

PUBLIC LAW BOARD NO. 1760

Award No. 40

Case No. 40

Docket No. MW-DEC-81-6

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company (Former Wabash Railroad)

Statement

of Claim: Appeal of discipline of "30 days actual suspension assessed R. W. Burkhart for violation of Rule G, and request that he be paid at his respective rate for time lost and the investigation be stricken from his record."

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 2, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant was dismissed from Carrier's service October 8, 1981 for alleged violation of Rule G after the Roadmaster allegedly smelled an odor of alcohol on Claimant.

Following a requested formal investigation, on November 4, 1981 said discipline was reduced to a thirty (30) day suspension.

It has been long held that a lay person is capable of being a competent judge of whether another person is under the influence of an intoxicant. Such judgement is predicated on their sensory perceptions of the usual indicia exhibited by person deemed to be under the influence of an intoxicant. The indicia referred to includes but is not limited to a person emitting an odor of alcohol, staggered or unsteady gait, slurred speech, flushed face, red eyes and an inability to focus, voice oftentimes louder than normal and exhibiting actions not otherwise considered normal.

The only indicia allegedly exhibited by Claimant in the instant case was "an odor of alcohol" and Claimant's "gait." No other symptoms were observed or alleged.

The transcript reflects favorable medical evidence from Claimant's doctor, James R. Hoover, a specialist in diseases in surgery of the foot, who stated:

"Richard was examined by me on October 22, 1981. My findings included plantar flexed 1st and 4th metatarsals with associated accutely painful callouses on the plantars surface.

Due these painful lesions, which have become progressively worse over the last few months, the patient ambulates in a compensatory gait to avoid the painful areas..."

Additionally, there was testimony from several fellow workmen including an Assistant Foreman, that Claimant walked and worked normal. However, said "normalcy" was better stated by witness, Laborer G. L. Pattengale (Page 13) Q&A 114:

"He had a, ever since I've known Dick he has walked funny, he has had a different type of walk than the rest of the men have. Ah, you know, but he has walked that way for six years."

The Board must conclude that the evidence adduced, concerning Claimant's gait, was too tenuous to conclude that such was an indicia indicative that Claimant was under the influence of an intoxicant.

The other indicia, an odor of alcohol, was predicated on the affirmative assertions of the Roadmaster J. M. Sparks, Assistant Foreman R. L. Brown and the qualified assertions of Laborer J. H. Settles. The Board, in light of the record thereon, finds an insufficient degree of evidence to support Carrier's conclusion on this point. Seven employees, including Claimant and two Assistant Foreman, rode some 14 miles from their Lafayette headquarters to West Point in a truck with closed windows. None testified that they could smell alcohol in the cab of the truck or from Claimant. In fact the testimony in that connection was contra.

It would appear, that if alcohol was involved its use, if at all, occurred after arrival on the job site, or, after 7:15 AM. There was conflict from Carrier's witnesses in this connection. Assistant Foreman Brown testified that he advised Roadmaster Sparks that: "Burkhart is drinking again." But Roadmaster Sparks asserted that he first smelled alcohol from Claimant when both were observing a passing train. Thereafter he asked Brown to check Claimant and verify same.

In addition to Claimant's denial of drinking that day a medical statement that he had hypertension, was under doctor's care and was taking medication therefor, was offered as evidence thereon.

Lastly, the confused state of whether a request to take an alcohol blood level test was, in fact, even made, or was ordered must be viewed in the light of a previous similar incident Claimant had on October 1980. There Claimant had been sent by Carrier to a hospital for a blood alcohol level test. Said test was then found to be negative. However, Claimant had to pay the bill for such test or face legal action. Subsequently, Roadmaster Sparks authorized its payment. Such approval occurred only after Claimant had been advised by the hospital that they would undertake legal action if he did not pay the hospital bill. Consequently, a balanced reading of the evidence creates a degree of doubt on this point.

Therefore, absent a sufficiency of evidence, Carrier's conclusion that Claimant had been drinking alcohol on October 8, 1980 must fall. While we find that Roadmaster Sparks had acted in good faith there were facts and factors which caused the Board to conclude that doubt existed which fact redounds to Claimant's benefit. The claim will be sustained with the caveat added that Claimant had best continue to stay on a program of abstinence for if not, the only one to be fooled may be himself.

Award: Claim sustained as per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

M.A. Christie
M. A. Christie, Employee Member

S.C. Lyons
S. C. Lyons, Carrier Member
I dissent.

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued May 13, 1983.