

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(International Brotherhood of Firemen & Oilers  
PARTIES TO DISPUTE: (  
(Soo Line Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Laborer W. Harris, Bensonville, Illinois, was unfairly dismissed from service of the Soo Line Railroad Company effective June 6, 1990.

2. That accordingly, the Soo Line Railroad Company be ordered to make Mr. Harris whole by restoring him to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his record.

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 dismissed for violating Carrier Rule G due to "consumption by you of alcoholic beverages prior to coming on duty for laborer assignment at 3:00 P.M., Thursday, May 10, 1990." At the time of the incident in question, Claimant was employed as a laborer at Carrier's Bensenville, Illinois, Diesel House, working the 3:00 P.M. - 11:00 P.M. shift. On May 10, 1990, he reported for work at 2:20 P.M. to discuss another matter with Carrier's Manager, Locomotive Services.

The Manager, Locomotive Services testified that at 2:40 P.M. he met with Claimant, smelled alcohol on Claimant's breath and asked Claimant if he had been drinking. Claimant replied that he had been drinking and that he had had his last drink at 11:30 A.M. The Manager Locomotive Services then called the Diesel House Foreman.

The Diesel House Foreman testified that the Manager called him in, that he was unable to smell alcohol on the Claimant's breath but that he smelled mint. He further testified that, in his presence, the Manager asked Claimant again whether he had been drinking and Claimant responded that he had had a couple of beers around 11:30 A.M.

Claimant testified that he had told the Manager and Foreman that he had had one beer at 10:00 or 10:30 A.M. Claimant further testified that he asked to be tested for alcohol but that the Manager refused to allow the test. The Manager and Foreman each denied that Claimant requested an alcohol test.

The Organization contends that the evidence failed to prove that Claimant was intoxicated or under the influence of alcohol. The Organization further argues that the penalty of dismissal was too severe and, therefore, was arbitrary and capricious. Carrier argues that Claimant was dismissed for consuming alcohol while subject to duty, not for being intoxicated or under the influence of alcohol. Carrier contends that Claimant admitted the offense. Carrier further argues that the offense is very serious, that Claimant was offered and declined an opportunity to participate in an employee assistance program in lieu of the investigation and that dismissal is an appropriate penalty.

Rule G provides:

"The use of alcoholic beverages, intoxicants, drugs, narcotics, marijuana or controlled substances by employees subject to duty, when on duty or on Company property is prohibited.

Employees must not report for duty, or be on Company property under the influence of or use while on duty or have in their possession while on Company property, any drug, alcoholic beverage, intoxicant, narcotic, marijuana, medication, or other substance, including those prescribed by a doctor, that will in any way adversely affect their alertness, coordination, reaction, response or safety."

Carrier charged Claimant with consuming alcoholic beverages prior to reporting for work, i.e., while subject to duty. The evidence presented at the investigation showed that Claimant admitted consuming beer while subject to duty, and thus proved the charge.

The consumption of alcoholic beverages while subject to duty is a very serious offense. Carrier's judgment as to the appropriate penalty should be disturbed only under very limited circumstances where the penalty is arbitrary and capricious. Giving Carrier's judgment its due deference, we nevertheless find that the penalty of dismissal should be set aside.

Claimant was not charged with being intoxicated, under the influence of alcohol or otherwise impaired. Neither witness called by Carrier at the Investigation testified that Claimant was impaired. Claimant admitted his consumption of beer earlier in the day. He testified that he did not realize that such consumption violated Carrier's Rules. Although such ignorance of the Rules cannot excuse Claimant's misconduct, Claimant gave assurances that, having been made aware of the Rule against consuming alcohol while subject to duty, he would not repeat the violation.

Although Claimant rejected Carrier's offer of participation in an EAP in lieu of the Investigation, Claimant subsequently entered an alcohol treatment program. A letter dated April 19, 1991, from Claimant's counselor indicates that Claimant was successfully participating in treatment; was highly motivated to achieve his goals, including a major goal of obtaining reinstatement; and had a positive prognosis for long term recovery. Claimant's rejection of Carrier's initial EAP offer is not fatal to his claim for reinstatement. See Second Division Award 11943.

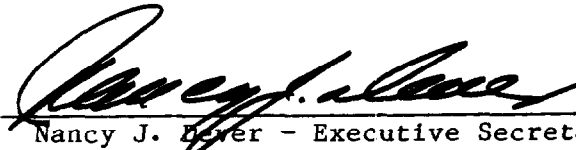
Under these circumstances, Claimant's dismissal should be reduced to a lengthy suspension equivalent to time held out of service. Claimant shall be reinstated with his seniority unimpaired, but without backpay or other compensation. Claimant's reinstatement is conditioned on his passing a medical examination, including drug and alcohol testing, to be approved by Carrier.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Boyer - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1992.