Form 1 RECEIVED NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7937
JUN 4 1979 SECOND DIVISION Docket No. 7721
2-C&NW-CM-' 79

J. W. GOHMANN

The Second Division consisted of the regular members and in addition Referee Robert A. Franden when award was rendered.

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

Dispute: Claim of Employes:

1. Freight Car Inspector Steven J. Gross was unjustly withheld from service beginning January 1, 1977, and was subsequently dismissed from service on January 19, 1977.

2. Freight Car Inspector Steven J. Gross was erroneously charged with being under the influence of an alcoholic beverage when reporting for duty on January 1, 1977.

3. That the Chicago and North Western Transportation Company be ordered to reinstate Freight Car Inspector Steven J. Gross, with seniority unimpaired, and compensate him for all time lost, beginning January 1, 1977, as well as make him whole for any loss of benefits he may have suffered during the time he was unjustly withheld from service.

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 discharged by Carrier following his allegedly reporting for duty "under the influence of alcohol" on New Year's Eve - during his tour of duty which extended into January 1, 1977.

The Organization argues that Carrier did not prove Claimant guilty of the charge, which was "being under the influence of an alcoholic beverage when reporting for duty as a car inspector, Wolf Road, at 1:15 A.M., January 1, 1977". It is argued that none of the testimony of Carrier's

three witnesses established that Claimant's behavior and demeanor showed that he was "under the influence". The Organization cites Second Division Award 7187, between these same parties, which held in relevant part:

> "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 wats'; 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 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.
>
> ...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 the claimant was guilty of the prohibition in the second sentence of Rule G. The claimant is to be returned to service with seniority unimpaired. He shall be paid for all regular time lost..."

Notwithstanding the fact that this decision was cited by the Organization during the handling on the property and in their submission, the Carrier never chose to respond to it. Rather, in Carrier's very brief presentation to this Board, both in their submission and rebuttal, they simply briefly outlined the evidence in the transcript and concluded, without citing any authority for such a conclusion, that the Claimant here was guilty of a breach of Carrier's Rule G, after having been charged with "being under the influence of an alcoholic beverage." Carrier's Rule G provides 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 alocholic beverages or narcotics while on duty or on Company property is prohibited."

Notwithstanding the brevity of Carrier's written presentation to this Board, we have thoroughly reviewed the transcript of this case as well as authority on the subject matter here involved. Claimant here was charged only with being under the influence of an alcoholic beverage while on duty, and in accordance with well established principles, our review of the record can extend no further than to determine whether substantial evidence exists to support this charge, and this charge alone.

The evidence of record does indicate that Claimant admitted to having a drink at dinner time. Other testimony of Carrier's operating department officers indicated that Claimant's eyes were irritated, and there was an odor of alcohol coming from Claimant's breath. Also, the General Car Foreman stated he observed Claimant's speech was, at times, a bit slurry. However, other than this evidence, there does not seem to be any other symptoms of "being under the influence" present in this case. For example, Carrier's Trainmaster Wilkinson testified, in response to a question:

"Q. Was Mr. Goss stumbling or incoherent at the time you interviewed him?

A. No, he wasn't stumbling or incoherent. His eyes appeared to be very blood shot and he was very insistent about the reason he was late for work."

Based on this, as well as other testimony, we conclude that there is a sufficiency of substantial evidence in the transcript to establish the fact that Claimant was, at the time of his confrontation, "under the influence of an alcoholic beverage". While we do not quarrel with the findings of Award 7187, between these same parties, we find that in this case, more evidence of probative value exists to establish the condition of the Claimant. Notwithstanding the fact that Claimant's condition was not verified by a laboratory finding, the effect of the use of either intoxicants or narcotics is well known, and expert verification is not required where a sufficiency of evidence exists for a layman to make a valid, objective determination. (Award 7405, Second Division).

We next turn to the appropriateness of the discharge penalty. Against Carrier's asserted policy of discharge (and later, reconsideration of an individual's case) for the first offense of Rule G (which we do not quarrel with in proper cases), we must consider both the gravity of the offense in this case as well as Claimant's previous record. It is true that Claimant

was a short term employe when this incident occurred, however, we cannot find reference to any previous discipline or cautionary letters against Claimant, nor can we find (or is it argued) that Claimant had a drinking problem. Further, aside from the evidence herein before reviewed, there were no other obvious signs of intoxication which would substantiate a serious breach by the Claimant.

Based on the foregoing, and considering the purpose of discipline, we find the discipline assessed was excessive. We conclude that while in exercising due precaution, management was justified in not permitting the Claimant to work on the night in question or pending the hearing, the discharge was excessive and should be converted to a six (6) month suspension without pay. Claimant is to be compensated in accordance with Rule 35 of the agreement for all time held out of service beyond six (6) months after his discharge, and he should be reinstated to service.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of May, 1979.

CARRIER MEMBERS DISSENT TO SECOND DIVISION AWARD 7937 - DOCKET 7721

(Referee Robert Franden)

In holding that being under the influence of alcoholic beverages was not a "serious breach" because there was no previous discipline nor evidence of a drinking problem, the majority seriously underestimates the tragic consequences of a lax enforcement of "Rule G", serious and tragic consequences which can mean train wrecks, personal injury to employes and, in general, a threat to the well being and safety of railroad employes and the general public. It is for this reason that the rail industry has, historically, taken the enforcement of "Rule G" seriously and assessed severe, but necessary penalties, including dismissal, for those employees found guilty of Rule G infractions, regardless of their length of service or previous records. While "progressive discipline" may in many instances be appropriate for lesser offenses, such as absenteeism or tardiness, it is certainly not appropriate for an employee found guilty of "rule G" who, in essence, is threatening the safety of himself and his fellow employees by working around trains or moving equipment while not in full and sober control of his faculties.

Several Carriers now have "employee assistance programs" to aid employes with alcoholic tendencies, and many employes have voluntarily presented themselves to these programs for assistance with their problems without the threat of disciplinary action. However, these programs are not within the scope of the collective bargaining agreements and the Board has now authority to intermingle the two processes aside from suggesting to the possibly alcoholic

dismissed employee that his voluatary submission to the program might be in his best interests if he seeks, ever, to return to his job with the railroad (See Second Division Awards 7613 and 7636, among others).

In this case, given the foregoing, the Majority should have let the discipline stand instead of substituting it's judgment for that of the Carrier. Carriers have a tremendous responsibility for the saftety of their employes and the general public, and we feel the majority erred when it imposed its' judgment of what, in this case, seemed to be an appropriate measure of discipline to the majority. It is the employes and general public that suffer from accidents and injury caused by the use of alcohol on the job, and the rail carriers should be granted full latitude in taking appropriate measures to protect all concerned from such tragic possibilities.

It is for these reasons that we must dissent.

J. W. Gohmann

B. K. Tucker

J. E. Mason

G. H. Vernon

P. V. Varga