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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6398
SECOND DIVISION Docket No. 6211
2-L&N-MA-'72

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

Parties to Dispute: (System Federation No. 91, Railway Employes' Department, A. F. of L. - C. I. O. (Machinists)
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

(a) That under the current agreement, Mechanized Equipment Mechanic C. A. McKeehan, hereinafter called the Claimant, was unjustly dismissed by the Louisville & Nashville Railroad, hereinafter called the Carrier, on October 2, 1970.

(b) That accordingly, the Carrier be ordered to reinstate the Claimant with his former seniority and all other rights unimpaired and with pay for all time lost since his dismissal on October 2, 1970.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, a Mechanized Equipment Mechanic at Carrier's K and A Division, Knoxville, Tennessee, who had completed more than twenty-eight (28) years of employment with the Carrier, was dismissed from service on October 2, 1970. He was held to have, on September 2 and 3, 1970, violated Rule "G" of Carrier's Rules and Instructions of the Maintenance of Way Department. Said Rule reads:

> "G. The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited, and will subject the offender to dismissal."

The Petitioner challenges the determination of the Carrier, claiming that the charges were not proved and that therefore the basic requirements and intent of

Rule 34 of the Controlling Agreement, namely "No employee shall be disciplined before a fair hearing by designated officers of the carrier...", were not met.

There is probably no subject area for which there has been accorded greater attention and review by all Divisions of this Board than that of discipline and discharge of employees covered by the Controlling Agreements. In our many Awards, we have laid down principles and concepts which should serve as guidelines to the parties to the agreements in the application and interpretation of provisions relative to this topic. In recognition of the Industry's obligation to provide safe, economical and prompt transportation of passengers and goods, we have afforded Carriers great latitude in enforcing reasonable rules and regulations for employee conduct. In doing so, however, we have expected that the employees will be treated fairly and equitably by the Carriers and their agents. In our recent Award 6368, we set forth the Awards and decisions underlying our considerations in these matters. Most applicable to the instant case are the following:

In First Division Award 16785 (Loring) it was stated:

> "In these investigations as to whether a discharge was wrongful, the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case or even by a preponderance of evidence as does the party having the burden of proof in a civil case. The rule is that there must be substantial evidence in support of the Carrier's action."

The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Consol. Ed. Co. vs. Labor Board 305 U.S. 197, 229)"

With this before us, we reviewed the record herein. The transcript of hearing on the property shows that there were five witnesses called by the Carrier. Three of them were in contact with the claimant on September 2, 1970. Two of them worked closely with him through most of the seven a.m. to four P.M. shift. They testified that he was not his usual self, that he staggered at times and that his speech was "blurry". One witness stated that he smelled no odor of alcohol, the other, stating that he was a teetotler and unfamiliar with the scent, was pressed by the hearing officer to aver that he smelled something similar to anti-freeze on the claimant. The third witness, who is the Mechanical Equipment Supervisor, did not observe claimant until mid-point in the shift. He detected no odor indicating the presence of spiritous liquor in connection with the grievant. Most significant is the fact that although he was led by the hearing officer to testify that he didn't think the claimant was in a condition to perform his duties in an efficient and workmanlike manner, he did not question the claimant, and made no effort whatsoever to ascertain what was wrong. Despite his observation that claimant was not "normal" and his speech not coherent, he permitted him to continue to work on a job which entailed some hazard to claimant and the crew working with him.

Four of the carrier witnesses were in contact with claimant on September 3, 1970. One who worked with him the entire shift, observed nothing wrong. The other in the same crew recited that claimant's actions were comparable to those of the previous day but there were no odors which could be considered as related to the untoward mannerisms described. Two supervisory employees stated that their observations led them to consider the claimant incapable of properly performing his work. They both alleged that they smelled alcohol or "something like it" on him. The Lead Equipment Mechanic made a comment to the claimant indicating discontent with his alleged actions and condition, but did nothing further about his concerns.

The Assistant Division Engineer was also dissatisfied with the fact that claimant was "going about his work in a mixed up manner,..." his speech was not making good sense, it was rapid and jerky" and had the smell of whiskey about him. He did not, according to the record, confer with the claimant to establish what was causing the supposedly disabling conduct, and permitted him to continue to work, apparently not too concerned that a dangerous circumstance could be the consequence if his allegations were valid.

Although we have stated in Awards too numerous to cite, that we will not determine the credibility of witnesses, we must, however, in effectuating the above substantial evidence rules, require that the record disclose that there was such "evidence as a reasonable mind might accept as adequate to support a conclusion". The obvious contradictions in testimony by witnesses called by the Carrier and the total disregard of the grievant's claim to be suffering from a minor illness to which attributed the possible disturbing appearance on the days in question, must lead to a holding that the hearing officer did not meet the prescription of the substantial evidence rule.

We find, based on the above, that the dismissal from the service of an employee with twenty-eight years of service, was not reasonable and order claimant restored to his position with the Carrier with all rights unimpaired and pay for all time lost, less earnings he may have had between October 2, 1970 and the date he is recalled to commence work.

A W A R D

Claim sustained to the extent set forth in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October, 1972.