

The Second Division consisted of the regular members and in addition Referee George V. Boyle 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 R. M. Heilman to service and compensate him for all pay lost up to time of restoration to service at the prevailing Machinist rate of pay.
2. That Machinist R. M. Heilman be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and were lost during this period, in accordance with Rule 7-A-1 (e) of the prevailing Agreement which was effective May 1, 1979.
3. The Consolidated Rail Corporation violated Rule 6-A-1 (a) and (b) of the prevailing Agreement effective May 1, 1979.
4. The Consolidated Rail Corporation violated Rule 6-A-3 (b) of the prevailing Agreement effective May 1, 1979.

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 was a machinist at the Carrier's Stanley Diesel Terminal in Toledo, Ohio working the 3:00 to 11:00 shift when an incident occurred which resulted in his dismissal from service. He was charged with "Violation of Rule 4002 of Maintenance of Equipment Safety Rules in that you were observed drinking alcoholic beverages at Stanley Diesel Terminal ..., while you were on duty and under pay..."

The Employees, on behalf of the Claimant assert:

- 1) that the Carrier did not have adequate proof, nor sufficient evidence to warrant discharge of the Claimant;

- 2) that the fact that the Claimant did not have any difficulty performing his duties on the night in question nor at any subsequent time up until his suspension demonstrated that the Carrier's action was improper;
- 3) that the Carrier did not produce witnesses at the hearing as required by the agreement;
- 4) that the Carrier improperly suspended the claimant eight (8) days after the alleged offense and prior to his hearing and;
- 5) that the Carrier improperly used the Claimant's past record in determining the penalty to be assessed.

In reviewing the evidence presented at the hearing the Board is convinced that the Carrier acted reasonably upon the testimony of its undercover agent who was an eye witness to the conduct for which the penalty was assessed. He was a trained officer with a long and capable record of education and experience in this field with no motive to fabricate the particulars of this incident. The Carrier was presented, not only with substantial evidence, but a preponderance of evidence in the form of the undercover agent's testimony in contrast to the Claimant's simple declaration of innocence.

The fact that the Claimant did not experience any documented difficulties or be reprimanded for his conduct at any time subsequent to his reported drinking on the job is not evidence of innocence.

The Employees cite Rule 6-A-3 (b) as requiring the Carrier to produce any witnesses who could testify with respect to the allegation. Rule 6-A-3 (b) reads:

"If he desires to be represented at such trial, he may be accompanied by a union representative(s). The accused employee or his union representatives (not to exceed two (2)) shall be permitted to question witnesses insofar as the interests of the accused employee are concerned. Actual, pertinent witnesses to the offense will be requested to attend the trial by the Company. The employee shall make his own arrangements for the presence of any witnesses appearing in his behalf, and no expense incident thereto shall be borne by the Company."

Reading the entire rule and placing the term "Actual, pertinent witnesses" in its context it is clear that the rule is intended to place upon the Company the responsibility of producing its witnesses at the trial for questioning and cross examination by the Claimant and are not to be permitted to rely solely upon unchallenged affidavits or written testimony placed in evidence. If the Carrier believes that only one witness is sufficient to prove its case it is free to risk producing only that witness and need not require the presence of others to give corroboration.

On the other hand, should the Employee wish to supply witnesses, whether supervisory personnel or members of their own organization, the Rule allows them to procure those witnesses. Also the "notice of trial" states "you may

produce witnesses on your own behalf". If the employees' organization felt that there were witnesses who might refute the Carrier-Agent's testimony, it was incumbent upon them to: 1) present them at the hearing; 2) request the Carrier to produce its personnel; 3) request a recess until the witnesses were made available. Having failed to do so the Employees cannot legitimately claim that the Carrier violated the rule.

With regard to the claim that the Carrier violated Rule 6-A-1(a) and (b) by improperly holding the Claimant out of service pending trial, the Employees are in error. This was a "major offense" as provided in the rule; the "retention in service" of the "employee suspected by the Company to be guilty" could have been "detrimental" to himself, "another person and the Company"; and he was given a fair and impartial trial before dismissal. The fact that he was permitted to work eight (8) days before action was taken does not preclude the Carrier from subsequently acting nor should the delay be taken as evidence of blamelessness.

Finally, the assertion that the Claimant's record should not be used at the hearing would be valid if such were used as evidence of the offenses with which he is charged. In fact, clearly the record was reviewed solely as a means of judging the appropriate penalty to be assessed and therefore was legitimately employed.

The offenses of drinking while on duty and possession of intoxicants are serious ones involving jeopardy to the individual, his fellow employees, the employer's property as well as the safety and health of the general public. For these reasons such conduct cannot be condoned nor permitted.

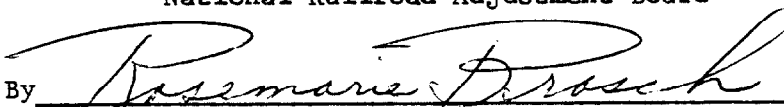
The Carrier heard probative evidence of such conduct on the part of the Claimant and its actions were proper in response.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of August, 1982.