



**Award No. 5900**

**Docket No. 5801**

**2-B&O-CM-'70**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION No. 30, RAILWAY EMPLOYES'  
DEPARTMENT, A. F. L.-C. I. O.  
(CARMEN)**

**THE BALTIMORE AND OHIO RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

- (1) That Car Inspector Earl E. Simmons, hereafter referred to as the claimant, was unjustly dismissed from the service of The Baltimore and Ohio Railroad Company, hereafter referred to as the carrier, July 5, 1968, for capricious and discriminatory reasons.
- (2) That accordingly the carrier be ordered to reinstate the claimant with full service and seniority rights 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 July 5, 1968, at approximately 4:00 P.M., claimant was handed a notice on the job by General Car Foreman Soummers to "report at Gen. Car Foreman office Chillicothe, O. at 9:00 A.M. on Tuesday July 16, 1968 for hearing on the following matter: In "connection with being under the influence of alcohol Friday, July 5, 1968 at 3:27 P.M. while on duty and on company premises."

At the same time on July 5, claimant was handed a notice relieving him from service as of that moment by General Car Foreman Soummers.

On July 15 a notice was sent to claimant cancelling the first notice and setting a new date for hearing on July 23, 1968.

On July 16 a notice was sent to Car Inspector L. D. Tolbert to report, as a witness, to the hearing on July 23, 1968. This is the first and only notice Mr. Tolbert received to appear at the hearing involving the claimant.

On July 22 a notice was sent to the claimant cancelling the July 23 hearing and rescheduling it for July 30, 1968.

On July 29 a notice was sent to Car Inspector H. D. Diehl to report, as a witness, to the hearing on July 30, 1968. This is the first and only notice Mr. Diehl received to appear at the hearing involving the claimant.

and Mr. O'Brien in connection with his unsteadiness in walking and his dazed and glassy-eyed appearance was, "I don't know why these men testified that way." The Claimant also stated that he was taking some type of pain pill in connection with an alleged injury to his shoulder; however, he failed to introduce any documentary evidence which would substantiate his statements.

Carrier's representative conducting the investigation was eminently fair and impartial, and the records reveal that he sought only the truth. He was able to note the demeanor of the claimant and give appropriate consideration of all the facts in making a determination of the guilt or innocence of the claimant.

#### CONCLUSION:

The carrier has shown:

- (1) The Claimant was at fault for being under the influence of alcohol at approximately 3:26 P.M. July 5, 1968, while on duty and on company property.
- (2) There was no showing of arbitrariness, capriciousness or bad faith on the part of the Carrier.
- (3) That the investigation and imposition of dismissal fully met all procedural requirements of the agreement and awards of the Board.
- (4) That in view of the testimony adduced at the investigation and the seriousness of the offence, the discipline imposed was fully warranted.
- (5) That the claim is without merit and should be denied in its entirety.

All data herein submitted in support of Carrier's position has been presented to the Employees or duly authorized representatives thereof and made a part of the question in dispute.

**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 was fully apprised of the charges filed against him, and good reasons were given to explain the need on two occasions to reschedule the hearings. Neither is the 25 days interval between the occurrence and the hearing an unreasonable delay, nor is there a convincing showing that the claimant was prejudiced thereby. It is plainly evident that claimant was afforded a fair hearing in accordance with the requirements of Rule 32.

Significantly, it was the observations of a fellow employee that alerted Management to the possibility that claimant was not in suitable physical condition to perform his duties as a Car Inspector. The testimony given at the investigation by Soummers, O'Brien and Diehl conclusively establishes that claimant was under the influence of alcohol on the date he was taken out of service pending a hearing. Accordingly, claimant stands guilty as charged, and he is subject to appropriate discipline.

3 On the subject of a suitable penalty, it is to claimant's credit, that except for the instant infraction, his service record covering some 15 years of employment, is free from any disciplinary notations. (His clean record and substantial seniority warrants that a form of punishment, milder than discharge, be imposed for this first offense.)

4 That is not to say that his conduct is condoned by the circumstances that on the date of this incident his wife gave birth to their twelfth child, and his oldest son reached the age of fifteen. These two auspicious family milestones do not excuse his irresponsibility in starting to celebrate before reporting for work.

5 Certainly, there is no justification for any back pay award. On the other hand, claimant's reinstatement on a leniency basis will serve to impress him with the seriousness of his escapade.

#### A W A R D

That Car Inspector Earl E. Simmons shall be reinstated to his former job with his seniority and vacation rights unimpaired but without back pay for any wage loss incurred by him during the period extending from July 5, 1968 up to the date of his reinstatement.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

ATTEST: E. A. Killeen  
Executive Secretary

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

## DISSENT OF CARRIER MEMBERS TO AWARD NO. 5900

As pointed out in many Awards of this Division, and others, it is the established policy that the Board will not substitute its judgment for that of the Carrier and it is the duty of the Board to leave the Carrier's findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion. Here, the majority stated:

"The testimony given at the investigation by Soummers, O'Brien and Diehl conclusively establishes that claimant was under the influence of alcohol on the date he was taken out of service pending a hearing. Accordingly, claimant stands guilty as charged, and he is subject to appropriate discipline." (Emphasis added)

Yet despite this statement reinstated him to his former job. Violation of Rule "G" is a very serious offense.

Also, the majority stated:

"On the other hand, claimant's reinstatement on a leniency basis will serve to impress him with the seriousness of his escapade." (Emphasis added)

This Division has consistently held that leniency is strictly a matter of management's prerogative and not within the province of a neutral. We believe the majority erred in this Award.

H. F. M. Braidwood

W. R. Harris

P. R. Humphreys

J. R. Mathieu

H. S. Tansley