

Award No. 16873
Docket No. SG-17135

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert A. Franden, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie-Lackawanna Railroad Company, that:

Signal Maintainer M. H. Rhow be reimbursed for all wages lost as a result of ten (10) calendar days suspension effective December 10, 1965, and that his service record be cleared of the charge.

(Carrier's File: 101.9, Item Sig. 133 - General Chairman's File: No. 273)

OPINION OF BOARD: This is a discipline case. The Claimant was suspended for ten calendar days (six days' wages) for an alleged violation of Rule G of the Rules of the Operating Department of the Carrier railroad. Said rule reads as follows:

"The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited, and is sufficient cause for dismissal."

Following the alleged offense a hearing was held and the Claimant was given a ten calendar day suspension. The Claimant appeals on the grounds that the evidence presented at the hearing was inadequate to support the charge.

The uncontested facts in this matter show that at approximately 3:50 P. M. on the day in question the Claimant was found in a bar by two Carrier Officers. Although this was during duty hours, the Claimant had been let off early (3:45 P. M.) to cash his pay check. At the time the Claimant was seen in the bar he was standing at the bar where the proprietor was counting out money and paying same over to Claimant. The Claimant was ordered outside by the Carrier Officers. He was asked for his pass and keys and was told that he was being held out of service for a Rule G violation. There was presented in evidence a letter from the proprietor of the bar which reads as follows:

"On December 9, 1965, M. H. Rhow stopped at the Corner Place about 4:00 P. M. I cashed his check for \$113.50. There were no other transactions taken place and nothing was sold to him.

/s/ Rose Stanton"

The Claimant has denied that he was drinking.

The conflicting testimony is to the effect that a man seated next to the Claimant asked him if he would like another drink before he left. Claimant does not deny that the statement was made but states that he did not hear it. This man was not produced at the hearing, nor was a statement from him presented. One of the Carrier Officers testified that the Claimant's eyes were glassy and that he stuttered a couple of times. He further testified that he "believed" he could smell alcohol. The word "believe" indicated a lack of conviction on this point.

The question before this Board on review of this matter is whether there was sufficient evidence presented at the hearing so that a suspension for a violation of Rule G was not unreasonable, arbitrary or capricious. It is not our function to weigh the evidence as triers of fact. We must only satisfy ourselves that there was some substantial evidence to sustain a finding of guilt. See Award 5032 (Parker). A "finding based on substantial and competent evidence will be respected." Award 9230 (Rose).

In the case at bar, the most damning evidence of the Claimant's guilt is the hearsay evidence of a statement by an unnamed individual, "Would you like another drink before you leave." It is uncontradicted that the Claimant could have been in the bar but a matter of a few moments before the Carrier Officers entered. The testimony of the Carrier Officers was that they did not see him drinking. One "believed" he could smell alcohol on Claimant's breath. The testimony of the proprietor of the bar has been quoted above and speaks for itself.

The unsubstantiated hearsay evidence of the anonymous individual in the bar and the qualified "belief" that the Carrier Officers could smell alcohol on the Claimant's breath, all taken in contrast to the statement of the proprietor, the unqualified denial of the Claimant and the time element involved herein, leads this Board to conclude that the finding of guilt by the Carrier was unreasonable and without substantial evidence to support it.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 24th day of January 1969.