



Award No. 5657

Docket No. 5565

2-SCL-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

SEABOARD COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current applicable agreement Carman helper H. G. Brown was unjustly given an investigation in the Master Mechanic's office, Jacksonville Shop, Jacksonville, Florida, on July 21, 1966 and was dismissed from service August 15, 1966.

2. That accordingly the Carrier be ordered to reinstate Carman Helper H. G. Brown and that H. G. Brown be restored to service and paid eight (8) hours pay per day plus all overtime that he would have been entitled to since June 24, 1966 and that he be made whole by the Seaboard Air Line Railroad for all fringe benefits and vacation rights as a result of said unjust charges.

EMPLOYEES' STATEMENT OF FACTS: H. G. Brown, hereinafter referred to as the claimant has been employed by the Seaboard Air Line Railroad Company hereinafter referred to as the Carrier, for approximately fifteen (15) years as a carman helper at Baldwin, Florida, his regular assigned hours being third shift, 11:00 P. M. to 7:00 A. M., Tuesday thru Saturday with rest days Sunday and Monday. Claimant was notified by letter dated June 27, 1966 to appear for formal investigation on July 5, 1966. The charges as follows: "Failure to protect your 11:00 P.M. assignment as car oiler at Baldwin, Fla. on June 23, 1966 and conduct unbecoming an employe." A copy of said notice is submitted and identified as Exhibit (A). **Amended Charges:** Charged with violation of Rule 19, failure to properly protect assignment during the hours of 11:00 P. M. to 7:00 A. M. June 23, 1966, conduct unbecoming an employe in an alleged intoxicated condition on company property. A copy of said notice is submitted and identified as Exhibit (B). On July 21, 1966 claimant was given an investigation, copy of which is submitted as Exhibit (C). On August 15, 1966 claimant received notice of his dismissal from service, a copy of which is submitted and identified as Exhibit (D). This dispute has been properly handled with all Carrier Officers authorized to handle disputes of this type with the result that all of them have declined to adjust it. The Agreement effective March 10, 1923, as subsequently amended is controlling.

Under agreed to understanding with the Shop Crafts in the application of discipline under Rule 33 such employes can only be reprimanded or dismissed.

POSITION OF CARRIER: It is noted that the claim specified in the October 2, 1967 letter of notification to the Second Division from President Fox of Railway Employes' Department was that Carman Helper Brown "was unjustly given an investigation" whereas the claim specified by the General Chairman in the handling on the property was that Mr. Brown was "unjustly dealt with by being dismissed from the service." Mr. Brown was given a formal investigation in accordance with the provisions of Rule 33 and was, therefore, not unjustly given an investigation.

The transcript of the investigation and the record in this case conclusively show that Mr. Brown was properly dismissed from the service and, as held in Second Division Award 3933, "Under these conditions the Carrier's action was justified, and claimant should not be reinstated to the detriment of another employe."

If there was ever a case where an employe was justifiably dismissed from the service this is it. As held in Second Division Award 1814, the action of the Carrier in this case was motivated by necessity and not by action that could be deemed arbitrary or capricious. Also appropriate is Second Division Award 1541 which held that, "Claimant had been dealt with very leniently in the past and could not always expect Carrier to overlook his neglect of duty." Also see Second Division Awards 2044 and 1666.

The position of the Organization was fully answered and refuted by the Director of Personnel in his letters of January 25, 1967 and June 14, 1967, with no denial or rebuttal thereof by the Organization. The evidence developed at the investigation was too conclusive as to Carman Helper Brown being in an intoxicated condition in his automobile on Company property at Baldwin at a time when he was assigned to be on duty and working to be successfully challenged. The record likewise conclusively shows that every effort had been previously made to straighten out Mr. Brown and make him a desirable and responsible employe, and that he was deserving of no more consideration. There can be no question about such efforts being made, as confirmation thereof was made by Local Chairman Higginbothom on Page 16 of the transcript of the investigation in his answer to question by Master Mechanic Alexander as follows:

"Q. Have you and Mr. Oglesby in the past endeavored to work out plans to assist Mr. Brown in trying to rehabilitate himself?

A. I would say that is correct to some extent. Not to the full extent that has been stated here."

Carrier, therefore, reiterates that its action in this case was fully justified, and the claim should accordingly be denied.

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 waived right of appearance at hearing thereon.

This is a discipline case. The appeal is based on the claim that, on or about April 24, 1966, H. G. Brown, claimant, was wrongfully suspended and dismissed from service effective that date, after a formal investigation to develop the facts and place responsibility for Claimant not being on his assignment the night of June 23, 1966 at Baldwin, Florida.

Mr. Brown, a 15-year employe, about 40 years of age, hereafter referred to as Claimant, was regularly assigned to the third shift, 11:00 P. M. to 7:00 A. M., Tuesday through Saturday, as Car Oiler, Baldwin Shops, Seaboard Shop, Baldwin, Florida, on the date in question.

Claimant failed to show up for work at the starting time of his shift. Another employe found him about 11:15 P. M. in the front seat of his car, parked adjacent to the Car Inspector's office in the Yard, in a state of suspended or deadened sensibility. The employes "hollered at him and knocked his knees up against the steering wheel." He did not fully respond and the employe departed. Two other employes repeated the attempts to get Claimant on his feet within minutes of each other. He did not respond.

Claimant's supervisor, J. D. Ryan, after learning that Claimant had not reported for work and had ascertained the reason, went to the Yard Office and, at 11:35 P. M., called Foreman E. J. Oglesby to come out to the property. The Foreman arrived at 11:55 P. M. Claimant was still in his automobile stretched out on the front seat in the same dead stupor, his feet on the steering wheel or on the left side of the car and his head toward the opposite side. The Foreman also observed two pint whiskey bottles, two empty coca cola bottles, an empty glass, a spoon and a shotgun on the floor in the front part of the car.

The Foreman called for re-enforcement. The Yardmaster was busy. Local Chairman W. W. Higginbothom came out at 12:40 A. M. Conditions had not changed. There was a strong odor of whiskey present. The Foreman called the Chairman's attention to the whiskey bottles on the floor. One was empty. The other had the remains of about 1/3 of a pint. "Calvert" was the name brand. Foreman Oglesby and Supervisor Ryan perceived by the sense of smell that it contained whiskey. Chairman Higginbothom declined the offer to smell the contents. The evidence was produced at the investigation.

The Chairman walked around to the right side of the car, opened the door and started shaking Claimant, called him, and slapped him on the shoulder. Claimant responded but remained on his back, "rolled his eyes back" and gazed upon his visitors. The Chairman asked Claimant if he was sick. He nodded in the affirmative. The Foreman told Claimant he was drunk and said, "I can't let you in that Yard in your condition, it is 12:45 A. M. and you are out of service." The Chairman interceded and asked the Foreman not to "pull him out of service." The Foreman instructed Claimant to put on his shoes, get up and see if he could walk. Claimant "got out and staggered possibly 20 or maybe as much as 30 feet from us and turned around and came back in his staggering or drunkard (sic) walk."

Claimant was intoxicated in Supervisor Ryan's opinion. He was "staggering" and was "incapacitated." The Supervisor knows that Claimant has a

"natural limp," ever since an automobile accident. The Supervisor has had instruction on different jobs and knows what to look for when a person is suspected of being under the influence of alcohol. In his opinion, Claimant was under the influence of whiskey, not drugs. Claimant "smelled of whiskey." Supervisor Ryan is not an authority on drugs.

The Foreman was convinced that Claimant was drunk. He explains: (tr. 17):

"Q. Would you mind explaining to us just how do you determine when a person is drunk?

"A. I didn't have that man walk down a chalk line, he couldn't begin to do it; whenever he walked off from me staggering. When he even looked at me out of that glazed condition, in his car, glassy-eyed, then when he got up, that whiskey I could smell on him, then after getting out of his automobile and walking off from me staggering all around coming back, then I was certain, with his grin on his face, thinking that he was making a wonderful impression that he was sober — now I have no doubt at all that Brown thought he was putting up a wonderful exhibition of a sober man but due to my experience with drunks he put up an excellent exhibition of a man walking intoxicated."

The Foreman, acting upon his own conviction, announced that he should call the Special Agent to remove Claimant from the property. The alternative would be to call the Highway Patrolman who was at a filling station nearby. The Foreman finally suggested that the better plan would be to call neither the Special Agent nor the Highway Patrolman if Chairman Higginbothom would agree to take Claimant off the property. The Chairman agreed. Whereupon, the Chairman got in the car with Claimant and drove off.

Chairman Higginbothom explains his version of the incident (tr. 19. 20):

"I walked over to Mr. Brown's automobile; Mr. Oglesby and Mr. Ryan followed me. I opened the door on the south side of the automobile and I gently shook Mr. Brown by the shoulder and I asked Mr. Brown what's the matter, are you sick and I shook him either two or three times and asked him the question. Mr. Brown roused up and replied yes I am sick. Mr. Oglesby asked Mr. Brown — Brown aren't you drunk and Mr. Brown replied in a low tone, no I am not drunk. Mr. Oglesby then asked Mr. Brown to sit up. Mr. Brown did sit up in the front seat of the automobile. Mr. Oglesby asked Brown to put on his shoes, which he did. Then Mr. Oglesby asked Mr. Brown would he walk for him. Mr. Brown then got out of the automobile and walked approximately 25 or 30 feet, somewhere thereabouts and back to where we were standing and I made the remark to Mr. Oglesby, who was standing to my side, Mr. Brown did walk didn't he Mr. Oglesby. Mr. Oglesby made the remark 'yes, but he was staggering a little' and I made the remark 'he walked just as straight as he ever does.' I said he has a slight limp any way and for the record I would like for it to be noted that during that time we had had a lot of rain and the automobile tires had cut the ground considerably in the area where Mr. Brown was walking, which made it somewhat difficult to walk across, and after Mr. Brown walked back to where we were Mr. Oglesby told me Mr. Brown was out of service and that somebody

would have to get him off of the Company property, he wasn't going to allow him to stay on Company property and if somebody didn't agree to take him off of the Company property that he would have to call the Special Agent or County Patrolman to come and take him off and I told Mr. Oglesby not to worry about that, that I would take care of getting him off of the Company property, which I did. I told Mr. Brown to get in his automobile on the opposite side from steering wheel. I got in Mr. Brown's automobile and I drove him away off the Company property. That concludes my statement."

Chairman Higginbothom is of the opinion that Claimant was not drunk. No odor of whiskey was present. He saw Foreman Oglesby remove a bottle of "fluid," or "liquid" from Claimant's car, but he cannot "definitely state that that was whiskey." He doesn't recall that Foreman Oglesby asked him to smell the contents of the bottle. When he agreed to take Claimant off the property, he didn't know then whether Claimant was drunk or not. There was "a possibility that the man was intoxicated." He did not learn all the details until later. The Chairman only agreed to take Claimant off the property, not to drive him home. Claimant kept assuring the Chairman that he was capable of driving his own automobile, that "he wasn't intoxicated." Accordingly, the Chairman left him at the home of Mr. Brown's friend, F. A. Harvey. Claimant Brown drove away in his automobile. "This friend carried me back to where my automobile was parked." The time was "around 1:00 A. M."

Claimant Brown didn't go straight home. He went to T. J. Peterson's and procured some gasoline. Mr. Peterson is not in the employment of the railroad. He is in the business of raising livestock, hogs and cattle. Claimant and Mr. Peterson are intimate friends, "born and raised together," according to Mr. Peterson, who says that claimant is just like one of the family. "He eats with us, we are almost like brothers."

On the day in question, Claimant had been at the Peterson home from 1:00 o'clock in the afternoon until about 8:30 P. M. Mr. Peterson had Claimant "tend to the hogs" while Mr. Peterson was at his brother's that day. He "didn't stay there, but came back later on."

Before leaving his friend's home at about 8:30 P. M. on the eventful day, Claimant went to the medicine cabinet to get some pills to relieve a headache. He went onto work. When he arrived on the property a short time later, he says he felt sleepy and groggy; that he told some men in the Car Inspector's Building that he was going out and go to sleep and for some of them to wake him up at 11:00 o'clock when they got off. He explains his condition and conduct on the night in question to a "discovery" made by him later. He does not fix the time of the "discovery" unless he means to connect it up with the trip to Mr. Peterson's to get gasoline, on his way home. The full effect of his explanation concerning his "discovery" follows:

W. W. Higginbothom, Local Chairman to H. G. Brown (tr. 31):

"Q. Well, what I am getting at, you stated to me earlier that you found out after this happened that you had taken a sedative, I believe it was, thinking that you had taken some pain pills out of Mr. T. J. Peterson's medicine cabinet.

A. That's right.

Q. After this all happened then you did discover that you had made a mistake and you had gotten sleeping pills that are normally

taken by Mr. Peterson's wife rather than the pain tablets that you went in the medicine cabinet to get, is that correct?

A. Yes sir."

L. B. Alexander, Master Mechanic to H. G. Brown (tr. 31):

"Q. Don't you think that is a little unusual for a man to go in another man's home in his medicine cabinet and just pick up a bottle of pills and take two of them? Don't you think it is unusual?

A. Yes sir.

Q. Mr. Brown, then you agree that your statement is highly unusual and impracticable that a man would go into another man's home and go into his medicine cabinet and take pills out of his cabinet and take them without knowing what he was taking, providing he was in a normal condition?

A. Yes sir."

W. W. Higginbothom, Local Chairman to H. G. Brown (tr. 31):

"Q. Mr. Brown, I believe you told me that these sleeping tablets you took is what caused you to be in the condition that you were in, sound asleep and that you didn't discover what had taken place until you went back and saw the mistake that you had made in getting the wrong medicine from the medicine cabinet is that right?

A. That's right."

L. B. Alexander, Master Mechanic to H. G. Brown (tr. 32):

"Q. Mr. Brown, how do you know if you took the wrong pills?

A. I don't know, I think I took sleeping pills instead of pain pills."

Claimant denies that he was drunk. He did not have a drink before or after he came on the property. He did not stagger. The ground was rough. He naturally walks with a limp. He agreed to let Chairman Higginbothom drive his car off the property on Foreman Oglesby's orders. Chairman Higginbothom asked to drive the car, because if he didn't "they were going to call the Special Agent or the cops to come and get me, so he asked me to let him drive me off."

Claimant disclaimed any knowledge of the whiskey that had been removed from his car.

L. B. Alexander, Master Mechanic to H. G. Brown (tr. 14):

"Q. Have you seen this bottle before today? Is this yours?

A. I couldn't swear to that."

L. B. Alexander, Master Mechanic to H. G. Brown (tr. 29, 30):

"Q. This bottle of whiskey that was removed from your automobile by Mr. Oglesby and Mr. Higginbothom present along with

Mr. Ryan present, are you familiar with this bottle here in my hand?

A. No sir, I am not.

Q. How about the other bottle that was empty in your car, are you familiar with it?

A. No sir.

Q. How about this shotgun in your car, are you familiar with it?

A. Yes sir.

Q. How about the coca cola bottles, are you familiar that they were in there?

A. Yes sir, my little boy drank them, and left the bottle in the car.

Q. How would you say that you wasn't familiar with this partial bottle of whiskey being in your car when Mr. Higginbotham observed Mr. Oglesby when he took it out.

A. I didn't know it was in there."

Mr. Peterson answers for the incriminating evidence concerning the whiskey that was found in Claimant's car and about the sleeping pills.

Mr. Peterson had borrowed Claimant's car the day before the night of June 23. He went to his brother's home. He bought a pint of "Calvert" whiskey. The two brothers drank part of it. Mr. Peterson forgot and left the whiskey in Claimant's car without Claimant's knowledge. It was late when Mr. Peterson returned the car to Claimant. He put the whiskey under the front seat and forgot to tell Claimant about it. "It slipped my mind." When Claimant came back to the Peterson home the next day, June 23, "it had done slipped my mind. I don't drink very much. Me and my brother just went off together and drank that whiskey. I just pushed it under the seat and forgot it."

L. B. Alexander, Master Mechanic to Mr. T. J. Peterson (tr. 35):

"Q. Now, when you left the car was there another pint of whiskey in this car other than this?

A. No sir.

Q. Was there an empty pint bottle of whiskey in this car when you left it?

A. There could have been, I didn't look under the seat, all I done was put the bottle there.

Q. Were there any coca cola bottles in this car when you had it?

A. The best I know there were about two coca cola bottles in the car.

Q. Were there any spoons, glasses or any cups or anything in the car when you had it?

A. There might have been some spoons that had been picked up out of my hog slop.

Q. Did you use any cups, glasses, coca colas or were they in his car when you picked it up?

A. I didn't use any of them.

Q. Then when you bororwed his car, this is the only whiskey bottle you saw in it?

A. That is the only one I saw."

W. W. Higginbothom, Local Chairman to T. J. Peterson (tr. 35):

"Q. For the record I would like to make the point that in Mr. Peterson's business, and he will bear me out in this, that he picks up swill from the Naval bases, etc. to feed his hogs and in this swill many times they get cups and silverware, etc. that has been dumped in the garbage cans and it is my understanding that is where those cups and silverware came from that was in the floor board of Mr. Brown's car. That's correct, isn't it?

A. Yes sir."

When Mr. Peterson learned from Claimant, after Claimant had been taken out of service, that Claimant had been found asleep on the property it there-upon occurred to Mr. Peterson and possibly Claimant Brown migh thave in-advertently procured sleeping pills instead of pain pills from the medicine cabinet in the Peterson home.

W. W. Higginbothom, Local Chairman to T. J. Peterson (tr. 33, 34):

"Q. Now, when Mr. Brown came back to your house after he was taken out of service did you all have any discussion concerning what he might have taken, what type of medicine he might have gotten out of that medicine cabinet?

A. Yes, we did. He came back next morning and told me he went to work and got awful drowsy, that he might have gotten some wrong medicine out of the cabinet. My wife did have some sleeping pills that she takes to make her rest at night. I know it is possible that he could have gotten the wrong pills from the cabinet as all of the prescriptions, anacin and bufferin were in the cabinet together. It is possible that he could have gotten hold of the wrong bottle.

Q. Do you recall if these two types of medicine were close together in the medicine cabinet?

A. They were all right there together. We don't have any children — they are all gone — just my wife and myself. Gilbert was raised there is practically one of the family, and does about like he pleases around the house, is the reason he went in there by himself."

H. D. Higginbotham, Committeeman to T. J. Peterson (tr. 36):

“Q. There could have been a bottle in there, that you didn’t see, under the seat?

A. Yes sir, I didn’t look under the seat.

Q. Also Mr. Peterson, you brought it out here that your wife keeps her sleeping pills in the same cabinet with your headache medicine?

A. Yes sir.

Q. After Mr. Brown explained what had happened to him, you are pretty familiar I assume with the reaction this medicine has on person taking it — after he explained what had happened to him would you say it would have the same effect on him as it did your wife?

A. Yes sir.

Q. You believe that is what he got hold of?

A. Yes sir, I believe that is what he got hold of.”

L. B. Alexander, Master Mechanic to Mr. T. J. Peterson (tr. 34):

“Q. As I understand it, Mr. Peterson you told Mr. Brown to go in your medicine cabinet and take something for his headache, is that correct?

A. Yes sir.

Q. Did you tell him what to take when you told him to go in there?

A. No sir, I did not.

Q. Wouldn’t be unusual for him to go in your medicine cabinet and not even ask you what he was taking?

A. That’s right. If I wasn’t at home and he came by there and wanted something, he would go in there and get it.

Q. Did he show you the kind of pills he took the next morning on the 24th after he got in trouble?

A. No sir, he didn’t.

Q. You don’t know exactly what pills he took then?

A. No sir, I do not.

Q. Actually you do not know whether or not he took any pills out of your cabinet, do you?

A. No sir, he just told me he was going to take something for his headache.”

Mr. Harvey says that when Claimant came to Mr. Harvey's home about 1:00 A. M. in the morning, in company with Chairman Higginbothom, Mr. Higginbothom inquired if Mr. Harvey thought Claimant appeared to be drunk. "I told him he didn't, to me, and he did not." Claimant got out of the car on the right hand side, walked around it and got in on the left hand side. He did not stagger. When Claimant drove away from Mr. Harvey's home, he did not "drive his car as an intoxicated person would." Claimant appeared to be "normal in every way." He did not "look like he was under any sedative or any drugs whatsoever."

A number of employes who had seen Claimant on the property about 9:00 P. M. on the night in question say that Claimant Brown was not intoxicated when they saw him at that hour. None witnessed him take a drink. He complained that he was not feeling good and was going to his car and lie down until time to go to work.

Claimant has been ably represented at each stage of the investigation and on his appeal. The dispute was thoroughly investigated on oral hearing and has been carefully reviewed at each level of appeal on the property.

The facts of record, as shown above, are in material conflict. The Board rarely weighs such conflicts on appeals in discipline cases if the discipline does not appear to be manifestly unjust; but, this is one of the rare instances when it has done so.

Claimant was either dead drunk or the victim of a dead sleep brought on by medication inadvertently taken. Claimant, his "shop mates" and bosom friend, if their stories are credited, have successfully explained away Claimant's most unusual behavior. On the other hand, if the report by Carrier's officers, on his actions and conduct, is true, claimant was dead drunk. The circumstances prove him drunk.

Wherefore, it is the findings of the Board that the decision to terminate Claimant's tenure of employment with this Carrier should be and same will be sustained.

AWARD

Claim (1) denied.

Claim (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1969.