

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Carrier violated Rule 28 but not limited thereto when they dismissed Machinist R. J. Setsodi (sic) from service on January 19, 1984.
2. That, accordingly, the Carrier be ordered to compensate Claimant for wage loss incurred due to said dismissal from December 29, 1983, to August 5, 1984.

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.

Claimant was a Machinist in the service of Carrier on December 29, 1983, when his conduct on that date led to an Investigation in which he was charged with:

"Violation of Rule M810 ... Employees must not sleep on duty. Lying down or assuming a reclining position with eyes closed or concealed, will be considered sleeping.

Violation of Rule G. The use of alcoholic beverages, intoxicants or narcotics by employes subject to duty, or their possession, use, or being under the influence thereof while on duty or on Company property, is prohibited."

The Investigating Officer found that the charges had been proved and, as a result thereof, dismissed Claimant from the service of Carrier.

Two Carrier employees came upon a parked Carrier truck and approached it to ascertain the circumstances of it being parked in that location. The first employee approached the truck and discovered Claimant asleep in it. He shook Claimant's leg to awake him and after doing so detected an odor of alcohol on his breath. The second employee came to the truck and was asked by the first to see if he detected the odor of alcohol. Claimant was asked to blow his breath in the employee's face which he did. Both of these employees testified at the Hearing that Claimant's breath smelled of alcohol, that his eyes were red and glassy and that his speech was slurred.

Claimant admitted that he was asleep in the truck, but denied that he had recently been drinking any alcohol. He testified that he had been taking cough medicine. He had been asked to submit to a blood test and had first agreed but had later changed his mind and did not take the test.

The Organization contends that the Carrier did not meet the time limits of Rule 28(b) of the Maintenance of Way Department Agreement which reads in pertinent part:

"A claim or grievance may be presented in writing by the duly authorized committee to the officer of the carrier designated to receive claims or grievances provided said written claim or grievance is presented within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative), in writing, of the reasons for such disallowance."
(Emphasis by the Board)

The March 19, 1984 letter is not as explicit or precise as would be the usual denial letter. However, the meaning is clear. It states in pertinent part:

"Having fully reviewed all testimony of hearing and Mr. Setsoti was in violation of Rules M810 and Rule G as charged. However, am agreeable that he be returned to duty provided Mr. Setsoti and the General Chairman agree to the following conditions:

. . ."

The answer is saying that the transcript proves that Claimant was guilty as charged and can only implicitly mean that the claim is being denied. A normal letter of denial would likely state that the writer has reviewed the transcript, has determined that the evidence established the charges, and on this basis would deny the claim. The fact that the answer inarticulately says the same thing is sufficient to toll the time limits.

The testimony of the Carrier witnesses was credited by the Investigating Officer. Absent any evidence in the record to establish that he was arbitrary or capricious in his findings, an Appellate Board cannot substitute its judgment for that of the Investigating Officer. We find no such evidence in the record.

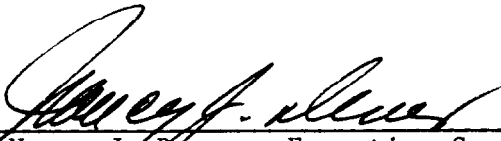
Much is made of the fact that the witnesses were laymen and did not possess sufficient expertise to determine whether or not Claimant was under the influence of alcohol. They testified that Claimant smelled of alcohol, that his eyes were red, and that his speech was impaired. Their testimony squarely meets the criteria for laymen for ascertaining such an individual's condition. We hold that this evidence established the proof of the violation.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1986.