

Award No. 4533

Docket No. 4489

2-B&O-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement Carman M. T. Tumminello was unjustly treated when removed from service through capricious and discriminatory actions by the Carrier on December 4, 1961.

(2) That accordingly the Carrier be ordered to reinstate M. T. Tumminello with all rights unimpaired and he be compensated for all time lost and made whole for all other rights provided for in the Collective Bargaining Agreement.

EMPLOYES' STATEMENT OF FACTS: On December 4, 1961, Carman M. T. Tumminello, hereafter referred to as the claimant, reported for work at 11:00 P. M. at the Baileys Shop, Baltimore, Maryland on the Baltimore & Ohio Railroad, hereafter referred to as the carrier. He was given a time card and instructed as to his duties by Foreman J. Cox. The claimant proceeded to perform these duties by going to the passenger station and inspecting and making brake test on train #12.

At 11:40 P. M. the claimant voluntarily went to the University Hospital with Foreman Cox and B&O Patrolman J. N. Collins for the purpose of having a blood test made to determine the alcohol content. This was done with the permission of the claimant. There was no hostilities between the foreman and the claimant.

The blood samples were taken by a doctor at University Hospital and turned over to Foreman Cox. The claimant was sent home.

The B&O Medical Examiner, Dr. Drozd reported that the alcohol concentration was 0.24 mg.

Under date of December 5, 1961 notice was sent to the claimant to appear at Baileys Shop at 8:00 A. M. December 8, 1961, for a hearing on the

comply with Article 15 that a written charge be made by a witness to the incident giving rise to the discipline. It was the Carrier acting through its officials and not the foreman who initiated the charge in the proceedings against claimant. Notice of the precise charge was given to him in sufficient compliance with the investigation rule.

With respect to employees' second contention from the testimony adduced at the hearing and reasonable inference to be drawn therefrom, there was a substantial basis for a conclusion that claimant was in an intoxicated condition while on duty. Whether in the first instance, we would have reached the same conclusion therefrom, is not material to our findings. In any event, without indicating agreement or disagreement therewith, there are awards of this Division which held that it is a violation of Rule 'G' to indulge in the use of intoxicants whether on or off duty.

The employees' third contention is without merit upon the facts appearing in this record. At the hearing the claimant was asked if he desired any witnesses at the investigation and he replied in the negative. Where, as here, carrier calls sufficient witnesses to fully determine the facts, if the claimant desires to question any additional persons, the burden is upon him to request their presence. (See Awards 13204, 13207).

Here claimant was afforded a fair hearing and the Carrier's action was not arbitrary. We, therefore, find that the claim should be denied."

In First Division Award 15367 (BRT v B&O) claim for restoration with back pay was denied with the following holdings in part:

"Claimant contends in his dismissal he was not given a fair hearing as provided in Rule 7 and was not proven guilty of violating Rule G.

On the first proposition claimant raises the question of failure of carrier to call certain witnesses. Claimant was asked at the start of the hearing if he desired the presence of any witnesses at the investigation and replied: 'Only those present.' And at the close of the hearing no exception was taken with reference to the method of conducting the same. In view of these facts claimant is now estopped from raising this question. See award on a similar fact situation involving this carrier and the Brotherhood of Railroad Trainmen, Award 13606.

On the question of violation of Rule G there is substantial evidence in the record to support the charge made. It cannot be said that carrier acted arbitrarily or capriciously in this dismissal."

CONCLUSION: In this case the petitioner was properly dismissed from the service of this carrier. His actions while on duty on December 4, 1961, were unconscionable. His actions could not and cannot be condoned. The claim in this case in its entirety is without merit. The carrier respectfully requests that this division so hold and that the claim in its entirety be declined.

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 employe 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.

The Division finds that there is sufficient evidence in the record to support the disciplinary action which the Carrier imposed upon the Claimant.

The testimony of both the Assistant Foreman and the Carrier's Patrolman that the Claimant's manner of speech and physical demeanor indicated that he was under the influence of intoxicants, was buttressed and corroborated by the results of the hospital-administered blood test which found that the examined blood contained 0.24 mg of alcohol. The record indicates that there was some looseness in the handling and identification of the blood both prior to its testing and also while it was in the possession of the hospital. Dr. Adam's testimony, he being the Carrier surgeon, was hearsay with regard to Dr. Drozd's certification of the alcoholic content of the blood. However, both because timely objections were not made to certification of the results of the blood test, and because of the existence of corroborative evidence tending to show that claimant was under influence of intoxicants, the Division cannot accept the Petitioner's aforementioned objections.

The record is uncontroverted that the Carrier's officials were not motivated at any time by malice or animus toward the claimant.

The record further shows that the disciplinary sanction of discharge, is not only supported by the character of the proved offense, but also by the less than exemplary work record of the Claimant.

The total record of this case leaves the Division with no alternative but to uphold the Carrier's disciplinary action and deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June, 1964.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4533

The majority erroneously found that the charge against the claimant was proven. In Award No. 4533 the majority states that:

"The record indicates that there was some looseness in the handling and identification of the blood both prior to its testing and also while it was in the possession of the hospital. Dr. Adam's testimony, he being the Carrier surgeon, was hearsay with regard to

Dr. Drozd's certification of the alcoholic content of the blood. However, both because timely objections were not made to certification of the results of the blood test, and because of the existence of corroborative evidence tending to show that claimant was under influence of intoxicants, the Division cannot accept the Petitioner's aforementioned objections."

Due to the lack of proper certification that the blood sample tested by the hospital was blood of the claimant, there is no probative evidence in the record that the claimant was on duty in an intoxicated condition as charged.

The majority further states that:

"The record is uncontroverted that the Carrier's officials were not motivated at any time by malice or animus toward the Claimant."

The record further reveals that the principal witnesses, Foreman Cox and Patrolman Collins, when asked by the investigating officer to explain the incident leading to the charge against the claimant, did not reveal the careless handling of the blood sample. It was not until cross-examined by a committeeman did Foreman Cox explain the handling of the blood sample which, according to the record, was not accurate.

Therefore, the record definitely indicates there was malice on the part of the carrier officials toward the claimant and Rule 32 of the existing agreement required an affirmative award.

C. E. Ragwell

T. E. Losey

E. J. McDermott

Robert E. Stenzinger

James B. Zink