NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24100
Docket Number SG-24134

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation:

On behalf of David Benjamin, who was dismissed by notice dated September 23, 1980, for restoration to his former position, pay for all loss of time, and that his record be cleared." (System Docket 1561, Atlantic Region, New Jersey Division)

OPINION OF BOARD: On August 27, 1980, the Claimant was directed to attend an investigation on the following charge:

> "Alleged violation of Rule G from Conrail's Rules of the Transportation Department Rule G- The use of intoxicants, narcotics, amphetamines or hallucinogents by employees subject to duty, or in their possession or use while on duty, is prohibited. Alleged violation of Rule 3002 from Conrail's Safety Rules Maintenance of Way and Structures Employes, S7-C. Rule 3002-Narcotic medication and/or alcoholic beverage must not be used while on duty or within 8 hours before reporting for duty. In that you had possession of and consumption of an alcoholic beverage on August 15, 1980 in the area of CP Nave, Jersey City, N.J."

Subsequent to the investigation the Claimant was dismissed. The charges were made in connection with the observations of two Carrier supervisors who allegedly observed the Claimant take a drink from a bottle of beer while he was operating a Company truck on the day in question.

The Carrier first argues that the claim is procedurally defective inasmuch as it wasn't handled in accordance with the provisions of Article No. 7(b) of the controlling agreement. They contend that a copy of the Organization's letter of appeal dated September 29, 1980, was never given to the division engineer, the officer whose decision was appealed. Moreover, they point out such notice is required by Article No. 7(b). The Organization, on the other hand, contends, as they have since the issue was first invoked, that a copy of the September 29, 1980, letter was provided. In reviewing this issue, we do not believe that the arguments or the evidence on the issue are well enough developed to justify dismissing the claim. We will consider it on its merits.

Regarding the merits, the Carrier argues that there is substantial evidence, even though conflicting, to support the charge. They direct our attention to the well established principles of our appellate Board which holds that the Carrier hearing officer, as the trier of the facts, is entitled to assess the credibility of witnesses and to resolve conflicts in evidence. They direct our attention to testimony of Carrier witnesses Audet and Kurylo who both indicated that they saw the Claimant drink from a bottle of beer.

The Organization argues that Carrier witnesses Kurylo and Audet cannot be believed. Moreover the Organization suggests their testimony, particularly Audet's is too inconsistent to be considered substantial evidence. They rely on the testimony of the Claimant and employee Cotten who was in the truck with the Claimant at the time Audet and Kurylo reportedly saw the beer bottle. Both Cotten and the Claimant contend that the Claimant was drinking bottled Tropicana orange juice not bottled beer. The Organization also directs attention to written statments submitted by two other employees in the truck which both indicated that they did not see the Claimant drink beer in the truck. The Organization also finds significant the fact that the Carrier never produced the alleged beer bottle. Moreover, they point out that the Claimant later offered to take a breathalyzer or blood test but the Carrier failed to submit him to such a test.

In considering the evidence, it is our conclusion that although the evidence sharply conflicts, it is substantial enough to support the Carrier's conclusion. The fact that the evidence conflicts does not necessarily render it insubstantial. We often have held that because of the appellate nature of these proceedings we must defer to the decisions of the trier of facts so long as they are supported by substantial evidence. This includes deference to his assessment of credibility, the resolution of conflicts and his weighing of the evidence. There are several aspects of the evidence which when considered together establish its substantial nature.

The first aspect of the evidence which tends to establish the substantial nature of the evidence is the testimony of Audet and Kurylo. Although their testimony relative to which side of the Claimant's truck Audet approached is "fuzzy", their testimony that they saw the Claimant drink from a bottle of beer is clear and consistent. Moreover, we note that Audet testified he was close enough to notice that it was a bottle of "Miller" beer and that when he was between the vehicles he noticed the Claimant open his door and then he smelled the beer. Based on this, Audet concluded the Claimant had poured the beer out.

The next significant aspect of the evidence we would like to discuss is the absence of the "beer bottle" and the Claimant's failure to mention the Tropicana bottle at the time he was confronted. The Organization argued it was significant that the Carrier failed to produce the beer bottle. We find it significant as well, however, we do not feel that in the final analysis it distracts from the evidence to the point of being less than substantial. We agree with the Organization that the burden is on the Carrier to prove the charges but it is our opinion that even without the bottle the evidence is substantial. While having produced the bottle would have made the evidence compelling, clear and convincing or stronger, there is enough other evidence to support the charge. There is a distinction between "substantial evidence

test" and more stringent standards of proof. We have often said the Carrier is obligated to support the charges by substantial evidence and not beyond a reasonable doubt as the argument of the Organization implies. The aforementioned testimony of Audet and Kurylo is substantial evidence when taken into consideration with another facet of the evidence. This has to do with the Claimant's failure to mention or contend, when first accused by Audet, that he was in fact drinking from a Tropicana orange juice bottle. While the absence of the beer bottle is troublesome, we believe the hearing officer had reasonable basis to conclude that the Claimant's failure to mention the orange juice was more significant in light of the other evidence than the failure of the Carrier to produce the beer bottle. It is reasonable to conclude that after being accused of drinking beer while on duty and after being informed he was being removed from service that if the Claimant had in fact been drinking from an orange juice bottle he would have at least said so or better yet produced the bottle or had some reasonable explanation why he didn't. The Board has previously held that failure to proffer a defense at the time of accusation is substantial evidence of guilt. See Third Division Award 21219 (Eischen) and Fourth Division Award 3562 (T. O'Brien).

Regarding the Claimant's offer to take a blood test and the testimony of others in the truck, it is apparent that the hearing officer did not attach as much weight to these factors as others. Considering the evidence as a whole, we must conclude there is substantial evidence to support the hearing officer's decision.

In reviewing the question of whether discharge is appropriate, we note that discharge for possession and consumption of alcohol while on duty has been held grounds for summary discharge many times. Therefore, we do not find the penalty arbitrary, capricious or excessive.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of January 1983.