

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12091
Docket No. 11884
91-2-90-2-16

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

PARTIES TO DISPUTE: (International Brotherhood of Fireman and Oilers
(Norfolk Southern Corporation
(Southern Railway Company)

STATEMENT OF CLAIM:

1. That under the current and controlling agreement, Service Attendant C. Payne, S.S. No. 240-90-8553, was unjustly dismissed from service on March 9, 1989. The aforesaid dismissal was reaffirmed by Senior General Foreman E.E. Mickens in letter dated April 17, 1989 after a formal investigation was held on April 7, 1989.

2. That accordingly, Service Attendant C. Payne be restored to service with Norfolk Southern Corporation, be made whole for all lost time, with seniority rights unimpaired, vacation, health and welfare, hospital and life insurance, as well as dental insurance benefits be paid effective March 9, 1989, the payment of ten percent (10%) interest rate be added thereto and his personal record expunged of any reference to this dismissal from 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.

On March 13, 1989, a preliminary Investigation was held wherein Claimant was charged with violation of Rule G and insubordination. Subsequent to the preliminary Investigation and confirmed by letter dated March 15, 1989, Claimant was dismissed from service.

At the request of Claimant a formal Investigation was held on April 7, 1989. Subsequent to that Investigation, the discipline of dismissal was reaffirmed.

The Organization protested the Carrier's discipline as violating Rule 34(a) which states that "An employee will not be removed from service... except... after a preliminary hearing." The Organization argues Claimant was fired prior to the preliminary Investigation. The Organization further argues that the events leading to the incident involved the unjustified request to check Claimant's breath by an untrained supervisor which was not in compliance with Carrier policy and F.R.A. Rules. The Organization maintains that the Claimant's response was provoked.

The record before this Board indicates that the Senior General Foreman detected alcohol when three employees assigned to work the second shift arrived to work. He approached the first two and detected no odor. He approached the Claimant and detecting the smell of alcohol confronted him. The Claimant indicated he had not been drinking. The Senior General Foreman requested to smell his breath. Claimant refused stating he was leaving to have a blood test.

The incident that followed clearly demonstrates that Claimant was ordered to give a breath test and refused the order. The Senior General Foreman testified that Claimant thereafter asked to be marked off and when permission was not granted, argued he was sick. After further conversation, the Claimant indicated he would not remain and the testimony thereafter differs between the Claimant and the supervisor.

We have studied the conflicting testimony in this record. On important points underlying the charges of Rule G and insubordination, in that Claimant left his assignment against direct instructions, there is no major inconsistency. The General Foreman was a second witness who also detected alcohol. He also confirmed the fact that Claimant was given a direct order not to leave and said "he was leaving anyway."

Claimant's testimony confirms that he refused a direct order from the Senior General Foreman. The Board does not find the request unjustified. The Carrier has an absolute responsibility to maintain a drug free workplace. Having detected alcohol, it would have been totally irresponsible not to have investigated further. Carrier's request for the smell of Claimant's breath has long been upheld as probative evidence of a Rule G violation. While there was no other evidence of Claimant's consumption, his refusal raises serious questions. The smell of breath standing alone can provide substantial evidence supporting the charge if, as here, it is confirmed by two clear witnesses and the simple breath test is refused. That test would have determined whether the smell was on the Claimant's clothes or evidenced drinking. In this case, the evidence substantiates guilt.

The evidence that Claimant was dismissed prior to a preliminary investigation is conflicting. The Senior General Foreman testified "If you leave, I will fire you." The Claimant states he was fired immediately. Credibility decisions do not lie with this Board. The fact is that the evidence substantiates Carrier's position and there is insufficient probative evidence to the contrary. The Claimant was not dismissed until March 15, 1989 after the preliminary investigation. The Board finds no violation of Rule 34 (a).


Therefore, this Board finds that the Carrier's determination of guilt was fully justified. The discipline of dismissal will not be disturbed. There are no mitigating circumstances which would justify the finding that the penalty was harsh. The Claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1991.