Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9948
SECOND DIVISION Docket No. 9413
2-BN-CM-'84

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1. That the then St. Louis-San Francisco Railway Company, now known as Burlington Northern, Frisco Region, unfairly and unjustly dismissed Carman W. O. Lowe on September 15, 1980, in violation of the current controlling agreement effective January 1, 1945, amended June 1, 1952 and revised April 1, 1971.

2. That accordingly, the St. Louis-San Francisco Railway Company (Burlington Northern, Frisco Region) be ordered to restore W. O. Lowe to service with seniority rights, vacation rights and all other beneifts that are a condition of employment, unimpaired.

3. That W. O. Lowe be compensated for all lost time wages, plus six percent (6%) annual interest.

4. That W. O. Lowe be reimbursed for all losses sustained account of loss of coverage under health, welfare and life insurance agreements during the time unjustly and unfairly 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 employes 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 had been in the employ of the Carrier for about thirteen (13) years when on August 1, 1980, he was working the 3:00 p.m. to 11:00 p.m. shift as a Car Inspector. While on duty at 4:30 p.m. and sitting in his personal vehicle on the property, he was observed by Special Agent O. M. Motley placing a can to his mouth. Motley notified Foreman W. R. Myers, and the two of them went to a place approximately 50 yards from the Claimant and observed him through binoculars as he again placed the can to his mouth.

Motley and Myers then approached the Claimant and asked him if he were drinking an alocholic beverage. He said he was not, whereupon Motley searched inside the vehicle and found a half full, cold Budweiser beer can underneath a jacket on the seat. Motley also found five unopened cans of beer in an ice chest in the vehicle. The Claimant said it was his and that he planned to go crabbing after work. He then stated he was not intoxicated and requested a blood test, the results of which were negative.

The Claimant was charged with violating Carrier's Rule G, quoted in pertinent part below:

> "The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employes subject to duty, or their possession or use while, on duty or on company property is prohibited ..."

An investigation was ultimately conducted on September 4, 1980. As a result, the Carrier concluded that the Claimant was guilty as charged and suspended him without pay for 365 days. The Claimant was returned to service on September 15, 1981.

The Carrier maintains that the evidence supports the charge. It also asserts that the discipline invoked should not be disturbed unless the Board finds that its action was arbitrary and capricious. It quotes from Second Division Award 6443 in support of this position:

> "This Board has established, in accordance with the authority vested in us by the Railway Labor Act and the Controlling Agreements, the standards which will be applied in dealing with disputes concerning disciplinary action taken against employes. Given that Carrier had substantial evidence to support a finding of infraction of reasonable rules or expected appropriate employe conduct and performance it is within the employer's discretion to determine the discipline to be imposed. We will not interfere therewith, absent a clear showing that the penalty was arbitrary, capricious, unreasonable or excessive ..."

The Organization believes that the Claimant's suspension was arbitrary, unjust, and excessive. Furthermore, it asserts that Carrier representatives merely saw the Claimant from a distance as he put something to his mouth. It is true, the Organization maintains that the Claimant had his own personal cooler in the back seat of his car, and that there was beer in the cooler. But those circumstan are easily explained, at least according to the Claimant. He was going to take the beer and cooler on a fishing trip right after work. And he needed to bring his cooler on Carrier property since part of his job assignment requires him to service cabooses and/or locomotives with ice.

The Organization also objects to the sloppy appearance of the hearing transcript and to the fact that Special Agent Motley had no search warrant when he searched the Claimant's personal vehicle.

After a careful review of the record the Board has concluded that the Claimant is guilty as charged. We are particularly persuaded by the fact that a cold, half-full can of Budweiser beer was found under a jacket on the seat of the Claimant's vehicle. We are also influenced by the following testimony:

"Q. Mr. Lowe (the Claimant), at approximately 4:45 p.m. on August 1, 1980, you were sitting at the north end of the yard in your private vehicle, is that correct?

A. Yes sir.

Q. Were you in possession of any alcoholic beverages, such as beer?

A. No, I did not know they were in there, in the ice chest, but they were there. I went fishing, came in at 3 O'clock and went fishing. Went fishing that morning and usually just throw the ice chest in the back of my truck."

On the one hand, the Claimant explained that he had the cooler and beer because he was going fishing after work; on the other, he asserted that he did not realize he had the beer with him because it was left over from a morning fishing trip. In any event, the cold, half-full can of beer on the seat beside him is sufficient to convince us that he not only realized he had the beer with him, but that he was drinking it while on duty.

Turning to the severity of the penalty, we find that although a 365-day suspension is clearly on the severe end of acceptable penalties for the Claimant's offense, it is not outside of the bounds of reasonableness. This Board and those of other Divisions have consistently enforced the strictest penalties for possession and use of intoxicants on railroad property. Discharge is commonly upheld in such cases. (See Second Division Award 8543, where a discharge for having three cans of beer in a locker was upheld.) We note that in such cases the Claimants have often been intoxicated, and realize that the Claimant in the instant case was not. However, Rule G does not distinguish between drinking to excess and drinking a reasonable amount. It specifically prohibits the use of alcoholic beverages or their posession while on duty.

Alcohol and employment in this industry simply do not mix. Sound safety practice dictates strict enforcement of Rule G, and we believe the Carrier's approach here was far from arbitrary. It was based upon sound reasons connected with employe safety. Moreover, the Carrier was not capricious. It notified Carmen General Chairman W. S. Merrill in January, 1980, of its policy regarding enforcement of Rule G. Treatment of the Claimant in the instant matter was in conformance with that policy.

Finally, we find no procedural irregularities in the processing of this claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1984