Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8904
SECOND DIVISION Docket No. 8855
2-CR-EW-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That the Consolidated Rail Corporation (ConRail) was arbitrary, capricious and unjust in their action of removing Electrician Robert Harrison from service on July 5, 1979, in violation of Rule 6-A-1.

2. That the Consolidated Rail Corporation (ConRail) was arbitrary, capricious and unjust in the subsequent dismissal from service of Electrician Robert Harrison on July 28, 1979.

3. That accordingly the Consolidated Rail Corporation (ConRail) be ordered to restore Electrician Robert Harrison to service with compensation for all wages lost along with seniority rights, insurance, vacation and all other benefits unimpaired as outlined in the controlling Agreement.

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.

The Claimant, an electrician, whose service date is September 29, 1976, was removed from service on July 5, 1979 after allegedly being observed drinking an alcoholic beverage (beer), on June 25, 1979, by an undercover police officer. The investigative trial, which had been postponed by mutual consent of the parties, was held on July 19, 1979. Pursuant to the results of this investigative trial the Claimant was dismissed from service on July 28, 1979 for his alleged violation of Rule 4002 of Maintenance of Equipment Safety Rules.

As in Award No. 8903 it was alleged by the Organization that since the allegedly rule breaking incident occurred on June 25th, while Claimant was not removed from service until July 5, 1979 and since Rule 6-A-1-(b) provides: "When a major offense has been committed, an employee ... may be held out of service ... only if their retention in service could be detrimental ...," it was, in effect, recognized by Carrier that Claimant had not been guilty of a major offense and was not a detriment to the work situation.

However, as the Board points out in Award No. 8903, Rule 6-A-1-(b) speaks in precatory rather than mandatory language. Its phrase is "may be held out of service ..." rather than "must be held out of service ...". Consequently a major offense might be committed with the Carrier electing not to hold the offending employee out of service. Therefore, when the Carrier makes such a choice it ought not be considered to thereby acknowledge, necessarily, that the offense is not a major or that the employee in question is not a detrimental influence in the work situation. There may be other reasons for not immediately removing such an employee from service. Such reasons may well have been present in this case since, because a considerable number of other employees were being disciplined at the same time that Claimant was being disciplined, Carrier had to provide replacements for such employees prior to removing them from service.

Again, as pointed out in Award No. 8903, authority supports an interpretation of Rule 6-A-1-(b) to the effect that it permits a holding out of service when a major offense has been committed, rather than demands it. See Award No. 1 of Public Law Board No. 2613, especially the relevant excerpt quoted therefrom in Award No. 8903.)

Another contention of the Organization is that aside from the inference, disposed of above, to the effect that Claimant's offense was not "major" and that he was not "detrimental" to the work situation because he was not removed from service until July 5th, although the alleged infraction of Rule 4002 took place on June 25th, the time lapse between these two dates was such as to prejudice Claimant's ability to defend against the charge brought against him. If from June 25th to July 5th Claimant is given no indication that he's being charged with an infraction, Organization contends, then when he is charged on July 5th he cannot readily recall those pertinent facts, surrounding the alleged incident on June 25th, which can be useful to his defense. This argument might be convincing if a greater period of time than the ten days between June 25th and July 5th had elapsed. However, in view of the relative brevity of this period it cannot be found that Claimant's ability to defend against the charge would be prejudiced in any significant fashion.

Carrier asserts that there is a straight conflict of testimony between the undercover police officer and Claimant regarding whether Claimant was drinking beer on the date, and at the time, in question. The officer testified that he directly observed Claimant so consuming alcoholic beverages and Carrier points out that the only evidence contravening this testimony is Claimant's self serving denial. Carrier further contends that it need prove its case only by substantial evidence and the determination by its officials to believe the police officer in preference to such self serving denials is not subject to review by this Board. As outlined in Award No. 8903, it is the Carrier's position that the Board frequently holds that, in a conflict of testimony situation at a disciplinary proceeding, the Carrier as the trier of facts, has the responsibility of resolving such conflict; the Board acting in an appellate role cannot disturb such findings which are grounded on competent and credible evidence. (See Award Nos. 1809 and 6372, of the Second Division, especially the excerpts from them cited in Award No. 8903.)

However, as indicated in Award No. 8903 the substantial character of the implicating testimony cannot be judged in a vacuum but, rather, assessed only in the context of all the evidence illuminated in the record. From this perspective the undercover officer's testimony loses cogency. The Board is left with the general sense that there is very little evidence to make out the violation which Claimant is alleged to have committed; not enough in any event to sustain the Carrier's burden of proof.

The officer testified that he saw Claimant drinking from a bottle of the shape of a typical beer bottle. However, under cross examination, the officer was unable to define what, exactly, a typical beer bottle shape was. The officer also testified that after he observed Claimant drinking from such a bottle the Claimant passed within two feet of him and had bloodshot eyes and smelled of alcohol. (In addition to the fact that these are standard indicia of inebriation, likely to be almost perfunctorily cited by someone charging another individual with being under the influence of alcohol, it should be pointed out that at least one of these signs is not really probative of the officer's assertion regarding Claimant's comsumption of this particular bottle of beer at 7:35 P.M. on June 25th. The one bottle of beer was not likely to produce the bloodshot eyes -- certainly not in the very short period of time between when the officer observed Claimant drinking from the bottle in question and when Claimant passed within two feet of him.) In any event, the officer would not definitively assert that the bottle from which he saw Claimant drinking contained alcohol. The furthest he would go was to testify that in his opinion it contained alcohol. The officer admitted that he did not smell or taste whatever remaining contents there might have been in the bottle after Claimant had discarded it into a waste receptacle. He said that he did not bother to retrieve this discarded bottle from the waste receptacle after Claimant had thrown it there. This seems especially curious in view of the fact that the officer testified that immediately upon discarding the bottle Claimant left the room. Thus, the officer could have obtained the bottle without arousing Claimant's suspicion as to his interest in it. It might be expected that one interested in proving that another had been consuming an alcoholic beverage might have followed such a simple procedure since it might well have provided clinching proof of such consumption. The officer testified that he tried to obtain the bottle in question but was unable to do so. However, he provides no explanation as to why he failed to do so.

In the context of all the evidence it cannot be said that there is enough probative material pointing toward Claimant's violation of Rule 4002 for this Board to conclude that Carrier has sustained the requisite burden of proof.

Claimant should be reinstated to service and the charge stricken from his record. He should also be compensated for the difference between the amount he would have earned, based on assigned working hours, had he not been dismissed, and the amount he earned while out of service. He should also be accorded all benefits such as insurance and vacation rights to which he would have been entitled had he not been dismissed.

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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 10th day of February, 1982.