

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. 22, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { St. Louis-San Francisco Railway Company

Dispute: Claim of Employees:

1. That the St. Louis-San Francisco Railway Company unjustly withheld Carman Helper Robert A. Brake, Springfield, Missouri, from service on July 1, 1977, and subsequently dismissed him following an investigation conducted on July 15, 1977, in violation of the controlling Agreement.
2. That the St. Louis-San Francisco Railway Company deprived Carman Helper Robert A. Brake of a fair hearing, in violation of the controlling Agreement.
3. That Carman Helper Robert A. Brake be restored to service with all seniority rights, vacation rights and benefits that are a condition of his employment; that he be compensated for all lost time plus 6% annual interest; that he be reimbursed for all losses sustained because of loss of coverage under health and welfare and life insurance agreements during the time he has been held out of 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 appeared at an investigative hearing on July 15, 1977, in reference to his "alleged possession of intoxicants and narcotics while on your assigned duty". Following the hearing, the Claimant received the following notice of disciplinary action dated July 25, 1979:

"As a result of formal investigation conducted with you July 15, 1977 concerning your responsibility in connection with your alleged possession of intoxicants and narcotics while on your assigned duty, July 1, 1977.

This is a violation of Rule 'G' of the Rules, Regulations, Safety Rules and Instructions governing Mechanical Department Employees, Form MP-1 Standard, Effective March 1, 1957.

From facts developed in the investigation, you are hereby dismissed from service of the St. Louis San Francisco Railway Company."

The Board finds, at the outset, that the Claimant received a fair hearing as referred by Rule 35(a). Despite the sharp contentions between the hearing officer and the Organization's representative, as demonstrated in the record, the Claimant was afforded ample opportunity for the presentation of his defense.

Upon arriving for work, Claimant's vehicle (a van) and the vehicle of another employee were involved in a collision in Carrier's parking lot prior to the start of the employees' shift.

On behalf of the Claimant, the Organization alleges that Claimant reported for duty and shortly thereafter was summoned back to the scene of the accident. Before returning, it is alleged that the Claimant talked with his foreman, indicated he was "shaken-up, upset and nauseated as a result of the collision," and was then removed from service at his request to be examined by a physician. This was not contradicted by the Carrier. (This examination occurred during that day, at which time the physician released the Claimant for duty.)

When the Claimant returned to the accident scene, a Special Agent, who had been summoned, reported (later) that the Claimant "appeared to be in a very relaxed condition, the pupils of his eyes appeared dilated and he was acting strange". Allegedly, the Claimant admitted to the Special Agent to being "strung out". The Special Agent, accompanied by another Special Agent, requested and received from the Claimant permission to look into his van. Within the vehicle, the Special Agents found what laboratory tests showed to be as marijuana; a bottle of whiskey with "one inch" left in the bottle; and another whiskey bottle "with a few drops left".

On the basis of this and the hearing record, the Claimant was dismissed from service.

The Board takes particular note of the charge against the Claimant: "possession of intoxicants and narcotics while on your assigned duty" as a violation of Rule G.

As quoted by the Carrier, Rule G provides:

"The use or possession of intoxicants or narcotics is prohibited."

Rule 35(a) requires that an employe subject to investigation be "apprized in writing of the precise charge". Clearly the charge was confined solely to this point, and on this the Carrier's disciplinary actions must stand or fall.

In the Board's judgment, the charge is not proven. The Special Agent's opinion as to the Claimant's condition is not pertinent to "possession" (and, incidently, was an opinion rendered shortly after the Claimant was involved in a traumatic accident). At the time of the search of the van, Claimant had been released from duty and, further, the presence of the items found in the van do not constitute "possession" while on duty. The Board found similarly in Third Division Award No. 15023 (Hamilton), in which under different particular circumstances, the Board held:

"The fact that the bottle (of wine) was ultimately removed from ... (Claimant's) locked automobile, negates any argument that the Claimant had the intoxicant in his possession, while on duty."

The Carrier pursued a narrowly based charge. The hearing record did not produce evidence to sustain the charge. Allegations beyond the scope of the charge are immaterial.


The Board will sustain the claim, but the remedy is specifically limited to that provided in Rule 35(a), namely, reinstatement with seniority rights unimpaired and compensation for wage loss, if any, less amounts earned in other employment.

A W A R D

Claim 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 11th day of July, 1979.