

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

PARTIES TO DISPUTE: (United Transportation Union
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

"DTSL Sub-division claim of Mr. J.A. Barbara Jr., for discipline assessed to be removed, record cleared, reinstatement with all seniority, prior rights and privileges restored, vacation and insurance rights in impaired (sic), and pay for all time lost from date withheld from service (February 7, 1990), until reinstated with the Grand Trunk Western Railroad as a result of Trial held on March 14, and 15, 1990."

FINDINGS:

The First 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 an engineer trainee away from his home terminal. During an inspection of an engine the Supervisor Train Operations (STO) smelled an odor and determined that a breath test be administered, followed by a blood test. As the blood test was negative, the positive breath test was deemed negative. By certified letter dated February 8, 1990, Claimant was notified to attend a Trial to determine responsibility if any, of GTOR General Notice and Rule G violation. The Hearing was held on March 14 and 15, 1990, and thereafter, Claimant was advised that he had been found guilty as charged and was dismissed from the service of the Carrier.

The case at bar centers upon the merits and complex procedural issues. Considerable care has been given to the two procedural arguments of this dispute. First, the Organization argues that the Claimant did not work under the DTSL Enginemen's Working Agreement (BLE), but worked under the Trainmen and Yardmen's Agreement (UTU). As such, the Carrier failed to comply with UTU Article 16 in many respects, including time limits. The UTU argues that the Carrier's utilization of BLE Article 31 failed to properly advance the Claim. The Board finds insufficient factual evidence presented to sustain the view that engineer trainees are covered by the UTU Agreement. The Board finds no historical precedent or reason to believe from the factual record that when Claimant worked as an Engineer Trainee (Fireman) holding seniority in two crafts and was dismissed while working in the craft governed by the BLE Agreement, he returned to governance under UTU Article XIII, Section 3 (3) as a resultant right for discipline, time limits and claims. The record before us demonstrates that the Claimant was correctly tried, disciplined, and the Claim appealed on property under the applicable BLE Agreement.

Second, the Carrier has argued that the Claim was not properly brought to this Board under Section 3, First (1) of the Railway Labor Act. It is the Carrier's position that the Claim cannot be advanced to the First Division by the UTU, who has no such authority under the BLE Agreement. Progression to this Board is restricted to the employee, Carrier or duly authorized representative. The UTU General Chairman's argument that he is the Claimant's "duly authorized representative" as he correctly handled the Claim on the property is not persuasive and a construction of language that would violate the intent of the Railway Labor Act. However, while the UTU General Chairman had no rights to pursue this Claim to the Board, we will not deny jurisdiction in the instant circumstances. The record conclusively demonstrates that it was pursued to this Board by the employee. The Claimant signed the initial letter to this Board requesting the progression of his Claim (before his name was removed). There is no evidence that the Claim is before us without the intent and actions of the Claimant. We are convinced from this record that the Claim is properly before this Board.

On merits, the Board has systematically followed the issues and events. The burden of proof for any disciplinary action rests with the Carrier. In the instant case, the shortcomings of the Hearing were numerous and the facts established were insufficient to establish guilt.

The Supervisor Train Operations stated that he "noticed an odor on [Claimant's] breath that caused me to suspect that he had been drinking an alcoholic beverage." There is no factual corroborative evidence that the Claimant's breath smelled of alcohol. The Carrier points to the Assistant Foreman's testimony, but it is not conclusive. The Assistant Foreman states "I detected an odor, but at that time I did not determine what the odor was" and later after the breath test he states "it seemed to be alcohol." The Carrier did not call the only witness who was requested to smell the Claimant's breath and whom evidence indicated smelled nothing due to "sinus problems." Nor did the Carrier call other employees to testify who were in close proximity to the Claimant.

There are numerous contested statements in the testimony. Nowhere in this record can we find even one instance where the Supervisor Train Operations repeated in front of any other employee or supervisor the Claimant's alleged statement (denied by the Claimant) of having been drinking at a tavern. The Supervisor Train Operations states he sought a supervisor and the Assistant Foreman "said he would be a witness." According to the Assistant Foreman, he was ordered to witness the breath test and to sign the form. The Claimant's witness who accompanied the Claimant to the hotel and to work in the same car the next morning detected no odor, observed no red eyes and was not aware of the Claimant consuming any alcohol.

On the basis of the testimony the Carrier determined that the Supervisor Train Operations:

"did not fabricate evidence regarding his conversations with Claimant is far more believable than the conclusion that ... he made it all up.... Such position is reinforced by the fact that at the time Claimant allegedly made the statements a blood test had not been conducted, but subsequent to that time, i.e., when Claimant denied..., Claimant had knowledge that the blood test results were negative."

There are serious credibility issues involved and their resolution rests solely with the Carrier and not with this Board. We note that Claimant did not state he was a non-drinker until testifying. We also note questionable responses and contradictions from all parties. The Carrier has determined that the testimony of both Carrier witnesses has the needed weight of probative evidence to substantiate guilt. We disagree.


This record is deficient in the needed proof. There are strong grounds for suspicion but none adequate to establish guilt. Carrier's alcohol policy and approach are certainly in line with the serious need to remove all drug use from the work place. There is every right of the Carrier to rely upon customary breath and behavior evidence to substantiate any alcohol or drug use. Dismissal for Rule G or GTOR General Notice upon factual presentation of alcohol on the breath did not herein occur. The Carrier's discipline must be based upon a clearly established fact with the full weight of substantial probative evidence. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. v. Labor Bd. 305 U.S. 197, 229). The evidence in this record is inadequate to conclude that the Claimant had been drinking. Claimant is to be returned to service with seniority and all other rights unimpaired and he is to be compensated for all time lost, less any outside earnings he may have had from February 7, 1990 until he is returned to service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 12th day of September 1991.