

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11685
Docket No. 11350
89-2-86-2-163

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada
PARTIES TO DISPUTE: (
(The Chesapeake and Ohio Railway Company (Chesapeake
(District)

STATEMENT OF CLAIM:

1. That Car Inspector J. W. Lowry was unjustly assessed discipline of thirty (30) days actual suspension from service as a result of investigation held in Richmond, Virginia on March 22, 1985 in violation of Rule 37 of the Shop Crafts Agreement.

2. Accordingly, Lowry is entitled to be compensated for all lost time during the period of discipline plus 6% annual interest, and all other benefits that are a condition of employment. Reimbursement for all losses sustained account loss of coverage under health and welfare and life insurance agreement during the time held out of service. Further, that Lowry's service record be expunged of all reference to said violation.

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 employes 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.

On March 10, 1985, a Gang Foreman, an Electronic Maintainer, and a Car Inspector observed the Claimant holding two beer cans while on duty at the Carrier's Fulton Yard. The Electronic Maintainer exchanged a few words with the Claimant, left the scene, and later lodged a complaint with the Carrier's Police Department. As a result, the Claimant was charged by the Carrier with being in possession of two cans of beer while on duty at approximately 2:45 P.M., on March 10, 1985, at Fulton Yard, Car Inspector's locker room. This was in violation of Rule G, Chessie System Safety Rules, which reads, in pertinent part:

"The use of intoxicants, narcotics, or dangerous drugs by employees subject to duty, while on duty, or on Company property is prohibited. Possession of intoxicants, narcotics or dangerous drugs or participation in any transaction involving same by employees on duty or on Company property is prohibited."

A Hearing was held in which the Claimant was found guilty and was assessed a 30-day actual suspension. The Claimant had previously been found guilty, in 1979, of insubordination and excessive absenteeism, and had been assessed a 30-day actual suspension at that time.

The three employees who had observed the Claimant holding the beer cans all testified at the Hearing. The Car Inspector testified that the beer cans in the Claimant's possession had been empty, that "...he was holding them in a manner that I could see that the seals of the cans had been cracked...", and that he had been unable to see the brand label. The Electronic Maintainer testified that they had looked liked Coors beer cans, and that the tops had not been opened. The Gang Foreman--who had initially reprimanded the Claimant for being in violation of company policy, and who had told the Carrier's Police Captain that the Claimant had been in possession of two opened cans of Coors beer--testified at the Hearing that he had seen the Claimant with two beer cans but had not noticed if they were open or what brand they were, and that he had not reprimanded the Claimant regarding the beer. Finally, the Police Captain, who had been summoned by the Gang Foreman, testified that he did not have any statements from any of the witnesses that could substantiate that the Claimant had, indeed, committed a Rule G violation.

The Board recognizes the seriousness of the charge of being in possession of intoxicants while on duty or on company property. However, it is the responsibility of the Carrier to systematically prove a charge, particularly such a serious one as this (see Second Division Award 9854). In the evidence presented before this Board, there is conflicting testimony as to whether the cans were actually "beer cans;" whether they were opened or unopened; and whether the Claimant was consuming the contents of them, offering the cans to other people, or merely handling or disposing of "empties." Thus, the Carrier has failed to establish beyond a reasonable doubt that the Claimant was in possession of two full cans of beer while on duty on March 10, 1985, and there is no conclusive evidence whatsoever to suggest that the Claimant was drinking the contents of either can.

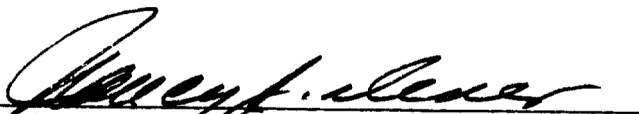
The Board sustains the Claim in part and directs that the Claimant be made whole for the 30-day suspension period and that all references to this incident be expunged from his record.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of March 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 11685, DOCKET 11350
(Referee Thomas F. Carey)

The Majority held, in part:

"On March 10, 1985, a Gang Foreman, an Electronic Maintainer, and a Car Inspector observed the Claimant holding two beer cans while on duty at the Carrier's Fulton Yard. The Electronic Maintainer exchanged a few words with the Claimant, left the scene, and later lodged a complaint with the Carrier's Police Department. As a result, the Claimant was charged by the Carrier with being in possession of two cans of beer while on duty at approximately 2:45 P.M., on March 10, 1985, at Fulton Yard, Car Inspector's locker room." (Emphasis added)

The Majority summarized the evidence adduced at the Investigation as follows:

"The Car Inspector testified that the beer cans in the Claimant's possession had been empty... The Electronic Maintainer testified that they had looked like Coors beer cans, and that the tops had not been opened. The Gang Foreman...testified...that he had seen the Claimant with two beer cans but had not noticed if they were open or what brand they were...."

In sustaining the Claim, the Majority concluded:

"The Board recognizes the seriousness of the charge of being in possession of intoxicants while on duty or on company property. However, it is the responsibility of the Carrier to systematically prove a charge, particularly such a serious one as this (see Second Division Award 9854). In the evidence presented before this Board, there is conflicting testimony as to whether the cans were actually "beer cans;" whether they were opened or unopened; and whether the Claimant was consuming the contents of them, offering the cans to other people, or merely handling or disposing of "empties." Thus, the Carrier has failed to establish beyond a reasonable doubt that the Claimant was in possession of two full cans of beer while on duty on March 10, 1985, and there is no conclusive evidence whatsoever to suggest that the Claimant was drinking the contents of either can." (Emphasis added)

Carrier Members' Dissent
to Award 11685, Docket 11350

Three aspects of the Majority's findings are particularly disturbing, to the point that this Dissent is required. First of all, the Referee was furnished Second Division Awards 9282, 8861 and 7542, as well as Third Division Award 26194 in support of the well-established principle that the reconciliation of directly contradictory testimony and establishment of witness credibility is properly the function of the Hearing Officer and not this appellate Board.

In Second Division Award 8861 (cited above) this same Referee denied the claim of a Machinist who had been discharged

"...for being absent without proper authority from his assigned work area between the hours of 10:00 p.m. and 12:00 midnight on August 4, 1978, and with sleeping in his car during that time."

Therein the Board cited Second Division Award 7542 and concluded:

"This conflict in the testimony is not within the purview of the Board to resolve, but rather must be left to the hearing officer."

* * * *

"The hearing officer in the instant case rejected the Claimant's version and credited that of the Foreman. Given such a determination, the evidence is sufficient to support the charge that the Claimant is guilty of the offense of sleeping on the job."

Secondly, the Majority was furnished Second Division Awards 8159 and 7492, as well as Third Division Award 25907 in support of the proposition that unlike court proceedings, this Board has followed the substantial evidence rule in upholding the disciplining of employees. As noted in Third Division Award 25907, the Supreme Court of the United States set forth the substantial evidence rule as follows:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'
(Consol. Ed. Co. vs Labor Board 305 U. S. 197, 229)."

Carrier Members' Dissent
to Award 11685, Docket 11350

As the Board held in Award 8159 cited above:

"We have reviewed the record against the standard this Board has set for the burden of proof, to wit: that sufficient evidence of probative value be produced to support the charge. The standard is not beyond a reasonable doubt as required in criminal cases." (Emphasis added)

Lastly, with respect to the Majority's conclusion that:

"...there is no conclusive evidence whatsoever to suggest that the Claimant was drinking the contents of either can."

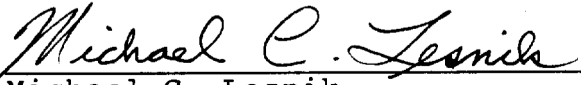
it should be obvious to even the most casual observer that, as evidenced by the aforequoted excerpts from the Award, the Claimant was charged with:

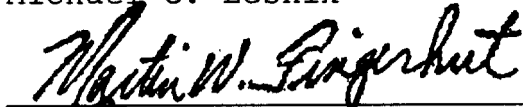
"...being in possession of two cans of beer while on duty..."

and not with "...drinking the contents of either can."

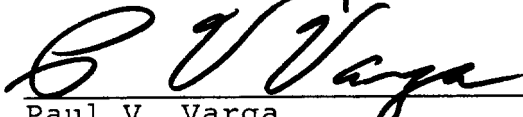
Obviously, this Claim should have been denied.

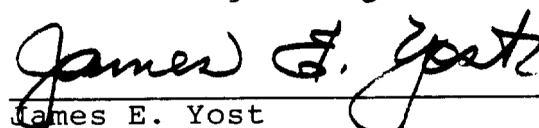
We dissent.


Michael C. Lesnik


Martin W. Fingerhut


Robert L. Hicks


Paul V. Varga


James E. Yost

