

Award No. 4671
Docket No. 4524
2-SOU-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement Carmen N. E. Hudson and C. L. Rawson were improperly suspended from service November 18, 1962, and discharged from service January 8, 1963.

2. That accordingly the Carrier be ordered to restore the afore-named employes to service with vacation, seniority and pass rights unimpaired, pay them for all time lost and keep their Travelers Insurance in full force and effect.

EMPLOYEES' STATEMENT OF FACTS: Carmen N. E. Hudson and C. L. Rawson, hereinafter referred to as the claimants, were employed by the carrier at Hattiesburg, Mississippi, were taken out of service November 18, 1962, charged with violation of Rule "G" in general rules of the book of operating rules.

Formal investigation was held November 26, 1962. On January 8, 1963, the claimants were dismissed from service of the carrier.

Claimants were examined by Doctor Grady Cook.

This dispute has been handled with the carrier's officers designated to handle such matters, in compliance with current agreement, all of whom have refused or declined to make satisfactory settlement.

The agreement effective March 1, 1926, as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is submitted the claimants were subject to the protection of the provisions of the aforesaid controlling agreement made in pursuance of the amended Railway Labor Act, particularly the terms of Rule 34, which reads in pertinent part:

vacation, seniority and pass rights unimpaired, pay them for all time lost and keep their Travelers insurance in full force and effect.

In First Division Award 14421, Referee Whiting, it was held that:

"A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the employer. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. In the absence of any enforceable right to reinstatement there is no basis for this time claim."

In reaffirming the above the board held in First Division Awards 15316, 15317 and 15318, Referee Colby, that:

" * * * the Board is without power to pass upon the propriety of the penalty imposed or to direct the carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this case."

It is therefore evident that the board lacks authority to do what is demanded by the brotherhood in Part 2 of the claim.

CONCLUSION:

Carrier has shown conclusively that:

- (1) The effective agreement was fully complied with by the carrier.
- (2) The charge against Messrs. Rawson and Hudson was proven. They were on duty under pay under the influence of an intoxicant in violation of Rule G and were accordingly suspended and subsequently dismissed for just and sufficient cause, and their employment relationship forever terminated. They were not improperly suspended on November 18, 1962, and discharged on January 8, 1963, as alleged by the brotherhood.
- (3) There can be no showing that the discipline imposed was a result of arbitrary or capricious judgment or in bad faith. Furthermore, carrier's action is fully supported by the principles of awards of all four divisions of the board.
- (4) The board does not have authority to order the carrier to rehire Messrs. Rawson and Hudson under any circumstances or to restore their former seniority, vacation and pass rights or to pay them for any time lost. Under the Railway Labor Act, by virtue of which the board functions, and the principles of prior board awards, carrier was fully justified in dismissing Rawson and Hudson and refusing to rehire them under any circumstances. The board simply does not have authority to substitute its judgment for that of the carrier.

In view of all the facts, the board cannot do other than make a denial award.

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.

Employe Rawson, who had eighteen years of service for the Carrier, and employe Hudson, who had sixteen and one half years of service for the Carrier, were both discharged because they allegedly violated Rule "G" of the Agreement which provides that the use of intoxicants while on duty or the reporting for duty while under the influence of intoxicants will be sufficient cause for discharge.

The transcript in the record of the hearing on these charges shows that Trainmasters Powers and Webb and Car Foreman Tucker testified that the employes "staggered, reeled and were unsteady on their feet". Engineer Harrell, Fireman Knight, Engine Foreman Aultman, Yard Helpers Myers and Draughn all testified that Rawson and Hudson were observed by them and did not appear to be under the influence of intoxicants.

Both men willingly submitted to both physical examinations and blood tests. The transcript shows that the Carrier's Doctor, Dr. Grady Cook made certain comments, based on his examination which, inter alia, included the following:

"Examination at the time I saw them revealed to me no definite evidence that either of the men were intoxicated. Their coordination was average. They walked and turned without any staggering or weaving * * *. I could not be sure there was an odor of alcohol on their breaths * * *. My final impression was that the men probably had drunk some alcoholic beverage sometime during the evening but they were not intoxicated, i.e. definitely influenced when I saw them."
(Emphasis ours.)

The Organization stated that it neither condones nor attempts to protect employes who are chronic alcoholics or who drink while on duty or who report to work under the influence of intoxicants.

Carrier states that the record conclusively proves that the men violated Rule "G" and, as such, were discharged. The Carrier states further that it was not arbitrary or capricious and that it is beyond the authority of the Board to substitute its judgment for that of the Carrier.

If the discipline imposed by the Carrier was supported by substantial evidence on the record considered as a whole then there would be no question that it should be sustained by the Board and a denial award issued. In the instant case more than a preponderance of the evidence in the record, and especially that of Dr. Cook, the Company physician, runs in favor of the employes.

On the record in the instant case it would appear that the Carrier's discipline is not supported by substantial evidence; in view of the Claimants' records which show 18 years and 16½ years of unblemished service, discharge is an excessive penalty; the record is barren of evidence to show that the

men were in such condition as to interfere with the proper performance of their duties; based on the record the imposition of the ultimate penalty of discharge was arbitrary and capricious; since there is some evidence that the claimants may have had some intoxicants during the day the penalty should be reduced to a 30 day suspension. The claimants are restored to their positions with full seniority and other rights unimpaired and they should receive back pay for all time lost except for the period of suspension.

AWARD

Claim is sustained in accordance with the above decision.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 26th day of February, 1965.

DISSENT OF CARRIER MEMBERS TO AWARD 4671

Claimants were charged with violation of Rule G in the book of Operating Rules in that they were on duty as carmen under the influence of an intoxicant at 11:30 P.M., Sunday, November 18, 1962.

Rule G, with which all railroad employees are familiar, provides that:

"The use of intoxicants or narcotics at any time is detrimental to good service and is cause for discipline. Employees who indulge in the use of an intoxicant or narcotic while on duty, or who report for duty while under the influence of either, will be dismissed."

Evidence of record reveals that Trainmaster Powers testified that at approximately 11:30 P.M., November 18, 1962, the two claimants "were in such condition that they were staggering and very unsteady on their feet and their speech was slurred," that at about 12:10 A.M., November 18, some 40 minutes later "Hudson was staggering and reeling around the fire," that "Rawson was sitting on a bench with his head in his hands and his elbows on his knees," that Rawson "stood up and was very unsteady on his feet," that "both men were reeling on their feet and that their speech was slurred and they talked sort of 'thick-tongued'," that he "smelled some alcohol or some kind of intoxicant on both men," that "they were in a condition that was detrimental to their own safety and to the safety of the railroad," that "they were very unstable and unsteady on their feet and their voice or speech was slurred, they spoke as if they were thick-tongued, not in full control of their faculties," and that later at the hospital before being examined Rawson conceded "that he had had a drink about 3:30 P.M. Sunday afternoon."

Trainmaster Webb testified that on Sunday, November 18, shortly after midnight that he observed "Rawson, he was sitting on a bench, with his head in his hands and his elbows on his knees," that "Hudson was standing up on

the north side of the fire and he walked around to the south side and as he did he stumbled," that Rawson "got up and as he stood up, he weaved from side to side," that he "observed Mr. Hudson walking in what I would call a deliberate fashion. That would be stiff back and putting his feet down in a manner a man would not normally — just free swing and walk along," that "both men appeared to me to be bleary-eyed and their talk, judging from my acquaintance with them, seemed to be in a more or less of a thick or blurred manner," that Hudson "weaved slightly from front to rear," that "Mr. Rawson said that he had had a drink about 3:30 Sunday afternoon," that "they both looked as if they were bleary-eyed, and I'd say heavy lidded," that "their eyes were more or less, eye lids, top eye lids were down, I would say more than they normally were, and while we were standing there talking Mr. Hudson was rocking or weaving from side to side," that he "could smell the stale smell of alcohol or an intoxicant" on Rawson's breath, that their "weaving was due to their being under the influence of some type of intoxicant; that Mr. Rawson's weaving and thick tongue; both of their rather thick and blurred speech when they stood up and talked," that "as we walked across the yard, I said Mr. Rawson coughed and I was in his immediate proximity there and I smelled the stale smell of alcohol, I'll say alcohol or an intoxicant on his breath."

Foreman Tucker testified that on the night of November 18, 1962, the two carmen on duty, N. E. Hudson and C. L. Rawson "were staggering all over the place," that as they approached the fire at about 12:10 A. M., November 19, "we could see Mr. Rawson sitting with his hand in his lap. Mr. Hudson was staggering around the fire. We observed their condition for about three minutes," that "Mr. Powers asked me to smell Mr. Rawson's breath. Since I had already smelled Hudson's breath at the fire I did now observe Rawson's breath. Rawson's breath did not smell exactly like Hudson's," that "Mr. Rawson told Dr. Cook that he had had a drink Sunday afternoon about 3:30 P. M.," that "Hudson also told Dr. Cook that he had been drinking Sunday, too," that both men "talked sort of thick-tongued," that this was unusual, that they did not walk normally, that he could smell the odor of intoxicants on their breath, that Hudson stumbled around the fire, that he was convinced that Hudson and Rawson "had been drinking during the night" and that they were under the influence of an intoxicant.

The undisputed evidence of record shows that the blood alcohol levels of 0.158% and 0.192% respectively found in the two men approximately 1 hour after they had been seen by witnesses to be apparently intoxicated would furnish presumptive evidence that the men had been under the influence of alcohol when at work and that they were still mildly influenced when examined by Dr. Grady Cook.

This positive and unrefuted testimony proves that both carmen were on duty under the influence of an intoxicant at 11:30 P. M. on November 18, 1962, in violation of Rule G specifically providing that:

"Employees who indulge in the use of an intoxicant or narcotic while on duty, or who report for duty while under the influence of either, will be dismissed."

It is obvious, therefore, that the majority's statements that "it would appear that the Carrier's discipline is not supported by substantial evidence" and that "the record is barren of evidence to show that the men were in such condition as to interfere with the proper performance of their duties" are contrary to the evidence of record.

The evidence is also clear that the testimony of the train and engine service employes was indefinite and inconclusive and carried little, if any, weight. Certainly it did not outweigh that of Trainmasters Powers and Webb and Car Foreman Tucker.

It is thus evident that the majority not only ignored positive unrefuted evidence of record that the two carmen were on duty under the influence of an intoxicant at 11:30 P.M., Sunday, November 18, 1962, in violation of Rule G, but has attempted to step beyond the bounds of the Board's legal authority in attempting to substitute their judgment for that of Carrier by attempting to reduce the dismissal of Carmen Hudson and Rawson to a thirty day suspension and holding that they should be restored to their positions with full seniority and other rights unimpaired and paid for all time lost except for a period of thirty days.

The award is not only contrary to the evidence of record and erroneous but proposes to exceed the Board's authority. We, therefore, dissent.

/s/ P. R. Humphreys

/s/ H. F. M. Braidwood

/s/ F. P. Butler

/s/ H. K. Hagerman

/s/ W. B. Jones