

Award No. 11325

Docket No. CL-13489

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5178), that:

1. The Carrier violated the Clerks' Agreement when at the close of work, 5:00 P.M., July 17, 1961, it summarily dismissed Lloyd M. Cheatham, Relief and Pension Clerk, Central Timekeeping Bureau, Roanoke, Virginia from service following investigation.
2. Clerk Lloyd M. Cheatham shall be immediately reinstated to the service of the Carrier with seniority and all other rights unimpaired.
3. Clerk Lloyd M. Cheatham, shall now be reimbursed for all monetary and other losses sustained account this improper dismissal.
4. Clerk Lloyd M. Cheatham's record shall be cleared of all alleged charges or allegations which may have been recorded thereon as the result of the alleged violations named therein.

OPINION OF BOARD: Claimant was employed by the Carrier from April 1, 1937 until he was discharged on July 17, 1961. At the time of his discharge he was working in the Timekeeping Bureau at Roanoke, Virginia. The charge against the Claimant, which was sustained after an investigation was as follows:

"Your responsibility in making false statements to obtain permission to be absent from duty June 16, 1961, and your responsibility for being absent from duty June 16, 1961, without proper permission."

The investigation hearing took three days. Neither the Hearing Officer nor the Employee Representatives conducted themselves with dignity nor decorum. The record is replete with immaterial testimony, with obvious bias and with unjustified charges and countercharges. The essential facts are frequently befuddled in a maze of irrelevant and contradictory statements.

On June 16, 1961, Claimant held a regular assignment as Relief and Pension Clerk and was scheduled to work from 8:00 A.M. to 5:00 P.M., Monday through Friday. About 9:55 A.M. on that day Claimant asked his immediate supervisor for permission for leave to go to his doctor's office. This permission was granted. Carrier's supervisor testified:

"He said that he may or may not be back, depending on the result of the test, that sometimes it was necessary to receive medication which had a bad reaction and made him dizzy, and, if such was the case, he would not be able to come back to work, and he left the office at a few minutes of 10:00 A.M."

Claimant testified that he told his supervisor that he would return if he felt better. When he was asked why he did not return to his office, he said:

"Because I did not feel any better. In fact, I was in severe, not severe enough to keep me in a state of tension and nervousness to the effect that I felt that I would be of no effect on my job at all. I am constantly under medication for these attacks for extreme nervousness."

He further testified that he went to his doctor's office, but did not stay to see him because there were so many patients in the reception room. "The waiting room was completely filled" he said, "and there was not a chair left." He then went home, took a nitroglycerin tablet and left in about 15 to 20 minutes.

From there his trail was picked up by Carrier's Assistant Special Agent, J. S. Fant, who testified that about 10:35 A.M., Claimant and another man were sitting in Claimant's automobile in front of the Coffee Pot. A third man came out of the Coffee Pot with a paper cup. This witness further said:

"It was observed that apparently a bottle of whiskey and soft drink was passed to all three men to consume same."

The Assistant Special Agent followed Claimant and his companions to the First National Bank Building, to Moore's Building Supply, to the ABC store, to Condiff's Body Shop and back to the Coffee Pot at 12:52 P.M.

The Assistant Special Agent continued to testify as follows:

"Mr. Cheatham returned to his automobile at 1:05 P.M., with a soft drink. At this time the drink in the paper cup was consumed. At 1:47 P.M., two men came out of the Coffee Pot and got into Mr. Cheatham's car, where at this time, drinks were taken by all. The third man left the car and at 2:25 P.M., the second man and Cheatham took a drink from a paper cup. At 3:12 P.M., Mr. Cheatham left his car with three empty Seven Up bottles, went into the Coffee Pot and returned with one Seven Up bottle at 3:15 P.M. Mr. Cheatham and the other man took a drink at 3:20 P.M. Directly after this drink was consumed, Mr. Cheatham stepped from his car and vomited on the street by his car and Mr. Cheatham then stepped back into his car and at 3:35 P.M., the other man left his car and Mr. Cheatham drove north on Brambleton."

Mr. H. L. Klink, Assistant to the Manager, met Mr. Fant about 3:30 P.M. Mr. Klink testified, in part, as follows:

"I parked my automobile, walked over and got into the other automobile. The man introduced himself as Mr. Fant. He said that Cheatham was leaving the Coffee Pot parking lot right then. I did not see the car myself, but Mr. Fant followed the car that had pulled off the parking lot and I then recognized it as Mr. Cheatham's car. We followed along behind. Mr. Fant told me that Mr. Cheatham had been in and out of the Coffee Pot since before noon, that he had been drinking constantly. He did not say what and that on coming out with a paper cup in his hand, this last time, Mr. Cheatham had taken another drink and vomited on the parking lot, before he drove off. Mr. Fant continued the conversation, that Mr. Cheatham had been doing most of his drinking in the car, which was parked in such a manner that he could see directly into it. He expressed an opinion that if it were liquor, that the man should have been in no shape to drive or even walk, but Mr. Cheatham arrived in his driveway at home without incident."

Mr. Klink further testified that he and Mr. Fant spoke to Claimant, that Claimant invited them into his house which they declined, but instead spoke to Claimant in the driveway. "Mr. Cheatham," he said, "stood absolutely still, with his arms folded, during the entire conversation."

There is no justification in the implication that the Claimant had been drinking hard liquor. Mr. Klink's testimony proves the contrary. Even Mr. Fant's testimony does not prove this. The mere fact that Claimant vomited is not proof of drinking. His physical condition was such that even soft drinks could stimulate nausea and vomiting.

There is no dispute that Claimant had been ill. He was treated by Dr. William D. Poe for six years prior to June 1961. His doctor filed the following statement:

"June 26, 1961

To Whom It May Concern: regarding Mr. L. M. Cheatham:

"I have treated this man for a heart condition for about six years. He is given to acute attacks of chest pain caused by angina pectoris. These attacks frequently come on rather abruptly and leave as quickly. He takes a drug constantly to delay the clotting of the blood which requires occasional checks by a blood test.

"I am informed by our receptionist that Mr. Cheatham did, in fact, call the office on June 16, 1961, for an appointment and was told that he might have some little waiting to do in the office. I am told that he began to feel a little better and decided to go on home rather than wait in the office for an examination on that day."

Carrier argues that "Claimant had a bad absentee record" and that he "had been previously disciplined for a similar offense." Carrier's witness testified at the investigation that Claimant had been absent due to sickness 16 days and 1 hour in 1954, 13 days and 5 hours in 1955, 15 days and 5 hours in 1956, 22 days and 3 hours in 1957, 21 days in 1958, 15 days and 7 hours in 1959, 34 days and 7 hours in 1960, and 18 days and 3 hours for the first six months of 1961. The record shows insurance payments in 1960 and 1961 for hospital,

medical and laboratory fees incurred by Claimant. At no time between 1954 and 1961 was Claimant disciplined for alleged unauthorized absences.

The discipline for excessive absenteeism occurred in March, 1949. He was held out of service for absence without permission "the afternoon of March 15, entire day March 16 and 17 and March 18 until 10:30 A.M." He was returned to duty Wednesday morning March 23, with the distinct understanding "there will be no further infraction of our office hours on your part." Claimant was then advised that: "You can expect no further leniency to be shown if you are found guilty of committing the same offense in the future."

Claimant had not been disciplined for unauthorized absences for more than twelve years. There is no dispute that Claimant had been treated for a heart ailment for about six years prior to his discharge. On the basis of the investigation record, we are compelled to conclude that his absences from 1954 to 1961 were legitimate and authorized.

Carrier's action in this dispute contains elements of arbitrariness and unreasonableness. Claimant had permission to leave his job and visit his doctor on June 19, 1961. He did appear at his doctor's office that morning even though he did not wait to see him. He did go home and take medication. He has a heart condition which makes him apprehensive and nervous. Further, he had twenty-four years of service with the Carrier, and only one discipline during that time -- twelve years prior to his discharge. On the basis of all the facts, we are compelled to overrule Carrier's decision to discharge Claimant and direct that he be reinstated to his position with seniority right unimpaired.

It is to the discredit of Claimant that he did not return to his position after his visit to the doctor's office and after he took medication at home. If he was not well enough to do so, he should have called his supervisor and reported to him. There is enough evidence in the record to justify the probability that he could have worked the balance of the day. It is unfortunate that the procedures under the Railway Labor Act and the heavy Docket of this Board delayed the consideration of this case for almost two years from the date of discharge. But that is beyond the discretion of the Board. We are obliged to hold the Claimant should have been disciplined by being held out of service for a reasonable time. Although 22 months is generally not such a reasonable time, we are constrained, on the basis of the entire record to award Claimant any compensation. We hold that he is not entitled to compensation for the time he has been out of service.

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; and

That the Carrier violated the Agreement to the extent set forth in the Opinion.

AWARD

Claim is sustained as set forth in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.