

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13285

Docket No. 13251

98-2-97-2-17

The Second Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(The Burlington Northern and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Dispute - Claim of Employee:

That the Atchison, Topeka and Santa Fe Railway (hereinafter referred to as the 'Carrier') violated Rule 40 of the Controlling Agreement, Form 2642-A Std., as amended, between the Atchison, Topeka and Santa Fe Railway and its Employees represented by the International Association of Machinists and Aerospace Workers (hereinafter referred to as the 'Organization') when it wrongfully and unjustly dismissed Belen, New Mexico Machinist R. J. Garcia (hereinafter referred to as the 'Claimant') cited in violation of various Carrier Rules for allegedly having consumed an alcoholic beverage on May 20, 1996 before reporting for duty.

Accordingly, we request that for this improper discipline, he be compensated for all lost time and benefits as provided for in Rule 40 (i) of the Controlling Agreement, as amended. Additionally, we request that all records and reference to this matter be removed from his personal 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 was dismissed from the service of the Carrier on June 14, 1996 as a result of an Investigation held on June 5, 1996. The Carrier found the Claimant violated numerous Rules.

The letter of dismissal reads:

"This letter will confirm that as a result of formal investigation on June 5, 1996, concerning your possible violation of Rules 1.1, 1.1.1, 1.3.1, 1.5, and 1.6 (Part 1), Safety Rules and General Responsibilities for All Employees, effective January 31, 1996, while on duty at Gallup, New Mexico, on May 20, 1996, you are issued a Level 6 dismissal from service for violation of rules, as quoted above."

The Rules that Carrier alleges the Claimant violated are as follows:

"1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

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1.1.1 Maintaining a Safe Course:

In case of doubt or uncertainty, take the safe course.

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1.3.1 Rules, Regulations, and Instruction

Safety Rules. Employees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form.

General Code of Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty.

Hazardous Materials. Employees who in any way handle hazardous materials must have a copy of the instructions or regulations for handling these materials. Employees must be familiar with and comply with these instructions or regulations.

Air Brakes. Employees whose duties are affected by air brake operation must have a copy of the rules and instructions for operating air brakes and train handling. Employees must know and obey these rules and instructions.

Timetable/Special Instructions. Employees whose duties are affected by the timetable/special instructions must have a current copy they can refer to while on duty.

Train Dispatchers and Control Operators. The train dispatchers and control operators must have a copy of rules and instructions for train dispatchers and control operators. They must be familiar with and obey those rules and instructions.

Classes. Employees must be familiar with and obey all rules, regulations and instructions and must attend required classes. They must pass the required examinations.

Explanation. Employees must ask their supervisor for an explanation of any rule, regulation or instruction they are unsure of.

Issued, Canceled, or Modified. Rules may be issued, canceled, or modified by track bulletin, general order, or special instructions.

* * * * *

1.5 Drugs and Alcohol: The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have

any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property."

Neither party to the dispute furnished the Board a copy of Rule 1.6 (Part 1).

The facts of the case as they appear in the transcript of the Investigation reveal Claimant was assigned to work from 8:00 A.M. until 5:00 P.M. at Gallup, New Mexico. On May 20, 1996 Claimant had completed the shift and had gone home. At some time between 6:10 P.M. and 6:20 P.M. Carrier's Trainmaster at Gallup called the Claimant to return to work to place pulse tapes on a locomotive. After placing the pulse tapes, the Trainmaster requested the Claimant to bring some spare tapes to the office. Claimant did as instructed. When the Claimant got to the office the Road Foreman, Engines and the Trainmaster were present. They told the Claimant that there was a dead locomotive that needed to be started. A discussion ensued as to how the Claimant was to be paid as the call was not to start a locomotive. Claimant left the office to go to the dead locomotive. After leaving the office, the Carrier's two officers agreed that they had smelled alcohol on the Claimant's breath, and they went to meet the Claimant at the locomotive. When confronted by the officers, Claimant admitted to having one beer after leaving work and before being called back.

The Carrier's officer ordered the Claimant to take a breathalyzer and urinalysis test. The result of the urinalysis was negative and the breathalyzer showed 0.007%, well below the FRA Standard of 0.02%. In fact such a low reading is generally considered unreliable.

The Organization argues the Carrier failed to prove the Claimant violated any of the Carrier Rules.

The Carrier points out that regardless of the test results Claimant admitted to having a beer. It also argues that this was Claimant's second violation of Rule 1.5 in as much as Claimant had tested positive in April 1990, and also had received demerits. However, Carrier failed to furnish this Board with a copy of Claimant's Personal Record.

This Board finds that the Carrier failed to prove the Claimant violated any of the cited Rules except Rule 1.5. Claimant by his own admission proved the violation of the Rule. Also, this Board is cognizant of the importance of employees not using alcohol while on duty or subject to duty. However, in this case Claimant had finished the normal workday. While having a beer before being recalled to work is a violation of the Rule, the Carrier's action in this case was harsh.

The Claimant who has 17 years of service is ordered to be reinstated with seniority unimpaired, but without pay for time lost.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an 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 18th day of May 1998.