

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6423**

John C. Fletcher, Chairman & Neutral Member
Kendall F. Koff, Carrier Member
Dale L. McPherson, Employee Member

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
CPR-US/METRA/IMRL**

and

I & M RAIL LINK, LLC

**Award No. 8
Case No. 8
Claimant A. Dahl**

*Date of Hearing-September 5, 2001
Date of Award-February 10, 2002*

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Was Carrier justified in dismissing Claimant Engineer A. Dahl in connection with Assistant Engineer J. R. Fitzgerald's proven violation of General Operating Rule 1.5 on August 29, 2000?

FINDINGS:

Public Law Board No. 6423, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

The circumstances culminating in the case at bar were addressed in prior Award 4 of this Board, which supported Carrier's dismissal of Assistant Engineer J. R. Fitzgerald for violating General Operating Rule 1.5. They are briefly summarized herein below.

The Claimant in this case was assigned as an engineer in road pool service between Mason City, Iowa and Marquette, Iowa. On August 29, 2000, he was called for Train No. 386, and departed Mason City with Assistant Engineer J. R. Fitzgerald at 0800 hours. The record establishes that Claimant was required to stop at Ossian, Iowa at 1045 hours to wait for an Engineering Department crew to release the track ahead of him. According to facts not in dispute, Claimant took that opportunity to visit the rest room in the nose of the lead engine, while Assistant Engineer Fitzgerald opted for a beer break. Unfortunately for him, Train 386 stopped only fourteen (14) feet away from a home located next to the track in Ossian, and through her laundry room window, the resident of that home observed his actions. After notifying the local sheriff that a railroad crew member was drinking on the job, she contacted Carrier's main office in Davenport and reported her observations there. However, before Carrier could respond, Train 386 departed Ossian, and Claimant and Assistant Engineer Fitzgerald were not intercepted until they arrived in Marquette. Both were subsequently subjected to reasonable cause alcohol breath tests, the results of which were negative for Claimant and positive for Assistant Engineer Fitzgerald. Nevertheless, Claimant was removed from service and directed to attend a formal investigation in connection with the following charge:

[A]ttend a fact-finding session...for the purpose of ascertaining the facts and determining your responsibility if any for allegedly being involved in an incident concerning Mr. Fitzgerald wherein we received information from a civilian that a crew member was observed drinking an alcoholic beverage while on the locomotive as confirmed by a positive breath alcohol test, and your alleged violation of the General Code of Operating Rules:

Rule 1.1 - obeying the rules is essential to job safety and continued employment.

Rule 1.4 - Employees must cooperate and assist in carrying out the rules and instructions.

Rule 1.47 - The conductor and the engineer are responsible for the safety and protection of their train and observance of the rules. If any conditions are not covered by the rules, they must take every precaution for protection.

Rule 1.47 (B-1) - The engineer is responsible for safely and efficiently operating the engine. Crew members must obey the engineer's instructions that concern operating the engine. A student engineer or other qualified employee may operate the engine under close supervision of the engineer. Any employee that operates an engine must have a current certificate in his possession.

Rule 1.9 – Employees must behave in such a way that the railroad will not be criticized for their action.

And General Safety Rules:

Rule G-1 – We have the right and the responsibility to make decisions based on experience, personal judgment and training. We must make certain that:

Rule G-1(C) – Co-workers are warned of unsafe acts and hazards.

Rule G-1(F) – Our work place is drug and alcohol free.

Rule G-7(21) – The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

An evidentiary hearing into the matter was held on September 19, 2000, during which Claimant unequivocally denied being aware that Assistant Engineer Fitzgerald either possessed or consumed alcohol during their trip on August 29, 2000. Carrier nevertheless dismissed him on October 3, 2000 for his “involvement” in the incident, and in due course, the instant claim for his reinstatement was presented. As the matter could not be resolved on the property, it was submitted to the Board for disposition.

Carrier argues that Claimant, as engineer of Train 386 on August 29, 2000, was responsible for assuring that “his subordinate” complied with all operating and safety rules. Carrier rejects the Organization’s argument that Claimant was dismissed without sufficient cause on the “assumption” that he was aware of Assistant Engineer Fitzgerald’s drinking. On this point, Carrier argues that he *must have known*, because extrapolated breath alcohol test results revealed that Fitzgerald’s alcohol consumption likely exceeded the one beer he admitted drinking. Moreover, Carrier maintains that, “[I]n the unlikely event [Claimant] was truly oblivious to what was happening in the confined space of the locomotive, he is still culpable for not knowing” (Carrier submission at page 2, emphasis added).

Carrier further accuses Claimant of “evasiveness, detachment and indifference” during the evidentiary hearing, and maintains that he hid “what the physical evidence gathered later showed – that Fitzgerald was drinking throughout the trip” (Carrier submission at pages 6 and 7). On that basis, Carrier urges the Board to find Claimant responsible as charged and support its sanction of permanent dismissal.

The Organization argues that Carrier dismissed Claimant without just cause on its assumption that he knew Assistant Engineer Fitzgerald drank alcohol while on duty and failed to report it. On this point, the Organization cites Fitzgerald’s testimony that he

drank the beer *outside* Claimant's presence, and concludes that Claimant therefore had no way of knowing about it. The Organization also argues that Claimant's failure to observe behavioral manifestations of Fitzgerald's drinking was not caused by "indifference", noting that Carrier officers even testified of his normal conduct both before and after reasonable cause testing. The Organization further cites Claimant's "exemplary" 40-year career in the industry, and for all the foregoing reasons, urges the Board to sustain the instant claim in its entirety.

Upon the whole of the record, the Board is convinced that Carrier acted against Claimant without sufficient evidence of his culpability in the bizarre events of August 29, 2000. The record is totally absent any material revelation that he was, in fact, aware that Assistant Engineer Fitzgerald drank on the job and moreover chose to suppress that information. Here, the Board reminds Carrier of its contractual burden as the moving party in this case, and points out that the affirmative argument it raised on this point lacked support of hard evidence necessary for it to prevail. In other words, Carrier's mere conclusion (and consequent assertion) that Claimant must have known about Fitzgerald's drinking because it made sense, did not make it so. Carrier does cite forensic evidence indicating that Fitzgerald's breath alcohol level at the time he was tested allowed for the reasonable conclusion that he either drank more than the one beer he admitted consuming on his trip, or was "falling down drunk" when he came to work. Either way, according to Carrier, Claimant therefore must have known he was drinking, but the Board does not agree.

The Board is first persuaded by the fact that Fitzgerald testified to drinking at Ossian outside Claimant's presence. Furthermore, even Carrier officers observed Fitzgerald conducting himself in an entirely normal manner upon his arrival in Marquette. Therefore, the Board is not convinced that Claimant had any *behavioral* manifestation of Fitzgerald's infraction to observe. Carrier's determination that Claimant must also have observed the act of Fitzgerald's drinking does not meet the Board's standard of burden either. Surely Carrier has considered the possibility that if Fitzgerald indeed continued to drink after the incident at Ossian, he may not have been so bold as to pop open a beer right in front of Claimant, choosing instead to "spike" his thermos or replace bottled water with clear alcohol. The Board readily concedes that this, too, represents nothing more than pure conjecture. However, the illustration serves to show Carrier that something altogether different from its interpretation of events could, in fact, have happened.

The Board holds Carrier to its contractual obligation to prove that Claimant knew of Assistant Engineer Fitzgerald's violation of Rule 1.5, and then deliberately concealed it. The record before the Board simply contains no evidence of such an act. The Board concludes, therefore, that because Claimant was dismissed on what amounted to speculation of guilt, as opposed to material evidence of guilt, the claim must be, and is, sustained in its entirety. Carrier is ordered to immediately reinstate Claimant to service

with seniority unimpaired and compensation for all time and benefits lost. Claimant's service record will be adjusted to so reflect.

AWARD

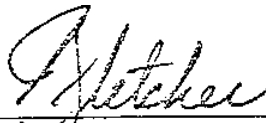
The issue before the Board:

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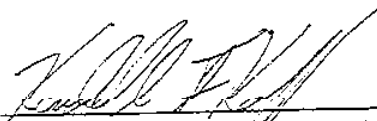
is answered in the negative, "No". The claim is sustained as set forth in the findings.

ORDER

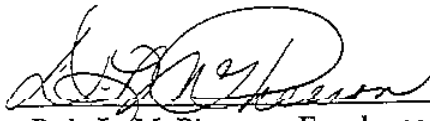
Carrier is directed to comply with this Award within thirty (30) days of the date indicated below.



John C. Fletcher, Chairman and Neutral Member



Kendall F. Koff, Carrier Member



Dale L. McPherson, Employee Member

Dated at Mount Prospect, Illinois, February 10, 2002