

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

“(a) That the Carrier violated the terms of Clerical Agreement, when on Saturday, July 5, 1958, it required M. L. Lambert to report and perform service at 3:45 A. M., and then arbitrarily dismissed him from its service at 6:30 A. M., allegedly because he was under the influence of intoxicants.

“(b) That M. L. Lambert be reinstated with all seniority, vacation and other rights and allowed pay for all wage and other losses sustained as a result of his arbitrary dismissal.”

OPINION OF BOARD: This is a discipline case.

M. L. Lambert was discharged for being under the influence of intoxicants while working as Messenger on July 5, 1958, in violation of Rule G of the Carrier's Book of Rules: “The use of intoxicants or narcotics is prohibited”. Lambert was charged on July 5, tried on July 7 and discharged on July 16. For convenience we shall refer to Lambert as the “Claimant”.

The fairness of the hearing is not questioned.

The Carrier's witnesses were Jones, Assistant Chief Clerk to the Trainmaster; Lawson, Chief Clerk to the Trainmaster; Badger, Special Officer; Bollinger, Trainmaster; and Phillips, Assistant Trainmaster. Jones, Lawson and Badger saw and talked with Claimant while Claimant was working. Bollinger's and Phillip's contact with Claimant occurred after Claimant had been turned in as unfit for duty. All testified that Claimant smelled of beer, that his speech was impaired, that he was unsteady, and otherwise showed the effects of alcohol. Lawson and Badger who had observed Claimant's driving of a company car, also testified as to speed, control and so forth and testified further that Claimant was not fit to drive.

Claimant was his only witness. He denied drinking on the job or having been under the influence of alcohol although he admitted drinking at home at an earlier hour.

The record amply sustains the Carrier's judgment that Claimant was under the influence of intoxicants during his tour of duty as Messenger on July 5.

The remaining question presented is whether the penalty of discharge was arbitrary. It is well settled that the Board will not substitute its judgment for that of the Carrier unless there has been a gross miscarriage of justice. Under the particular circumstances presented we consider that there has been a gross miscarriage of justice in that the penalty was arbitrary. And the evidence upon which we reach that conclusion is not in dispute.

Claimant had been a Messenger in Seniority Group 2. When these events occurred, Claimant's status was that of a "cut-off" employe in a different Seniority Group, namely Group 1. As such, Claimant was required to protect Group 1 extra work unless he "marked off" with permission.

At about 1:10 A. M. on July 5, Claimant telephoned his supervisor, Jones, Assistant Chief Clerk to the Trainmaster, and marked off with Jones' permission. At about 1:15 A. M., Jones found that the employe expected to work as Messenger from 12:00 midnight to 8:00 A. M., was absent. Jones telephoned several employes to obtain a substitute but without success. Jones then telephoned Claimant at about 1:30 A. M. and asked Claimant to work as Messenger. Claimant, according to Jones, said "he didn't know—he wasn't feeling so well—but if I couldn't get anyone else, he would help me out". Jones then tried others without success.

At about 2:30 A. M. Jones again telephoned Claimant and told Claimant he could not get help. Claimant reluctantly agreed to work. "I told him I did not feel well and did not want to work, but if he needed someone I would help him out; it was just a few hours and I figured I could stay up that much longer."

The Organization contends that Jones' procedure in canvassing for a substitute Messenger, and his use of Claimant on a job in a Seniority Group other than Claimant's Group, violated the Agreement; that consequently Claimant was improperly on the Messenger job and the discipline impermissible and in any event unreasonable. Carrier argues that the asserted violation is not relevant; that once Claimant began work, he was subject to Carrier's Rules and was properly disciplined.

We need not decide whether the Agreement was violated. Assuming that the Agreement was violated, that did not suspend operation of the Carrier's Rules nor immunize Claimant from discipline. Assuming that the Agreement was not violated, that did not license the Carrier to act arbitrarily. Violation or no, the circumstances surrounding Claimant's coming to work, are a significant part of the context of events here presented.

Claimant, as instructed by Jones, went on his first errand directly from home. Claimant arrived at the Yard Office at about 3:00 A. M. Jones observed Claimant's condition and talked with him. Jones continued to give Claimant assignments all of which Claimant fulfilled. Claimant "did what I told him to do".

Shortly before 6:00 A. M. Claimant, on one of his errands, picked up Jones' superior, Lawson, and drove Lawson to the Yard Office. Lawson entered and Claimant followed. According to Lawson, he had concluded, while riding with Claimant, that Claimant was under the influence of alcohol and unfit to drive; but when the Yardmaster asked Lawson what was the matter with Claimant; Lawson, according to his own testimony, responded "I don't know; I just got here. What is the matter?"

Lawson alerted Special Officer Badger and sent Claimant on another errand in the Carrier's car. Badger followed Claimant and reported by telephone to Assistant Trainmaster Phillips, Lawson's superior, that Claimant had been speeding and weaving from side to side. Badger took over the wheel and drove Claimant back to the Yard Office at about 6:30 A. M. Phillips and Trainmaster Bollinger talked with Claimant. Claimant was charged and relieved from duty at about 7:20 A. M. Claimant's prior record was clean.

Taking the whole record as it stands, it is abundantly clear that Jones was in a jam. "I had to have a Messenger." In view of the supervisor-employee relationship, Jones' calls to Claimant carried strong overtones of command. Jones, knowing Claimant's condition, took a calculated risk that Claimant would get by as a substitute during the hours remaining before 8:00 A. M. Lawson, Jones' supervisor, took a dim view of the situation at about 6:00 A. M., and passed the ball to Badger.

It is also clear that Claimant took a calculated risk that he could see the job through, and this despite his knowledge that he would have to drive to do the job.

Claimant deserved a penalty but under the particular circumstances, and in view of Claimant's previous clear record, the penalty of discharge was arbitrary.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein;

That the penalty of discharge imposed upon M. L. Lambert was arbitrary;

That a penalty of suspension without pay, commencing as of Lambert's removal from duty on July 5, 1958 is appropriate and reasonable;

That Lambert should be reinstated not later than the thirtieth calendar day following the date of this Award, with all seniority, vacation and other rights.

AWARD

Claim sustained to the extent that M. L. Lambert shall be reinstated no later than the thirtieth calendar day following the date of this Award, with all seniority, vacation and other rights. Claim otherwise denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June, 1960.