Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13071
Docket No. 12881
96-2-94-2-27

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers
(System Council No. 15, AFL-CIO
(
(Denver Rio Grande Western Railroad Company
((Southern Pacific Lines)

STATEMENT OF CLAIM:

"DISPUTE - CLAIM OF EMPLOYEES

1. That in violation of the current Agreement, Laborer J. Litzenberger Denver, Colorado, was unfairly dismissed from service of the Denver and Rio Grande Western Railroad Company (Southern Pacific Lines) effective March 24, 1993.

2. That accordingly, the Denver and Rio Grande Western Railroad Company (Southern Pacific Lines) be ordered to make Mr. Litzenberger whole by restoring him to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his record."

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 were given due notice of hearing thereon.

Claimant, a 15 year employee, worked as a Mechanical Laborer on the 3:00 p.m. shift at the Carrier's Burnham Shops. On March 24, 1993, after a formal investigation conducted on March 15, 1993, Claimant was dismissed from service for being in an unfit condition while at duty on February 16, 1993 in violation of Rule G. Claimant subsequently rejected Carrier's October 28, 1993 conditional offer of reinstatement.

A review of the record reveals that the Carrier's finding of guilt was based upon the conclusion of four supervisors on February 16, 1993 that Claimant's breath had the odor of alcohol. Relief supervisor Ahrendt testified that he smelled the presence of what he felt was alcohol on Claimant's breath when he approached him at around 3:30 p.m. on February 16, 1993, and Claimant turned his head and covered his mouth and nose when he spoke to him. Ahrendt testified that he did not know Claimant, who appeared to him deliberate in his actions and speech, so he asked Diesel Maintenance Supervisor Harris to observe Claimant. Harris testified that he also did not know Claimant, but smelled alcohol on his breath on that occasion. Harris stated that there was nothing wrong with Claimant's speech. General Foreman Cord testified that he was approached by Ahrendt and told that Claimant had been drinking. Cord stated that he and Plant Manager Burbach went to talk to Claimant, and he could smell a noticeable odor of alcohol on his breath. Cord testified that none of the other conditions he was trained to look for when detecting alcohol use (i.e. slurred speech, unsteady gait, red eyes, watery eyes, unfocused eyes or belligerence) was present in Claimant. Burbank did not testify in the investigation.

Claimant denied drinking, and gave two urine samples as requested by the nurse, who informed him that neither was sufficient and would not be sent to the lab. During the investigation, 8 fellow employees who had been with Claimant at work on February 16, 1993, testified that they did not smell alcohol on his breath and that he exhibited no other signs of having been drinking. Claimant testified that he was taking medication for asthma and allergies, including Primatene Mist, and that the Carrier had been previously made aware of all such medication. All three Carrier witnesses were questioned about whether what they smelled could have been something else, including some sort of mouth spray; they all responded that they did not think so.

A conference was held to discuss the Carrier's decision on March 30, 1993, and the Organization was informed that the dismissal would stand on April 5, 1993. A claim was filed on April 30, 1993, protesting the dismissal, and including a handwritten statement by Claimant that he had taken two puffs of his Primatene Mist on February 16, 1993, right after the group of employees left the coffee machine area. The Organization argued that Carrier's officers may have mistakenly interpreted that odor for the smell of alcohol. Throughout the continued processing of the claim on the property, Carrier contended that no new information had been brought forth since the formal investigation to alter its decision. Although correspondence from the Organization indicated that it agreed to Claimant's reinstatement with full seniority upon his successful completion of a return to work physical and clearance from the Employee Assistance Counselor with the right to progress his claim for time lost, the Carrier's October 28, 1993 offer of conditional reinstatement was rejected by Claimant. That offer additionally included Claimant's agreement to totally abstain from alcohol and other drugs, participate in a rehabilitation program through Employee Assistance Services, submit to random unannounced alcohol and/or drug tests for two years, and substantiate any failure to report for duty.

Carrier argues that (1) it had substantial evidence to find a Rule G violation, (2) the Board may not resolve credibility, (3) Claimant's evidence that he used Primatene Mist should not be considered since it was not submitted during the investigation, and (4) the rejection of the offer of a leniency reinstatement cut off any back pay liability owed to Claimant.

The Organization argues that the Carrier failed to prove that the Claimant was under the influence of alcohol. It notes that the Carrier did not request either a breath or blood test when it learned that the urine sample was insufficient to verify its suspicions, and thus, failed to prove a Rule G violation by substantial evidence.

While long established precedent reveals that this Board cannot set itself up as trier of fact when confronted with conflicting testimony and may not resolve credibility disputes, Second Division Awards 7542, 8280, 8566, it also recognizes that it is the responsibility of the Carrier to adduce substantial evidence in support of any discipline imposed. Third Division Awards 25411, 11626. If the only evidence in the record was the conflicting testimony of supervisors and employees as the odor of alcohol on Claimant's breath on the date in question, the Board would be unable to conclude that Carrier's determination was unreasonable.

However, as noted by General Foreman Cord, Carrier training sets forth a list of a number of different objective criteria to be used in assessing alcohol use other than the smell of one's breath. In none of the cases relied upon by Carrier was a dismissal determination for a Rule G violation upheld where the sole basis for substantiating the charges was the smell of alcohol. In this case, Cord admitted that none of the other indicia of alcohol use was present in Claimant at the time he was removed from service. There are no medical test results substantiating Carrier's assessment of Claimant's condition. When urine tests failed to produce the required sample, Carrier could have requested Claimant to take either a breathalyzer or blood test. It's failure to do so leaves its evidence subject to reasonable explanation by Claimant that the odor on his breath could have been from some other source than alcohol, considering his known asthma and allergy medications, and his claim that he used Primatene Mist shortly before he was approached by supervision on February 16, 1993. While he did not specify this fact during the investigation, he did so shortly thereafter, and well in time for the Carrier to respond. The Carrier's contention that this was not new evidence is correct, since he did testify that he used such medication during the investigation and Carrier's witnesses were questioned about the possibility of mistaking his breath odor for something else. Under such circumstances, the Board deems it appropriate to consider this evidence as having been adduced during the investigation on the property.

The threshold and determinative question in this case is the existence of substantial evidence to support a conclusion that Claimant had alcohol in his system on February 16, 1993, as asserted by the Carrier. The testimony of Ahrendt, Harris and Cord that they smelled alcohol on Claimant's breath must be weighed against the eight employees testifying otherwise, the admitted lack of any other indicia indicating alcohol use, the lack of medical verification of the presence of alcohol, the fact that the Carrier was aware of Claimant's asthma and allergies and his use of specific medication, and Claimant's reasonable explanation as to why his breath may have smelled similar to alcohol. Considering the totality of the evidence presented, we cannot find the existence of the required showing. First Division Award 23923.

With respect to the Carrier's argument that any back pay liability has been cut off by Claimant's failure to accept its offer of conditional reinstatement on October 28, 1993, the cases relied upon by the Carrier reveal that the doctrine that settlement offers are rejected at Claimant's peril normally is applied where guilt of the charges has been established and review of the appropriateness of the penalty is being assessed. See Third Division Awards 28076, 28645; First Division Award 22123.

In this case, the Board has found that the Carrier has failed to sustain its burden of proving the charge against Claimant. Further, the offer of reinstatement in this case, while conditioned upon the normal requirements for reinstatement of a Rule G violator, would have placed Claimant in the same position as other Rule G violators, and could have had an adverse impact on his future record. Under such circumstances, his rejection of such offer should not toll any otherwise appropriate liability for lost wages. However, the record indicates that the Claimant may have made himself unavailable by returning to school at some time during the period subsequent to his dismissal. Therefore, the Carrier is directed to restore Claimant to service with full seniority rights and benefits upon his completion of a return to work physical, and to pay him for lost wages at his straight time rate of pay for all time that he was available and able to perform his work. Interest is denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1996.