

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen and Oilers
{ Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That, in violation of the current agreement, Laborer Thomas E. Apel was unjustly dismissed from service of the Carrier following trial held on July 11, 1979.
2. That, accordingly, the Carrier be ordered to make the aforementioned Thomas E. Apel whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account 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, a Laborer with seniority date of February 8, 1977, at Carrier's Stanley Diesel Terminal, Toledo, Ohio, was charged with "(V)iolation of Rule 4002 of the Maintenance of Equipment Safety Rules in that you were observed smoking marijuana in Stanley Diesel Terminal at approximately 9:25 p.m. on June 26, 1979, while you were on duty and under pay ..." Pursuant to an investigatory hearing which was held on July 11, 1979, Claimant was adjudged guilty as charged and was terminated from Carrier's service. Said termination is the basis of the instant claim.

Organization's principle contention in this matter is that "... Carrier failed to sustain its burden of proof in regard to Claimant's alleged violation of Rule 4002" because Carrier "... failed to present pertinent evidence" in support of said charge but instead relied exclusively upon the testimony of a single witness, Patrolman D. A. Bedra, a Conrail Police Officer, who was working

undercover as a Laborer in the Diesel shop at the time, and who alleged to have merely observed Claimant smoking a marijuana cigarette on the evening in question. According to Organization, in cases such as that which is presently before this Board, the "... burden of proof is upon the Carrier to prove the charge ..."
(First Division Award No. 20471; Second Division Awards Nos. 1178, 1222, 3138, 3562, 4046, 4135; and Third Division Awards Nos. 12252, 14120 and 15412); and, in the instant case, Carrier's meager offering of proof is insufficient to prove the charge as levied.

From the outset Carrier's position in this matter is that it (Carrier) "... has the fundamental right and responsibility to establish and enforce rules, regulations and instructions which will insure the safe and efficient conduct of its operations"; that "(T)hese rules and regulations are neither unreasonable nor burdensome and the Carrier's employees are required to have a thorough knowledge of them and to obey them at all times in the performance of their assigned duties"; that "(V)iolations of such rules not only undermine the responsibility of the Carrier, but jeopardize the life and limb of its employees, patrons and the general public as well"; and that "(T)he Carrier, therefore, must be empowered to impose proper discipline upon those (employees) who ignore or disobey such rules". Furthermore, Carrier also asserts that "... there is ample evidence in the trial transcript to clearly establish the fact that Claimant ... violated ... (Rule 4002) ... when he was observed smoking marijuana in the Stanley Diesel Terminal while on duty June 26, 1979." Regarding the latter point, Carrier further asserts that "... where there is a conflict in the testimony of witnesses at a disciplinary hearing, the Carrier as the trier of facts, makes the determination as to whose testimony to believe and the Board may not upset such findings" (First Division Award No. 14690); also, "... it is not the Board's duty to weigh evidence or pass on the credibility of witnesses, but rather only to determine if there is competent, credible evidence to support the Carrier's assessment of discipline" (First Division Awards Nos. 13356, 16265 and 20645; and Third Division Award No. 10113).

Based on the foregoing, Carrier contends that "... there is substantial evidence of a probative nature to support the charges (in the instant case) and the Carrier's assessment of discipline as well". In support of this contention, Carrier next argues that Patrolman Bedra's testimony is "far more credible than the self-serving, unsupported statements offered by the Claimant presumably in an attempt to escape justifiable discipline ...". Carrier additionally argues that Claimant's defense in this matter was limited to a denial of his guilt and that "(A)t no time during the proceedings did the Claimant refute the testimony of Patrolman Bedra or present his own witnesses to corroborate his statements ..." even though such witnesses apparently were available and thus could have been called upon to testify.

As its final area of argumentation Carrier asserts that the dismissals of three (3) other employees who also were involved in the incident on the evening of June 26, 1979, have already been favorably adjudicated in accordance with Carrier's position as articulated herein (Awards Nos. 1 and 2 of Public Law Board No. 2613; and Award No. 176 of Public Law Board No. 2141); and, furthermore, other awards involving cases with similar fact situations have also been resolved in favor of Carrier's disciplinary assessment (Second Division Awards Nos. 9170, 9288, 9289, 9290, 9291 and 9292).

A complete and careful analysis of the entire record which has been presented shows that the disposition of this matter rests exclusively upon whether the Board is convinced that the particular quantum of evidence which Carrier has adduced is sufficient to support the charge that Claimant was smoking marijuana while on duty and under pay as a Laborer on the evening of June 26, 1979. The essence of Carrier's evidence in this regard is the testimony of undercover Patrolman Bedra, a seasoned, career law enforcement officer who has a considerable amount of formal training and experience in the area of Drug and Narcotics Enforcement, and who, on the evening in question, observed Claimant and a Mr. Sawyer passing back and forth a paper rolled cigarette with twisted ends which gave off a "strong pungent" aroma of marijuana. At that same time Patrolman Bedra also observed Claimant to have "glassy eyes" and to be affected by instability and in a generally "happy go lucky" state. The totality of Claimant's argumentation, however, is limited to the contention that, though he was smoking a cigarette at the time, it did not contain marijuana.

Carrier's argumentation as presented, most assuredly, constitutes a prima facie case which generally is defined as a presentation of evidence, sufficient in quality and quantity to warrant a ruling in favor of the presenting party if no contrary evidence is proffered by the opposing party. In the instant case, there can be no doubt, that Claimant's mere denial of his guilt is insufficient to offset Carrier's more comprehensive and more compelling argumentation -- particularly in light of the fact that potentially corroborating evidence and witnesses were available and could have been utilized to lend support to Claimant's position, but, for some unknown reason, were not presented. The only inference which can be derived from such a failure is that said evidence and testimony apparently did not support Claimant's contentions.

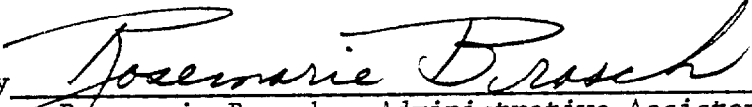
On the basis of the foregoing, the Board is led to the inescapable conclusion that Carrier has adduced substantial, credible evidence which supports the charge that Claimant was smoking marijuana while on duty on the evening of June 26, 1979, and Carrier's penalty assessment which has been directed is neither harsh, excessive or unwarranted, and, therefore, will remain intact and undisturbed.

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 22nd day of September, 1982.