the premises to go to a service station where he purchased a six pack of beer. Upon returning to the Company's premises, Master Mechanic K. L. Sellers, smelled alcohol on the Claimant's breath. Shortly thereafter Trainmaster L. E. Gale found a cold six pack of beer in the Claimant's vehicle which was parked on Company property. While interviewing the Claimant, both Trainmaster Gale and Special Agent S. G. Radcliffe also smelled alcohol on the Claimant's breath.

The Claimant denied that he had been drinking while on duty. He also indicated to the three (3) Supervisors that he had nothing to drink since 11:30 a.m. and that he had been drinking beer during the night. Lead Machinist Steve Evans who worked with the Claimant during the afternoon of April 6, 1981 testified that he did not smell alcohol on the breath of the Claimant. The Board cannot resolve issues of credibility since that function is properly reserved to the Hearing Officer. See Third Division Award 21290. Accordingly, consistent with the determination of the Hearing Officer, the Board concludes that the Claimant's breath smelled of alcohol while he was on duty.

On April 6, 1981, the Claimant consented to a blood test which indicated that the Claimant had a .2133 content in his blood. The Organization contends that this level does not show that the Claimant was under the influence of alcohol. However, Special Agent Radcliffe testified that on the basis of his experience as a police officer, and having been trained in alcoholic detection, he was of the opinion that the Claimant was under the influence of alcohol. It should be noted that it is not the Board's function to re-try or conduct an investigation. Since Special Agent Radcliffe's testimony was undisputed, the Board has concluded that the Claimant was under the influence of alcohol, while at work on April 6, 1981.

It is true that there was no evidence that the Claimant had slurred speech, was unsteady on his feet or that his physical appearance demonstrated that he was under the influence of alcohol. In this connection it was stated in Award 20100 (Sickles):

\*\*\*In Award 15023 (Hamilton) the Board found no evidence of intoxication to any apparent degree whatsoever\*\*\*. It is important to note, however, in Award 15023:

....the degree of impairment is not essential, and the Board will not condone the performance of work by those even under the slightest alcoholic impairment."

Turning to another consideration, the Board has concluded that the cold six-pack of beer found in the Claimant's personal vehicle, parked on Company property was in the possession of the Claimant. In Award 7234 the Board noted that Webster's Dictionary defines "Possession" as:

"The act of having or taking into control; control or occupancy of property without regard to ownership."

Moreover, in First Division Award 22294 the Board stated "that 'having possession includes having under one's control. This means in one's home, in one's automobile or any other place where the claimant would have control over the articles in question." Accordingly, we have concluded that the six pack of beer in the Claimant's personal vehicle was in the possession of the Claimant.

The Organization has strongly objected to the Carrier's search of the Claimant's personal vehicle and seizure of the six pack of beer contending that it violated the Claimant's constitutional rights. Suffice it to say that the rights granted to individuals under the Constitution is intended to protect them against the arbitrary exercise of governmental power; the Constitution does not apply to actions between individuals. See Award 22224 (Lipson). Clearly, constitutional rights are not part of the Controlling Agreement.

In light of the aforementioned considerations, the Board has concluded that there is substantial evidence in the record to warrant the conclusion that the Claimant has violated Rule G.

#### Discipline

It is well known in the railroad industry that violators of Rule G are subject to severe discipline including discharge. However, it should be pointed out that Rule G does not mandate discharge. With respect to the degree of discipline, it is not for the Board to substitute its judgment except under very limited and extenuating circumstances. See Award 9281 (Boyle). This case presents such circumstances.

The Carrier has failed to establish that the Claimant was drinking while on duty. There was no evidence that any one or more of the cans of the six pack of beer found in the Claimant's vehicle had been opened and was less than full. In fact, there was no evidence that the Claimant was intoxicated, or showed any manifestation of intoxication except for the smell of alcohol on his breath. Moreover, there is nothing in the evidentiary record to indicate that he did not perform his job in a satisfactory manner on April 6, 1981.

To be sure, just as a Carrier will consider an employee's unsatisfactory employment record in determining discipline, it is only fair that an employee's unblemished record be utilized in assessing discipline. Accordingly, the Claimant who had almost 26 years of seniority had an unblemished record. Moreover, as the Carrier has acknowledged the Claimant has sought medical treatment in June and July, 1981 for alcohol abuse.

In light of these considerations, the Board concludes that severe discipline is appropriate but not discharge. Accordingly, it is determined that the penalty of dismissal was excessive and that the Claimant's dismissal should be reduced to a disciplinary suspension equivalent to time lost from dismissal to the receipt of this Award. The Claimant shall be entitled to reinstatement with seniority unimpaired, but with no compensation for time lost. This decision may be taken into account by the Carrier in evaluating the disciplinary penalty appropriate to any further violation of duty by the Claimant should any occur; and shall be without prejudice to the Carrier if the Claimant commits a violation of Rule G in the future, provided that the Carrier can adequately prove such violation.

Prior to the Claimant's return to service, he must pass a satisfactory return-to-service physical examination to be approved by the Carrier's Medical Director. The Claimant's reinstatement to service is contingent upon satisfactorily passing the physical examination.

Form 1  
Page 4

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Docket No. 9939  
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A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy S. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April, 1984