

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(The Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employees:

1. That the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the Carrier) improperly suspended Machinist L. D. Bandeka (hereinafter referred to as the Claimant) from Carrier service on January 26, 1982, and subsequently dismissed Claimant on February 17, 1982, as result of investigation conducted on January 28, 1982.
2. That the Carrier be ordered to compensate Claimant for all loss of wages incurred from January 26, 1982 to date of restoration to Carrier service and with all rights and fringe benefits restored in full.

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 were given due notice of hearing thereon.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant L. D. Bandeka, a Machinist, was notified to attend a formal investigation to consider allegations in reference to alcohol use. The investigation was held on January 28, 1982 to consider the charge which was stated in part as follows:

"...having used and/or being under the influence...
while on duty...involving possible violation of Rule 6,
Form 2626 Standard."

As a result of that investigation, the Claimant was notified on February 17, 1982 that he had been found guilty and was dismissed from service.

The Organization contends that the Claimant was never found guilty of the specific charges brought against him. There was no evidence ever presented to suggest Claimant used alcohol while on duty. The only specific charge referenced during the investigation was that of "being under the influence." The Organization maintains that evidence to substantiate this charge is clearly lacking. Not one witness points to behavioral manifestations of alcohol intoxication such as problems with speech, coherence, or even the way in which Claimant appeared. Witnesses at first were even unaware of Claimant's drinking. Most importantly, however, the Organization points out that the Claimant was found guilty of charges not brought against him when he was dismissed for having "used intoxicants prior to reporting for duty and were under the influence of intoxicants while on duty...". As such, the Organization argues that the Carrier did not prove the charges that Claimant was under the influence at any time either when he reported to work or approximately five hours later when he was detected.

The record of the investigation discloses that at approximately 4:00 a.m. on January 26, 1982 the Assistant General Car Foreman picked up Claimant to have a truck serviced and smelled a strong odor of alcohol on Claimant's breath. He asked two other officials if they detected alcohol and was told no. Shortly thereafter they were able to confirm the odor of alcohol. In addition, the record discloses that Claimant indicated that he had consumed four or five beers between around six to eight p.m. and then after a nap a couple more beers before his 11 to 7 a.m. shift. The Claimant disputes that testimony given by two witnesses only in the amount of beer consumed.

The Carrier maintains that the charges have been confirmed and that the Claimant is guilty of being "under the influence" and in violation of the Agreement. In fact it is to the events that this Board must turn for resolution of the case at bar.

In the mind of this Board, the specific charge must be proven. In this case that charge is being "under the influence" which raises the question of proof. Three witnesses smelled the odor of alcohol. On the basis of alcoholic odor they proceeded to make an appropriate determination of the degree of impairment. The Claimant admitted drinking prior to coming to work, but never to having reached a point of intoxication. No witness reported slurred speech, unsteady gait or other behavioral indications of impairment. The Organization is correct when it makes the argument that the Carrier has failed to totally carry the burden of proof to document that Claimant was "under the influence", but this Board must examine why this is the case.

After admission of prior drinking and the detection of a strong alcoholic odor from his breath, Claimant was requested to take an alcohol test on at least two occasions and by his own admission refused. In addition, the Claimant was asked to allow a search of his vehicle and refused. Claimant's refusals deprived the employer of deterministic conclusivity to affirm or negate its presumption. Unable to dispose of Carrier's concerns it was relieved of some of the weight to totally carry the burden of proof that the Claimant was "under the influence".

This Board is well aware of the arguments for and against employee refusals to take such tests. Barring other strong evidence of occupational use, which exists in the instant case, this Board understands that refusal is not a presumption of intoxication. It is critical in the Railroad industry to avoid any level of impairment to maintain a safe occupational environment. In this case, the degree of impairment is largely unknown. Carrier officials did not question the performance of the Claimant's duties, nor indicate behavioral manifestations. Yet the Claimant admitted to a consumption of alcohol shortly before coming to work and a much larger consumption a few hours prior to that time. In addition, three witnesses including one who smelled "a strong odor of alcohol" on the Claimant's breath, detected a possible rule violation, and after detection the Claimant refused to allow an assessment of the degree of impairment. Overall, the evidence is sufficient to substantiate Carrier's charges that the Claimant was "under the influence". As stated in Third Division Award 20100:

"the degree of impairment is not essential, and the Board will not condone the performance of work by those under even the slightest alcoholic impairment."

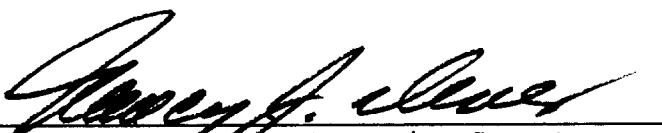
This Board finds that the record provides sufficient substantial evidence of probative value to support Carrier's findings of guilt. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (Consol. Ed. vs. Labor Bd. 305 U.S. 197, 229)." After a complete and thorough review of the issues at bar, the Board finds that Claimant was guilty and that the discipline imposed was neither arbitrary, capricious nor unwarranted. As such, this Board will not disturb Carrier action in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 5th day of June 1985.