

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

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 {
 { Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation be ordered to restore Machinist James O'Connor to service and compensate him for all pay lost up to time of restoration to service at the prevailing Machinists' rate of pay.
2. That Machinist James R. O'Connor be compensated for all insurance benefits, vacation benefits, Holiday benefits, and any other benefits that may have accrued and was lost during this period, in accordance with Rule J-1 (e) of the prevailing Agreement, which was effective April 1, 1976.

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 employees 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.

James R. O'Connor, the Claimant, was assigned as a Machinist in the Selkirk Yard with scheduled hours from 8 a.m. to 4 p.m. on June 16, 1978. While driving to work in his own car and after arriving on the property of the Carrier, O'Connor's automobile became involved in an accident with one of the Carrier's trains on the property. A fellow employe was in the automobile with O'Connor. Just prior to the collision between the train and the automobile, the fellow employe sought safety by jumping from the automobile, but instead, he was killed as a result of being caught between the train and the automobile and thus run over by the train.

As a result of the incident involving a fatality to one of the Carrier's employees, the Carrier suspended the Claimant and made him subject to an investigative hearing on the following charges:

- "1) For your failure to refrain from conduct which adversely affected your performance when on June 16, 1978 at approximately 7:55 AM you were involved in a collision in Selkirk Yard involving an automobile you were operating and Train Buck 15 and your subsequent arrest for driving under the influence of alcohol.
- 2) For your use and possession of alcoholic beverages and intoxicants on June 16, 1978.
- 3) For your failure to operate the motor vehicle in a safe manner while on Company property at approximately 7:55 A.M. June 16, 1978.
- 4) For your bringing discredit upon the Consolidated Rail Corporation by your involvement in a fatality to a Consolidated Rail Corporation employee at Selkirk Yard, June 16, 1978."

The investigation involved many witnesses called by the Carrier and the Organization, and it examined all aspects of the incident and the Claimant's relationship to it in great detail. Although considerable testimony and evidence was introduced into the hearing concerning matters not directly related to the Claimant as charged by the Organization, the hearing nevertheless afforded the Claimant and the Organization the fullest opportunity for defense, and none of the extraneous material introduced was unfairly prejudicial to the Claimant. The Board finds that the hearing was conducted in a fair, proper, and exemplary manner.

At the outset, it must be noted that the charges against the Claimant are of the most serious nature. Through testimony and evidence introduced at the investigative hearing, facts must be developed to support the charges against the Claimant if the Carrier is to find the employee guilty of the charges and subject to disciplinary action. The failure to develop such facts as support for the charges must result, of course, in a dismissal of the charges and the exoneration of the Claimant, as provided by the agreement between the Carrier and the Organization.

In this instance, the Carrier concluded that the investigative hearing supported all four of the charges, and the Claimant was therefore dismissed from service of the Carrier.

Upon careful examination of the entire record, the Board can find no support for the charges. While full weight must be given to the conclusions which may be drawn by the Carrier as a result of an investigative hearing, as well as to the Carrier's discretionary right to impose discipline where guilt is found, the Board in this instance must intervene with its judgment to find that Carrier's action was arbitrary and without proper foundation in the record.

A review of the charges shows that there are three components involved:

1. "... subsequent arrest for driving under the influence of alcohol" and "use and possession of alcoholic beverages and intoxicants on June 16, 1978."
2. "... failure to refrain from conduct which adversely affected your performance" during operation of the automobile and "failure to operate the motor vehicle in a safe manner while on Company property".
3. "... bringing discredit" on the Carrier by "involvement in a fatality" to a Carrier employee at the Selkirk Yard.

INFLUENCE OF ALCOHOL

The applicable Carrier rule here is Rule 4002, which states in part:

"Narcotic medication and/or alcoholic beverage must not be used while on duty or within 8 hours before reporting for duty."

The Carrier's argument is that the Claimant's conduct in permitting his auto to be hit by the train, showed that he was under the influence of alcohol. The Board finds this to be pure speculation. As agreed upon by a number of eye witnesses and the Claimant himself, he came to the first railroad track; stopped; proceeded to the second track; stopped extremely close to the track. Then the auto rolled forward slightly, whether due to Claimant's mistaken act or otherwise was not established. This put the auto close enough to the train for the auto to be caught by one of the cars of the train and dragged along with the train. There is no evidence that this occurred because the Claimant was under the influence of alcohol. As to direct observation, often given great weight in awards concerning alcoholic consumption, many witnesses from both the Carrier and the Organization testified that they observed the Claimant after the accident. No witness testified to any unusual behavior typical of someone who has been drinking; all found him normal, other than the obvious effect of shock and dismay following the accident. Police-administered breath test showed the Claimant below the level of presumed intoxication and the charge of driving while intoxicated (pending at the time of Claimant's dismissal) was later dismissed. The presence of an opened bottle of beer in the car was not shown to indicate that the Claimant had drunk from the bottle. There was no contradiction to his testimony that his companion drank some beer from the bottle. The presence of unopened bottles of beer in a cooler in the back of the auto likewise cannot be offered as proof that the Claimant was in violation of Rule 4002.

OPERATION OF THE VEHICLE

The Claimant was on Carrier property when the accident occurred, but he was not driving a Carrier vehicle and was not on duty. This has some significance. All witnesses agreed that the Claimant had stopped his car before reaching the track on which the train was approaching. This is not a case of a moving vehicle recklessly entering on to a train track. Witnesses agreed that after the Claimant stopped the auto, it rolled forward or moved forward, and the tragic result ensued. Exactly why or how did the auto move forward? There is no certain answer.

Rule 4394, quoted in the investigative hearing, states as follows:

"Vehicle driver must stop and determine that it is safe to cross railroad tracks, even though position of crossing gates or signals may not indicate that it is safe to do so."

A reasonable conclusion can be reached that this refers to operation of a Carrier vehicle. Assume however, that this can be made to include operation of a Personal vehicle on Carrier property. The Claimant, witnesses agree, did stop at the crossing. The impact with the train came after the auto rolled forward. Carrier has failed to provide evidence to show that the Claimant was recklessly and deliberately culpable in this instance, although he may well have made an operational error of some kind.

DISCREDIT ON THE CARRIER

As pointed out by the Carrier, the accident on Carrier property did generate a certain amount of news coverage. Nothing in the evidence suggests, however, that the image of the Carrier was affected. In the Board's view, something more than a subjective supposition by the Carrier is required. If the public perceived a picture of a "drunken" Carrier employe involved in an auto accident, that is not the employe's responsibility -- but rather the responsibility of those who, erroneously, made this charge. If the public is disturbed by an auto-train collision and thus think adversely of the Carrier, this instance was no different from other similar instances in which blame was not assigned to one of the victims or participants.

Understandably the Carrier reacted with shock and a deep concern following a fatal accident on its property taking the life of one of its employes. The remarkably thorough search to ascertain responsibility for the accident is commendable. In taking any disciplinary action, however, and particularly under the circumstances here, specific proof must be forthcoming. If it does not come forward, the resulting disciplinary action becomes arbitrary, unfair and unsupportable. As stated in First Division Award No. 20 471 (Anrod):

"It is firmly settled in the law of Labor Relations that, in discipline cases, the burden of proof squarely rests upon the employer convincingly to demonstrate that an employe is guilty of the offense upon which his disciplinary penalty is based. Mere suspicion is insufficient to take the place of such proof. This principle is so well established and so universally accepted in the industrial relations world as to require no detailed discussion."

A W A R D

Claim sustained. Claimant shall be restored to service and accorded compensation as specified in Rule J-1.

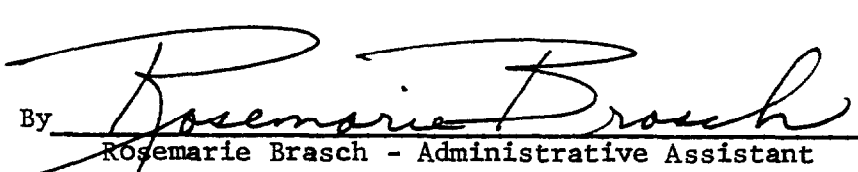
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Award No. 8471
Docket No. 8524
2-CR-MA-'80

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 8th day of October, 1980.