

Award No. 3738

Docket No. 3631

2-C&O-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Richard F. Mitchell when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Machinists)**

**CHESAPEAKE & OHIO RAILWAY COMPANY
(SOUTHERN REGION AND HOCKING DIVISION)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Machinist Helper Luke M. Houston was unjustly discharged from service on March 12, 1959.

2. That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and paid for time lost retroactive to March 12, 1959.

EMPLOYEES' STATEMENT OF FACTS: Machinist Helper Luke M. Houston, hereinafter referred to as the claimant was employed by the Chesapeake & Ohio Railroad, hereinafter referred to as the carrier, for a period 12 years, at its Newport News, Virginia, Piers.

The claimant's regular tour of duty was Sunday through Thursday, 7:00 A. M. - 3:00 P. M. Pier 9. On March 1, 1959, he was called to work overtime from 11:00 P. M. to 7:00 A. M., March 2. He was issued his time card by the foreman and reported for work at his assigned station. Later on, while he was engaged in his assigned work, Mr. Murphy, general foreman, accused him of being intoxicated and had the claimant accompany him to general foreman's office where he talked to him and told him to make out a time card until 12:30 A. M. and then go home.

The claimant was given an investigation on March 6, and the company, as well as the claimant, had witnesses present for this investigation. There was no conclusive evidence of intoxication presented by the carrier at this investigation. However, the claimant was discharged for intoxication on March 12.

This claim has been appealed as provided in the controlling agreement and has been discussed thoroughly with the highest designated officer of the carrier to handle such matters, but the claim was denied. The agreement, effective July 1, 1921, as subsequently revised, is controlling.

It is well established that intoxication on duty is just cause for dismissal. The evidence adduced at the investigation proves conclusively that Houston was guilty as charged notwithstanding the statements made by Houston and the witnesses who appeared in his behalf. In this connection attention is called to previous rulings of your Board:

"There was direct conflict in the evidence. The Board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employe charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. None is here shown. Reasonable grounds exist to sustain the determination of guilt made by the carrier." (Second Division Award 1809, Referee Carter.)

"It is within the province of the representative of the carrier who presides at the hearing to determine the credibility of those who testify and to weigh and evaluate their testimony. If upon so doing, it is probable that the charge is proven and the representative so finds, this Board may not disturb that finding unless it is manifestly unsupported by the evidence." (Second Division Award 3266, Referee Hornbeck.)

Carrier submits that Houston was guilty as charged, that the discipline administered was fully justified and should not now be disturbed, and urges that your Board so find.

FINDINGS: The Second 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 employe 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 were given due notice of hearing thereon.

Luke M. Houston was employed as a machinist's helper at Newport News, Va. and was dismissed from Carrier's service on March 12, 1959 as a result of his having been found guilty of being under the influence of intoxicants while on duty March 1, 1959.

Claimant had completed his tour of duty at 3:00 P. M. on March 1, 1959 but because of Carrier's requirement he was called at 10:00 P. M. to report for work at 11:00 P. M. He reported for work as instructed. He was sent home at 12:30 A. M. charged with being intoxicated.

An investigation was held and claimant was judged guilty. The General Chairman who represented Houston objected that the hearing was not a fair one for the following reason, which we quote from the record:

"MR. GUILFOYLE: Are you satisfied that this has been a fair and impartial investigation and conducted in accordance with the rules of the Shop Crafts' Agreement?

"ANSWER: No.

"QUESTION: What is your objection?

"ANSWER: The continuous repetition as to knowledge of the witnesses whether they had information or not as to Mr. Houston being sent home on being intoxicated on such being discovered."

The answer to the objection, as we see it, is contained in the testimony of Houston. We quote:

"QUESTION: Have you ever been sent home for being under the influence of intoxicants before?

"ANSWER: Yes, sir."

Since Houston testified that he had been, we can find no objection to the questions asked. The investigation was a fair one. Houston was represented by officials of the Machinists organization. He was present and testified and his representative cross examined witnesses.

Mr. Houston testified, and we quote:

"He told me that Mr. Young said I couldn't work and I asked him why. He said 'You have been drinking.' I said okay if you think I have been drinking and I am too tight to work I will go home."

Thus the claimant admits he had been drinking that evening. From his answer he himself had doubt in his own mind whether he was capable of working and was willing and did go home. In addition to this there is testimony that his speech was not intelligent, it was rambling; that as he walked he weaved; that he had the odor of intoxicants on his breath and that his actions in general were not what they were when he was known not to be under the influence of intoxicants.

There is evidence of some witnesses for Mr. Houston that they did not smell the odor of intoxicants on his breath and that he was normal. The whole record convinces us that Houston was guilty of violating the rules. For this the Carrier was justified in disciplining him, but in view of the fact that Houston after completing his tour of duty at 3:00 P. M., because of Carrier's request was called at 10:00 P. M. to report to work at 11:00 P. M., it does seem to us that the punishment was severe.

The Board is reluctant to substitute its judgment for that of the Carrier officers, however we feel that under the circumstances in this case the penalty has served its purpose. The Board directs that Houston be reinstated with seniority rights unimpaired, but with no pay for time lost.

AWARD

The claim is sustained as limited in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April, 1961.

DISSENT OF CARRIER MEMBERS TO AWARDS NOS. 3712 AND 3738

The majority, consisting of the Labor Members and the Referee, in our opinion went beyond the recognized rights and practices of this Board when it ruled that leniency was to be granted though claimants were guilty as charged.

Claimants were afforded a fair and impartial investigation, at which they presented witnesses in their behalf and were represented by the General Chairman of the Organization, both of whom were permitted to freely cross-examine witnesses, all in strict accordance with the rules of the applicable agreement. There was substantial and convincing evidence presented at the investigation to show that claimants were guilty of the serious charges against them.

In the handling on the property, the Carrier declined in its sound discretion to extend leniency to the claimants. The Carrier took into consideration the entire service records of the claimants before assessing its penalty, and under the circumstances we have no right to set aside its judgment, because no evidence was presented before this Board to show that the Carrier had abused its prerogatives.

The Carrier has a right to expect its employes to observe the rules of the controlling agreement and to be able to perform work for which they are paid. Referee Carter in Award 2207 ably stated, "It is not the function of this Board to weigh the evidence as in an original hearing. If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained."

For the reasons set forth herein, the Carrier Members believe that the majority has erred with the issuance of these awards.

/s/ **P. R. Humphreys**

/s/ **H. K. Hagerman**

/s/ **David H. Hicks**

/s/ **William B. Jones**

/s/ **T. F. Strunck**