

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Missouri Pacific Railroad Company is violative of Rule 32 of the June 1, 1960 controlling agreement and has unjustly dealt with and damaged Electrician D. V. Willette at North Little Rock, Arkansas when they removed him from service on March 3, 1987, denied him a notice that was precise, and subsequently denied him a fair and impartial investigation, resulting in the unjust and improper discipline of dismissal from the service of the Carrier by Notice Number 1987-2 dated April 10, 1987.

2. That, accordingly, the Missouri Pacific Railroad Company be ordered to reinstate Electrician D. V. Willette to service with all contractual rights concerning seniority, health and welfare benefits, vacations, etcetera, and that he be compensated for all wages lost commencing with March 3, 1987, at the straight time rate, eight (8) hours per day, five (5) days per week up to and including such time as he is reinstated to service and, that his record be cleared of this discipline of dismissal.

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 2, 1987, relying on information from an undisclosed person, the General Foreman checked the Claimant's breath for alcohol and administered a manual sobriety test which the Claimant passed. The General Foreman requested that the Claimant submit to a blood alcohol test. The Claimant refused. The General Foreman then requested that the Claimant meet with another supervisor before going home. For reasons not clearly established at the hearing, the Claimant did not meet with this supervisor.

On March 3, 1987, the Claimant was issued a Notice of Investigation which alleged his failure to follow instructions and a violation of Rule G which prohibits the use of alcoholic beverages when on duty or on company property. Rule G further states that employees must not report for duty or be on company property under the influence of, or use while on duty, or have in their possession while on company property any drugs or alcoholic beverages.

The Organization argues that the Claimant was not given proper notice and was denied a fair and impartial hearing as the charges were not definite and precise in that a time and date of alleged misconduct was not contained therein. Thus, the Organization contends that the Carrier was in violation of Rule 32 of the controlling Agreement.

Further, the Organization asserts that the Carrier denied the Claimant the opportunity to face his anonymous accuser and that the Carrier did not meet its burden of proof when it failed to produce as a witness the supervisor that Claimant was instructed to meet. The Organization also denies that the Claimant was in violation of Rule G.

The Carrier asserts that the Claimant was afforded a fair hearing in accordance with Rule 32 and that the evidence and testimony contained in the transcript establish a violation of Rule G by the Claimant; that the Claimant was aware of the facts that led up to the Notice of Investigation; and that the Claimant had developed a defense prior to the hearing.

The Carrier asserts that the Claimant was under the influence of alcohol by virtue of the odor of alcohol on his breath and was thereby in violation of Rule G.

While the Board adopts the Hearing Officer's findings that the evidence established that the Claimant had alcohol on his breath, no evidence was presented to establish that the Claimant had possession of or consumed alcohol on duty or that he reported to work under the influence of alcohol. Further, there was no evidence of impairment as established by the Claimant's completion of the sobriety test administered to him by the General Foreman. The odor of alcohol on one's breath does not establish "being under the influence." "Under the influence" is established by a subjective criteria such as one's walk, speech, and job performance. Nothing in the supervisor's testimony or the Claimant's behavior established that the Claimant was "under the influence" as found in Second Division Award 8807.

The Board is not persuaded the Claimant was denied due process because he did not have an opportunity to confront the anonymous informer. The General Foreman assumed the role of the anonymous informer by questioning and testing the Claimant. Just as the General Foreman fulfilled his obligation to ascertain whether or not the Claimant was "under the influence," the Claimant

has an obligation to himself, his fellow workers, and his employer to cooperate in such an investigation once it was established that alcohol had been detected on his breath. The Claimant's refusal to submit to a blood alcohol test and his denial at the hearing of even being questioned by the General Foreman regarding this matter is indicia of his lack of cooperation. This lack of cooperation contributed to the discipline issued to him as it was not unreasonable for the General Foreman and the Carrier to draw an adverse inference from the Claimant's refusal to be tested. Thus the Claimant does not come before this Board with clean hands.

The Board agrees with the Organization that the charge of insubordination would have been resolved by substantial evidence had the Carrier produced as a witness the officer that the Claimant was intended to meet before he left the property. While the Board agrees that the Notice of Investigation on its face, was not definite or precise, nothing in the record indicated that the Claimant and his representative were not prepared to participate in the investigation.


Accordingly, while the record does not provide a sound basis for dismissal, it does provide a basis for discipline. The dismissal shall be converted to a suspension and the Claimant shall be reinstated with seniority rights unimpaired but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of October 1989.