

The Second Division consisted of the regular members and in addition Referee Leonard K. Hall when award was rendered.

Parties to Dispute: (Sheet Metal Workers International Association
(
(Southern Pacific Transportation Company (Western Lines)

Dispute: Claim of Employees:

1. That claimants R. C. Hoffman and T. A. Fernandez were unjustly held out of service and dismissed by the Carrier in violation of Rule 39 of the controlling Motive Power and Car Department Agreement.
2. That claimants be compensated by the Carrier for all time they were unjustly withheld from service.
3. That claimants be made whole for all vacation rights.
4. That the premiums be paid for hospital, surgical and medical benefits for all time claimants held out of service.
5. That the premiums for Group Life Insurance be paid for all time claimants held out of service.
6. That claimants be paid for all contractual holidays, for all contractual sick pay and for jury duty.
7. Make claimants whole for all other contractual benefits lost while 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 Claimants in this dispute were employed as Sheet Metal Workers at the Carrier's Locomotive Repair Plant at Los Angeles, California, and were assigned to the 3:00 PM to 11:00 PM shift on October 3, 1983, the date of the occurrence on which this Claim is based.

The dispute initially flows from a hand-printed report dated October 3, 1983, that General Foreman C. W. Fuller addressed to his plant manager.

He reported that at 4:45 PM on that date Supervisor B. Perez told him that he saw a green and white Volkswagon Van leaving the property from the Foremen's locker room parking lot. The Foreman indicated he was busy at the time and that it was not until 6:30 PM that he walked to the parking lot and found the Van. Suspecting that something was amiss, he instructed Supervisor L. Levenson to call the Carrier's Police Department and have an officer meet in the parking lot. Shortly thereafter, Police Officer R. Somers met the General Foreman and was instructed to watch the Van to see what he could find out about the going and coming of the Van.

In Officer Somers' report he stated that at about 7:30 PM he saw some persons enter the Van and leave the property. At about 8:20 PM, he saw the Van return. He approached the persons who exited from the Van and it turned out that they were three employees, the Claimants and a fellow employee from another craft.

The Officer reported that he explained to them that the reason for his presence was that they were suspected of leaving the property and consuming alcoholic beverages. He subsequently asked them individually to smell their breath. The odor of an alcoholic beverage was detected on the breath of each. He then summoned the General Foreman and reported his observations.

The General Foreman asked them twice if they would take a blood test. Each made no answer and stood mute. He then asked each to blow their breath in his face, one at a time. He too detected the odor of an alcoholic beverage of each, but noted that Mr. Fernandez also had an odor of peanuts on his.

Supervisor Levenson's report was that he had the three blow their breath, one at a time, in his face and he too detected a heavy odor of an alcoholic odor on the breath of Claimant Hoffman, but none on the breath of Mr. Fernandez.

Mr. Fernandez granted permission to look in his Van, following which the General Foreman and the Police Officer opened a cooler which contained ice, water and two bottles of beer. The beer was removed, marked and initialed by the Police Officer.

The Claimants and the fellow employee were taken to the General Foreman's office where Rule G was read to them, following which each was informed that they were being removed from service pending Formal Hearing, instructed to secure their tools and leave the property.

The three employees were accorded a formal Hearing which began on October 11, 1983, and consumed seven days ending October 19, 1983. They were charged with allegedly leaving the property without proper authority from approximately 7:30 PM to 8:20 PM, allegedly having the smell of alcoholic beverages on their breath at 8:45 PM. The Notice to Mr. Fernandez included the charge of having alcoholic beverages in his personal vehicle on company property during his tour of duty. Rules G and 810 were cited in the Notice as possibly being violated.

Following the Formal Hearing, the Claimants were dismissed from the services of the Carrier in letters addressed individually to each dated November 14, 1983, for having the smell of alcoholic beverages on their breath during their tour of duty at approximately 8:45 PM on October 3, 1983, in violation of quoted portions of Rule G, as follows:

"The use of alcoholic beverages or intoxicants by employes subject to duty... or being under the influence thereof while on duty or on company property, is prohibited...."

Rule 810 (not absent themselves without proper authority) was not included in the dismissal notices. The dismissal letter to Mr. Fernandez included having alcoholic beverages in his personal vehicle on company property.

At the Investigation the employee Representatives strongly opposed the witnesses at nearly every turn; principally asserting many times that the Claimants were not observed in the use of alcohol beverages, were permitted to remain on Carrier property to put away their tools, permitted to drive their automobiles on company property without escort. The thrust of their assertions was the officials did not consider the Claimants to be under the influence of alcohol or incapacitated in any way.

In its appeals, the Organization postulated that:

Testimony of Carrier witnesses regarding the smell of alcohol conflicted substantially and was not cause for suspension pending the Hearing.

Hearing was not fair and impartial due to biased conduct of the Hearing Officer, in that the Representatives were denied the right to fully question witnesses.

Hearing Officer refused to call Supervisor B. Perez who initially reported departure of the Van from the property.

Request of the Representatives to recall the General Foreman and the Police Officer was denied.

Claimants were charged with violation of Rules G and 810 and were dismissed for violation of Rule G only which was not proven by substantial evidence, citing Third Division Award 18405 in support.

The Claimants were suspected of drinking at lunch when they were off the Carrier property on their own time, and adding that if the Claimants had consumed beer prior to reporting for duty, the smell would have lingered.

Those points were followed by citation of two and one-half pages of partially quoted Awards of the Second and Third Division.

Conversely, the Carrier contended that:

The record fully supports the imposition of the discipline assessed; that the Claimants were in violation of the portion of Rule G for which they were dismissed.

The General Foreman detected the strong odor of alcohol on the breath of the Claimants when observing them for the purpose of compliance or non-compliance of Rule G; that the General Foreman offered the Claimants opportunity to submit to a blood test to determine whether or not alcohol was in their blood and that since the Claimants did not respond to the offer, their silence was interpreted as refusing the offer.

The Police Officer testified that the odor of alcoholic beverages was prevalent about the person of the Claimant and two unopened bottles of beer were found in the vehicle in which they were riding.

The evidence is convincing that the odor was present to a degree that indicated a recent consumption of alcoholic beverages.

There was no conflict of testimony among the witnesses concerning the odor of alcohol as relates to the two Claimants.

There was good reason to believe that the Claimants might be engaging in an activity for which they were ultimately found responsible and that it was incumbent upon the local Supervisors to take action where that suspicion existed.

Mr. B. Perez had no first-hand knowledge of the Claimants being in possession of having used alcoholic beverages when they left at 7:30 PM and returned at approximately 8:20 PM on October 3, 1983, for he was not on duty nor was he on the property and could add nothing to the defense of the Claimants.

The Hearing Officer refused to call other witnesses or recall those who had previously testified for the reason that the hearing had gone on for seven days and 221 pages of testimony, all having testified fully and the Representatives had established no foundation for anything new or different from that already given.

Award 18405 is not on point for there the Claimant was off duty and the several other Awards cited by the Organization had their own set of circumstances, none of which paralleled those present here.

The Claim of Mr. T. A. Fernandez is moot for he agreed to accept reinstatement as a matter of leniency without compensation on January 24, 1984, and no longer has a viable Claim.

The Hearing

The Hearing Transcript discloses that the General Foreman identified and verified his initial report and testified at the time of confrontation and before he smelled their breaths that he told them if they took the blood test and it proved they were not drinking, he would apologize to them; if it did prove they were drinking, they would be removed from service for Rule G.

He thereafter testified that he smelled the strong odor of an alcoholic beverage on the breath of each employee, as the Police Officer had previously but with a smell of peanuts on the breath of Mr. Fernandez.

The General Foreman acknowledged in response to questions asked many times by the Representatives that no one had seen any of the Claimants drink an alcoholic beverage, that each spoke in a normal manner, walked in a steady manner, eyes looked normal, clothing looked normal for a working man. He also said many times that when he smelled the breath of each, he was one or two inches from their mouth, one at a time.

In further response to the Representatives the General Foreman testified that the Claimants were totally cooperative when asked to blow in his face and he could not say they were under the influence of alcohol.

The Police Officer identified and verified his report. He was closely questioned by the Representatives and he steadfastly testified that he smelled the strong odor of an alcoholic beverage on each of them. He stated that he had long experience as a former Law Enforcement Officer in detecting the odor of alcoholic beverages on the breath (of users), even when breath neutralizers seemed present.

The Supervisor identified and verified his report. He testified that he smelled the strong odor of an alcoholic beverage on the breath of Claimant Hoffman but none on the breath of Mr. Fernandez.

Conclusions

While the Claimants may have spoken in a normal manner, walked in a steady manner, eyes and clothing normal, there is no reason to doubt the testimony of the Police Officer, the General Foreman and the Supervisor as to the detection of an alcoholic beverage on the breath of each of the Claimants, with exception noted above with regard to the Supervisor and Mr. Fernandez.

The smell of alcoholic beverages on the breath of an employee on duty invites action by the employer's Supervisors, as here. The record is sufficient to hold that the Claimant's used an alcoholic beverage during their

lunch period. Even though they may have been off the property during that period, it can be held, and we so hold, that they were under pay and subject to duty in that interval.

We continue to acknowledge, as we did in Third Division Award 24873, that the odor of alcohol on an employee's breath is generally a sufficient basis upon which to assess discipline. In that Award, the Board held, in pertinent part:

"...Three witnesses testified the Claimant had the odor of alcohol on his breath. This Board agrees with the Carrier's argument that the smell of alcohol on an employee's breath is generally a sufficient basis upon which to assess discipline, and we so find in this case."

We find no fault with the Opinion as expressed above. We also acknowledge that the smell of alcoholic beverages on the breath of an employee is sufficient proof of its use. Its use of by an employee of duty or subject to duty does not comply with the quoted portion of Rule G used in this case.

Although the General Foreman did not question the performance of the duties of the Claimants upon their return from lunch nor indicate any behavioral variances, it was not improper for him to remove them from service pending formal Hearing. We note here the holding in Third Division Award 15023 where the Board found no evidence of intoxication to any apparent degree whatsoever and held in pertinent part as follows:

"....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."

Third Division Award 20100 reaffirmed the above and it was again cited with approval in Second Division Award 10436.

It is well known that use while on duty or subject to duty is commonly in the category of serious offenses which may justify dismissal from the Carrier's service. In this instance, we cannot say that the dismissals were an overreaction or in any way capricious or arbitrary.

Epilogue

Mr. Fernandez was reinstated under an Agreement signed by the Carrier Representative, the Organization's Local Representative and by the Claimant as a matter of leniency without compensation on January 24, 1984. The Claimant no longer had a viable Claim. Nothing has been cited to show that the parties were not empowered to effect that settlement. We find the Claim in his behalf is moot. Awards 9139, 8394, 6993, 6143, all of this Division.

Claimant Hoffman refused an offer on January 10, 1984, of reinstatement on a leniency basis and progressed his Claim to the Carrier's highest designated Officer. On February 16, 1984 offer was made to reinstate him on a leniency basis and the offer was rejected. The Carrier then agreed to return Claimant Hoffman to service without prejudice to the Claim for compensation. He returned to service on March 16, 1984.

We hold that the objections made by the Organization at the Hearing and its appeal are not sufficient to set aside the Carrier's actions in this matter. We add that the numbered Items 3 through 7 in the Statement of Claim were not handled on the property and cannot be considered under the rules of this Board.

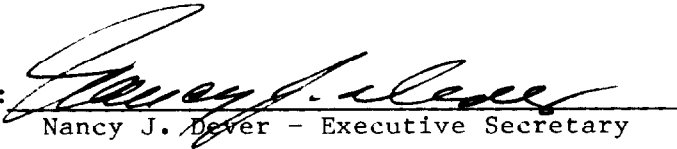
A W A R D

Claim of T. A. Fernandez is dismissed.

Claim of R. C. Hoffman is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 10th day of June 1987.

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