Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9292
SECOND DIVISION Docket No. 8904
2-CR-MA-'82

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 Employes:

1. That the Consolidated Rail Corporation be ordered to restore Machinist K. D. Klatt 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 K. D. Klatt 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 employed as a Machinist at the Carrier's Stanley Diesel Terminal in Toledo, Ohio for a period of almost three (3) years. He was dismissed from service on July 8, 1979 on charges that he had violated "Rule 4002 of the Maintenance of Equipment Safety Rules, on June 25, 1979." Specifically he was charged with "drinking alcoholic beverages ... while on duty and under pay ..., smoking marijuana ... while on duty and under pay ...; conduct unbecoming an employe in that you were observed participating in illegal and unauthorized activities when you were observed playing cards and gambling while on duty and under pay as a Machinist ..."

The Employes on behalf of the Claimant assert that:

1) The Carrier did not have adequate proof, nor sufficient evidence to warrant discharge of the claimant;

2) the Carrier violated Rule 6-A-3(b) by not producing witnesses as required by the agreement;

3) the Carrier violated Rule 6-A-1(a) and (b) by improperly suspending him after the alleged offense and prior to his hearing;

4) the Carrier did not afford the claimant a fair trial since the hearing officer was prejudiced;

5) the Carrier improperly used the Claimant's record in determining his guilt or innocence.

On 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 with which the Claimant was charged. He was a trained officer with a long and capable record of education and experience in this field. He had no motive to fabricate the particulars of this episode. The Carrier was presented, not only with substantial evidence, but a preponderance of evidence in the form of the undercover agent's detailed narration in contrast with the Claimant's simple declaration of innocence.

The Employes 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 Carrier the responsibility for 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 (1) witness is sufficient to prove its case it is free to take the risk of producing only that witness and need not require the presence of others to give corroboration.

On the other hand, should the Employes wish to supply witnesses, whether supervisory personnel or members of their own organization, the Rule allows them to procure those witnesses. Also the G-250, notice, states, "you may produce witnesses on your own behalf". If the Employes' 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, or 3) request a recess until the witnesses were made available. Having failed to do so the Employes 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 Employes 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 or the Company", and he was given a fair and impartial trial before dismissal. The fact that he was permitted to work for a week before action was taken does not preclude the Carrier from subsequently acting nor should the delay be taken as evidence of blamelessness.

The charge of bias on the part of the hearing officer is unsubstantiated by the record.

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

The offenses of drinking, smoking marijuana, playing cards and gambling while on duty, on the Carrier's premises, while on a paid status are serious ones involving jeopardy to the individual, his fellow employes, the employers' property as well as 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 thereto.

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
Rosemarie Brasch - Administrative Assistant

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