



Award No. 5892

Docket No. 5851

2-WM-FO-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 30,
RAILWAY EMPLOYEES' DEPARTMENT, A.F.L.-C.I.O.
(FIREMEN & OILERS)**

WESTERN MARYLAND RAILWAY COMPANY

DISPUTE: Claim of Employees:

1. That under the current agreement, Turntable Operator C. W. Kindle was unjustly charged with reporting for duty under the influence of alcohol and penalized sixty (60) days actual suspension from service.
2. That accordingly the Carrier be ordered to compensate this employee for all wage loss.

EMPLOYEES' STATEMENT OF FACTS: In 1942 the Western Maryland Railway Company, hereinafter referred to as the carrier, employed Mr. C. W. Kindle, hereinafter referred to as the claimant, as a Painter Apprentice at Hagerstown, Maryland. Subsequently, on October 15, 1948, the claimant became a firemen & oiler employee at Hagerstown.

The claimant was assigned as a turntable operator, relief, Saturday through Wednesday, with Thursday and Friday as his rest days. On Friday, May 10, 1968, after having been off from work three days due to illness, he was called and requested to work the 11:00 P.M. to 7:00 A.M. shift in place of an employee who was off sick. The claimant drove his automobile to work, arriving at approximately 9:05 P.M., and as he was not feeling well, requested another employee to work in his place, which this employee could not do. At 11:00 P.M. that same evening he was brought into the office for questioning.

On May 13, 1968, Mr. William M. Brewbaker, Jr., general foreman, charged the claimant with alleged violation of safety rule 2003—reporting for duty at 11:00 P.M. May 10, 1968 allegedly under the influence of alcohol beverage, and requested him to attend investigation at 9:00 A.M. on Thursday, May 16, 1968.

Formal investigation was held on May 16, 1968, as scheduled.

On June 13, 1968, Mr. William M. Brewbaker, Jr., advised the claimant that he was penalized sixty days actual suspension.

The following is quoted from Third Division Award 13643:

"Petitioner contends that Carrier improperly failed to call two individuals who were witnesses to the disputed incident. But since Carrier made a prima facie case against the Claimant, it was Claimant's responsibility to call such additional witnesses as he deemed necessary to provide an adequate defense. If Claimant did not become aware of the existence of additional witnesses until after the investigation began, he could have availed him of the right provided in Rule 17 to obtain adjournment of the hearing pending the availability of such witnesses. No adjournment request was made, however."

In Fourth Division Award 899 the Board ruled:

"There is no rule in the effective agreement stating that the Carrier should call any witnesses demanded by the employees and pay them for lost time. If witnesses are needed in defense of an employee to produce such witnesses in order to establish a proper defense of the charge."

The carrier further asserts that the absence of the three persons in no way prejudiced the claimant's position. The most favorable testimony they could have given would be to corroborate the claimant's statement and since the discipline was based on conclusive evidence, additional witnesses could not have changed the decision. The board has firmly established the principle that it will not weigh evidence based upon the number or credibility of witnesses.

The statement by Committeeman Jordan at the investigation to the effect that it has been the procedure for the company to call all witnesses requested by the organization is incorrect, as evidenced by Award 5167.

The investigation granted Mr. Kindle was conducted in a fair and impartial manner and in accordance with agreement requirements. The notice to appear was sufficient and duly apprised him of the charge. He was represented by the general chairman and a committeeman of his craft and class, and was given full opportunity to present his defense to the charge.

III—SIXTY DAYS SUSPENSION WAS WARRANTED.

The carrier has presented ample evidence that the claimant was under the influence of intoxicants when he reported for work in violation of rule 2003. The offense was a serious one and severe disciplinary action was necessary. In consideration of the seriousness of the offense and the claimant's 26 years of service with the company, 60 days suspension was neither arbitrary nor unreasonable.

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 waived right of appearance at hearing thereon.

Claimant, a Turntable Operator, received a sixty (60) day suspension from Carrier for being in violation of Rule 2003, which reads: "The use of intoxicants or narcotics is prohibited."

The Organization's position is that there were procedural defects in regard to the hearing, namely: (a) Claimant was not afforded a fair trial because Carrier refused to call witnesses as requested by Claimant; (b) that the hearing was not impartial because the attitude of the interrogating officer throughout the hearing was not only discriminating but also insulting as well; (c) that Claimant was denied a fair hearing because the Carrier's hearing officer, William M. Brewbaker, Jr., General Foreman, personally made the charge against Claimant, conducted the investigation and passed sentence on Claimant; and (d) Carrier's hearing officer refused to permit Claimant's representative to cross-examine Carrier's witnesses at the conclusion of their testimony.

In regard to the latter contention of the Organization, the record clearly shows that Carrier's presiding officer at the hearing, over the strenuous objections of Claimant's representatives, refused to allow said representatives to cross-examine a witness of Carrier, after said witness had testified. It is true that Claimant was permitted later to cross-examine each of Carrier's witnesses but it is undisputed that the hearing officer would have each of Carrier's witnesses testify partially on direct and then complete their direct testimony after each of the other Carrier witnesses had partially made their testimony on direct examination.

It is our judgment that said piece-meal method of testifying unequivocally violated Claimant's mandatory right to a fair trial or hearing in regard to the charge made against him. Carrier was required by the dictates of fair play to present Carrier's witnesses and have them testify in toto in regard to direct examination and then permit Claimant to cross-examine each such witness at the conclusion of the entire direct examination. Carrier if it desired to examine its witnesses further had the right to ask questions on re-direct examination of its witnesses after the direct examination and cross-examination were completed. But to break up a witness' direct examination into fragments by permitting other Carrier witnesses to testify partially on direct examination before having each witness conclude his direct examination would, in our opinion, sanction an unnecessary burden being placed on Claimant and or his representatives in attempting to achieve effective cross-examination. Fair play requires and dictates that procedures be not adopted or followed that would be partial or burdensome to either side.

Therefore, it is our opinion that Carrier denied Claimant the mandatory right to a fair trial by not completing its direct examination of a witness but interrupting each witness before completion of said direct examination and bringing in other witnesses to partially testify on each witness' direct examination, and thus this claim would be sustained.

It may be noted that a lucid and enlightening discussion of the importance of cross-examination at the conclusion of uninterrupted direct examination is set forth in this Board's Award No. 5336.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1970.

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