

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

Parties to Dispute: ( System Federation No. 76, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Freight Car Welder, James A. Balom was unjustly dismissed from service on February 19, 1975.
2. Freight Car Welder James A. Balom was erroneously charged with being under the influence of alcohol while on duty January 8, 1975.
3. That the Chicago and North Western Transportation Company be ordered to reinstate Mr. Balom for all time lost at eight hours per day, with seniority unimpaired, plus any other benefits he would be entitled to as per Rule 35.

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 waived right of appearance at hearing thereon.

Claimant was dismissed from service on February 19, 1975, for "your responsibility for violation of Rule G in that you were under the influence of alcohol while on duty January 8, 1975".

The first paragraph of Rule G of the General Regulations and Safety Rules reads as follows:

"The use of alcoholic beverages or narcotics by employes subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on company property is prohibited. The use or possession of alcoholic beverages or narcotics while on duty or on company property is prohibited."

The Organization's first defense is that the claimant was not afforded a fair and impartial hearing as required by Rule 35 of the controlling Agreement in that the Manager, Car Department Passenger (1) initiated the charge, (2) acted as a witness during the investigation, and (3) rendered the decision and assessed the penalty.

Many previous Awards have explored and ruled on this question, but with such a diversity of findings that this Board determines that the particular circumstances involved are of paramount importance, rather than a general procedural rule which can be applied. In the present case, this Board finds no fatal procedural defect, on two grounds. First, the Manager, Car Department Passenger was acting in his proper supervisory capacity in relation to the claimant when he initiated the charge and then later when he signed the disciplinary notice. At the hearing, however, he was not the conducting officer and he was only one of several witnesses. Except as to the introduction of a written statement by another Carrier representative, no other claim was made that the hearing itself was other than fair and impartial.

Second, as will be shown below, in this matter there is virtually no dispute as to the facts presented at the hearing. Thus, the claimant cannot be said to be prejudiced as to the hearing itself.

As to the introduction of a sworn statement at the hearing without the presence and testimony of the signer of the statement, this Board finds it unnecessary to rule in view of its conclusions below.

What is basically at issue in this matter is the validity of the charge leading to the claimant's dismissal, as weighed against the record presented to this Board.

Drawn from the record of the investigative hearing, the following facts in chronological sequence are undisputed:

Claimant had been drinking "beer and mostly beer" during much of the night prior to the work day in question. At 8 a.m., he reported for duty and performed his regular work for four hours, without drawing any special notice from his direct supervisors. At noontime, he was summoned to the office and at least three of the Carrier's officials (omitting for the moment one whose impressions were reported through a statement) found by direct observation that the claimant had extremely offensive breath indicative of alcoholic intake, had bloodshot eyes, and spoke in a hesitant manner. Claimant had been called to the office to discuss an unrelated previous disciplinary matter.

Based on these facts, the Carrier dismissed the claimant from service for being "under the influence of alcohol while on duty," as specified in Rule G.

The claimant in his defense freely admitted to having consumed a large quantity of alcoholic beverages the night before. He attributed bloodshot eyes to a condition common among welders, and his slow speech to a nervousness caused by his discussion of a previous disciplinary matter with his superiors.

The Carrier rests its case solely on claimant's "being under the influence" of alcoholic beverages--nothing more. This Board does not dispute the ability of supervisors without specialized medical training to recognize this condition in an employee while at work. But what was actually observed in this instance?

The pertinent definition of "influence" (from Webster's Third New International Dictionary, 1971) is "the power or capacity of causing an effect in indirect or intangible ways"; the Dictionary gives as the prime example of this meaning, "under the influence of liquor".

There is no question that the claimant had been drinking prior to reporting to duty; he admitted it. There is no doubt that his breath so indicated. The observation of bloodshot eyes and slow speech does not seem decisive as to "influence" at the time observed. The explanation given for these conditions by the claimant may or may not have been valid but in any case these are not conclusive.

What this Board does find conclusive is that claimant performed his normal work for four hours, for which time no evidence was presented to indicate that he was "under the influence". There was no evidence such as frequently found in other instances of this kind--inability to follow instructions, unsteady gait, uncharacteristically poor work, or simply "laying down" on the job.

A parallel may be drawn: an employee may report to work after consuming an enormous, highly spiced meal. His breath might be revolting, but his work unaffected. He could not be said to be "under the influence" of his hearty repast. Alternatively, the same well fed employee may come to work in the same circumstances and immediately become violently sick to his stomach and require medical attention. Clearly, in this case he is "under the influence" of his feast.

This Board finds, in sum, that the record fails to prove that the claimant was guilty of a violation of the prohibition in the second sentence of Rule G. The claimant is to be restored to service with seniority unimpaired. He shall be paid for all regular time lost, less any and all earnings from other sources during the same period. On this point the Board follows the reasoning of Award No. 1638 (Carter). Further, payment for time lost, if any, shall not be made unless claimant accepts the offered reinstatement to work with Carrier.

Form 1  
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Award No. 7187  
Docket No. 7028  
2-C&NW-CM-'76

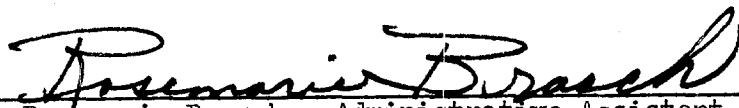
A W A R D

Claim is sustained as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of November, 1976.