

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

Appeal of dismissal from service of Electrician Aaron Cockrell by the Consolidated Rail Corporation at Collingwood Diesel Terminal, Ohio made effective January 19, 1988 by a notice of discipline dated January 19, 1988.

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.

On March 8, 1988, the Carrier issued the Claimant a Notice of Discipline dismissing him from service in all capacities. This discipline followed an Investigation held on March 2, 1988, wherein the Claimant was charged with violating Rules 4010 and 4012 of S7-D Conrail Safety Rules for Maintenance of Equipment Employees. Specifically, the Claimant was charged with being away from his work location. The Claimant was observed by Carrier officials with an open container of beer near him. The Claimant was not observed holding the can or drinking from it. According to the Carrier witness, the Claimant did not have the aroma of beer nor did he show signs of being under the influence. At the request of the Carrier official, the Claimant agreed to submit to a sobriety test. Test results were negative for alcohol and positive for marijuana.

Safety Rule 4010 states in relevant part:

"Narcotic (medication or drug) and/or alcohol beverage must not be used while on duty, or within 8 hours before reporting for duty...."

Safety Rule 4012 states in relevant part:

"It is essential to safety that employees performing service must give their undivided attention to duty; the following are prohibited:

(d) Engaging in any activity which is not directly associated with your duties."

The Board has reviewed the entire record. It finds that the evidence does not support the Hearing Officer's findings. To wit: the Carrier failed to meet its burden of proof. The evidence is insufficient to show that the Claimant either drank beer or consumed marijuana within eight (8) hours of reporting for work or at work pursuant to Safety Rule 4010. The Carrier did meet its burden of proof regarding Safety Rule 4012.

Further, the Board is mindful of the Organization's due process concerns generated by offering an alcohol test to the Claimant. The test, in reality, was for ten (10) drugs. Failure to be forthright with the Claimant regarding the extent of the test deprived him of the opportunity to make an informed decision as to whether or not to submit to the test. It also may have deprived the Claimant of options available to him regarding union representation.

While this Board disapproves of the violation of industrial due process rights, it is concerned with the results of the test. The test results do not indicate when the Claimant used marijuana. More importantly, the results indicate that the Claimant did use marijuana. Thus, this Board finds itself balancing the Claimant's due process rights against the public's right to have a safe operating rail system. The Board will accommodate these rights by ordering the Carrier to reinstate the Claimant without loss of seniority with no back pay provided the Claimant completes a drug rehabilitation program. Further, upon completion of the rehabilitation program, the Claimant must submit to a return to duty physical. The Claimant's failure to either complete the rehabilitation program or pass the physical will result in the discipline of removal being upheld.

A W A R D


Claim sustained in accordance with the Findings.

Form 1
Page 3

Award No. 11865
Docket No. 11742
90-2-89-2-14

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1990.