



Award No. 16280
Docket No. CL-16862

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6164) that:

(a) Carrier shall be required to reinstate Clerk C. Robinson, Tunica, Mississippi, to service with seniority rights unimpaired.

(b) Carrier shall compensate Clerk C. Robinson, Tunica, Mississippi, for all time lost from October 30, 1965, account being dismissed from service as a result of a formal investigation.

OPINION OF BOARD: This is a discipline case.

Claimant was the occupant of a regular position of station clerk at Tunica, Mississippi, with assigned hours 8:00 A.M. to 5:00 P.M., with one (1) hour off for lunch, rest days Saturday and Sunday.

Under date of October 18, 1965, the following communication was sent by certified mail to the Claimant at Coldwater, Mississippi, as follows:

"Arrange to attend formal investigation to be held in Superintendent's office Room 511, Central Station, Memphis, Tennessee, at 2:00 P.M., Thursday, October 21, 1965, to determine the facts and your responsibility, if any, in connection with your allegedly having been under the influence of intoxicants while on duty as clerk at Tunica, Mississippi, at or about 5:10 P.M., October 12, 1965.

This is to advise that your past work record will be reviewed at this investigation.

You may arrange for witnesses and representative as per your schedule agreement.

/s/ N. L. Meadows, Jr.
Train Master"

Under date of October 21, 1965, the following communication was sent by certified mail to the Claimant, as follows:

"At the request of District Chairman J. G. McKee, the investigation set in my letter October 18, 1965, for 2:00 P. M., October 21, 1965, in Room 511, Central Station, Memphis, Tennessee, for the purpose of determining the facts and your responsibility, if any, in connection with your allegedly having been under the influence of intoxicants while on duty as clerk at Tunica, Mississippi, at or about 5:10 P. M., October 12, 1965, has been postponed until 10:00 A. M., Saturday, October 23, 1965.

/s/ N. L. Meadows, Jr.
Train Master"

The investigation took place as scheduled with the Claimant and his representative present. A transcript of the testimony adduced at the investigation is attached to and made a part of the record.

Under date of October 30, 1965, the following communication was sent to the Claimant:

"Memphis, Tennessee
October 30, 1965

"Certified Mail
Return receipt requested

Mr. Chas. Robinson
Coldwater, Mississippi

In the investigation held in the Superintendent's office at Central Station, Memphis, Tennessee, Saturday, October 23, 1965, it was determined that you were under the influence of intoxicants at or about 5:10 P. M., October 12, 1965, at Tunica, Mississippi. It was determined in the investigation that you had been drinking prior to 5:00 P. M., October 12, 1965, in violation of Superintendent's Bulletin Notice No. 37 dated February 5, 1965, reading as follows:

'Refer to my bulletin notice No. 1 dated January 1, 1965.

The last sentence of this notice is changed to read:

The use of intoxicants or narcotics or their possession while on duty is prohibited.'

For this offense you are hereby dismissed from the service of this company. The measure of the discipline assessed you was determined in part by your past record.

Arrange to turn in any company property in your possession, including annual passes.

/s/ N. L. Meadows, Jr.
Train Master"

The decision of the Hearing Officer was duly appealed up to W. J. Cassin, Director Labor Relations of the Carrier, a conference had with reference thereto on March 4, 1966, but not resolved.

Claimant contends that the Carrier's action in this dispute was arbitrary, unwarranted and cannot be justified by the record and that in addition thereto Carrier violated the terms of the agreement between the parties and more particularly subdivision "f" of Rule 24, which reads as follows:

"RULE 24.

INVESTIGATION-HEARING-APPEAL

(f) Investigations and hearings shall be held when practicable at home terminal of the employe involved, so as to not cause the employe to lose rest or time. Employes shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses."

The language of the rule above quoted is clear and not ambiguous. It does not prohibit the holding of the investigations or hearings at places other than the home terminal of the employe. It does state that the hearings and investigations be held at the home terminal of the employe in order that the employe attending such hearing or investigation will not lose rest or time. The Claimant being held out of service at the time of the hearing certainly could not be caused "to lose rest or time."

It should be noted that after the receipt of the notice dated October 18, 1965, Claimant requested an adjournment of the investigation, which was granted. There is nothing in the record to show that at that time, Claimant made a request for a change in the location of the investigation. Certainly if the Claimant felt that the location of the investigation was improper, he should have requested such change at the same time that the request was made for a postponement.

Claimant also contends that the holding of the investigation at a place other than at his home terminal, deprived him of the benefit of the testimony of a material witness, Agent Hoff.

We cannot agree with that contention in view of the fact that the Claimant had ample time within which to obtain the attendance of Agent Hoff at the investigation. If he felt that Agent Hoff was a material witness, an application should have been made to the Hearing Officer for an adjournment in order that the Claimant might take the necessary steps to produce the presence of Agent Hoff at the investigation. This he did not do.

There can be no question but that the Claimant was entirely familiar with the charge against him and had a full opportunity to prepare his defense. If the Claimant desired to have witnesses called who had knowledge of the circumstances, he was free to call them. Not having called such witness and/or witnesses, he cannot now complain.

The record discloses that on October 12, 1965, at or about the hour of 5:15 P. M. several officials of the Carrier, including Division Superintendent A. M. Dickerson, visited the station at Tunica, Mississippi.

Mr. Dickerson, testified at the hearing, in part, as follows:

"When I entered the side door, Clerk C. Robinson looked up and immediately raised his hand in a greeting and began to giggle or laugh. I did not take exception to his raising his arm in greeting, however, for him to giggle or laugh did arouse my curiosity as to what brought this about. I walked over to Mr. Robinson's desk and discussed with him what work he was doing at this time, which was preparing a waybill to be mailed to destination. By that time the other men mentioned had entered the office and Mr. Robinson shook hands hurriedly with each of them and then attempted to keep several feet away from us. I was finally able to get close to him in the area between Agent Hoff's desk and the telegraph table. At this time I got a good, strong smell of whiskey and asked Mr. Robinson where the bottle was. He inquired, what bottle, and I stated, the bottle you have been drinking from. He first stated he had not been drinking, but then stated he had a drink but not since noon.

I notified Mr. Robinson he was out of service and discussed with him the conversation I had with him last May when he was reinstated.

During the conversation Mr. Robinson stated on two different occasions that his bottle was in the trunk of his auto. However, I asked him if he would open his trunk and show me that the bottle was there and not in the depot and he refused to do this."

* * * * *

Mr. Dickerson further testified as follows:

- "Q. Mr. Dickerson, concerning the part of the statement that Mr. Robinson stated he had a drink but not since noon. Could you elaborate on that statement?
- A. When I asked him where the bottle was, he first said he had not been drinking and then he said he had had a drink at noon. That is the extent of his statement at that time. The odor on his breath was strong enough that I felt that it was not as a result of something he had taken four or five hours previous to the time I found him in the station. The odor was very predominating as soon as I could get within two or three feet of him.
- Q. Would you say that Mr. Robinson was acting in his normal manner?
- A. Yes I could not say that he was acting too much out of the ordinary. As I stated in the letter, I did not take too much exception to his raising his arm in a greeting, however I did think it was peculiar for him to giggle or laugh in the manner in which he did. It kind of struck me as being the laugh of a person that had been up to something or about to get up to something. The laugh or giggle was not the usual behavior or usual greeting for Mr. Robinson. Not the greeting which I have known him to have. After he had shaken hands with the other men I would

attempt to get close to him and I had to follow him around the desk. He kept easing away. I thought I detected an odor when I first talked to him but he turned away from me and for that reason I did not get it until he was between the desk and the telegraph table and at that time Mr. Anderson was moving on the off side from me and Mr. Robinson and there was no place for Mr. Robinson to go and at that time I really got the full effect of the odor of the whiskey.

Q. Mr. McKee, you have any questions?

By Mr. McKee:

Q. Mr. Dickerson, did you find in the office anywhere, in the desk, or anywhere, a bottle that contained liquor?

A. On this date?

Q. On this date.

A. No sir.

Q. I believe that's all."

The next witness was Mr. Anderson, the Train Master, who corroborated to a great extent the material parts of Mr. Dickerson's testimony. He also testified as follows:

"Q. Mr. Anderson, how long have you known Mr. Robinson?

A. I have been on the Memphis Division the first time since 1950. I don't remember just where or how I first met Charlie but a number of years I have had occasion to see him on various occasions.

Q. Mr. Anderson, you are fully familiar with Mr. Robinson's manner of speech and actions?

A. Yes sir.

Q. And you did take exception to his speech and appearance when you were able to get close to him?

A. Yes sir. His eyes were on the glassy side and some of the things he said to Mr. Dickerson was not like Charlie.

Q. And you stated you definitely did smell the odor of intoxicants?

A. Yes sir."

On cross-examination by Mr. McKee, Mr. Anderson testified in part as follows:

"Q. Had you not smelled the intoxicants, as you say, on his breath, the other things that Mr. Robinson did you would not have thought too much about it, would you?

A. I believe I said a few minutes ago the confused way he talked to Mr. Dickerson and the way he kind of stared out of his eyes were definitely not normal. As I said, I have known Charlie a number of years and it was something beyond his normal behavior and actions that day.

Q. You did not see any liquor bottle, or liquor, or anything on the premises of the Illinois Central Station?

A. No, we did not find any."

Mr. Robinson was a witness in his own behalf. His testimony contains admissions and many contradictions. He does not deny that he did take a drink but claims that he did take the drink at 5:00 P.M. and not at noon, as testified to by both Mr. Dickerson and Mr. Anderson.

During the course of his examination he testified, in part, as follows:

"Q. How do you account for both Mr. Dickerson and Mr. Anderson in their statements that you stated you had a drink at noon?

A. Yes, sir, I didn't notice what time it was and it might have been afternoon that I said. I didn't realize the fact that I could have said noon. I was out in my car and it was 5:10 or 15 when I took the drink and came back to the office * * *."

* * * * *

Q. But you did return to company property after you had taken the drink in your car?

A. Yes sir, I came back to check the door.

Q. I thought you stated you were checking the waybill?

A. Yes sir, and if they had not come in I probably would have billed it rather than doing it in the morning.

Q. What were you checking?

A. Just to see how far I had gotten along with it. I had the waybill number and I think I had written Los Angeles on it. I am not sure of the destination."

* * * * *

"Q. Mr. Robinson, you stated earlier that you told Mr. Dickerson that you had a drink at noon because you did not know what time it was?

A. That afternoon. That's wrong; I just told him noon.

Q. And you stated it was after you left the office at 5:10 or 5:15?

A. I did.

Q. How do you explain the two statements — one that you did not know what time it was and another that it was after you left the office?

A. They were in there pulling the drawers open and asking where the bottle was and I just told him I had a drink at noon. It was 5:15 when they came in there but I did not give that any thought. I thought one time would be as good as another, but I didn't have any at noon. I can verify that by three people."

* * * * *

The Claimant contends and argues that the testimony adduced at the investigation is insufficient to sustain the charge against him in that he was not actually observed drinking. He further contends that if he was drinking, which he does admit, it was while he was off duty.

This Board has held on numerous occasions that it recognizes that an average individual is capable of detecting and testifying concerning intoxication.

In Award 15574 (Ives) we said:

"Testimony of four Carrier witnesses given at the investigation on March 4, 1965, was to the effect that Claimant's speech was incoherent, that he had an odor of alcohol on his breath and that he appeared in an intoxicated condition. * * * Although no medical tests were made to determine whether Claimant was actually intoxicated, lay men are competent to make such a determination. Awards 10928, 8993 and others."

In the instant case all of the Carrier's witnesses agreed as to the condition of the Claimant and we find that such evidence does have probative significance. See also Awards 10049 (Dugan); 10595 (Hall); 11015 (Dolnick); 13117 (Hamilton); 13481 (Kornblum).

We do not agree with the contention of the Claimant that he was "off duty" at the time he took a drink. The record contains proof to the contrary.

In Award 3411 (Tipton) we said:

"What an employee does when off duty and not on the property of the Carrier would not justify discipline so long as his conduct does not interfere with his work. * * *

However, an entirely different situation is involved when an employee is on the Carrier's property. If an employee's conduct, while off duty but while he is on the Carrier's property, is harmful and detrimental to the Carrier, there can be no doubt as to the Carrier's right to take disciplinary action against the employee." See also Award 8993 (Hornbeck).

The notice of the investigation informed the Claimant that his previous work record would be reviewed at the hearing. The Claimant contends that his

past work record was being used in determining as to whether or not he was guilty of the charges preferred against him. This is denied by the Carrier. At the hearing the following took place:

"By Train Master N. L. Meadows: (of Mr. Robinson)

Q. In the notice of investigation I stated that your previous work record would be reviewed. You are not being investigated for those offenses but they are merely being reviewed for the record.

District Chairman J. G. McKee: Mr. Meadows, is it necessary? As a matter of information I want to ask what bearing do the other investigations have on this investigation?

Train Master N. L. Meadows: His previous work record has no bearing on this investigation in itself. It is merely being reviewed for the record.

District Chairman J. G. McKee: I believe I will object to putting any of the past investigations in the record.

Train Master N. L. Meadows: Your objection will be noted in the transcript."

It is evident from the above that the Carrier was careful to point out that the Claimant's previous work record had no bearing on the investigation itself. There can be no question but that the Carrier may and can consider an employee's past record in assessing the penalty. See Awards 12126, 13308, 13086, 15184.

This Board has held in numerous prior awards that our function in discipline cases is not to substitute our judgment for that of the Carrier or to decide the matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier and we are not warranted in disturbing the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. See Award 5032.

We have carefully examined the record. We find that the Claimant was given and did have a fair trial. It is our opinion that the record discloses sufficient competent and relevant evidence to support the charges against the Claimant and that the Carrier was justified in so holding. We find that there was no violation of any of the provisions of the Agreement.

The record discloses that the Claimant has been in the service for a great number of years. Years of service alone does not give an employee a right or a license to violate rules. If he does, he does so at his peril.

Dismissal from service is an extreme, and severe penalty. Whether or not such a penalty is justified depends upon many factors and the circumstances

in each case. In order to overrule, reverse and/or set aside or modify the penalty, it is incumbent upon the Claimant to show that the Carrier in assessing the penalty was vindictive, arbitrary and malicious. The penalty assessed, in this case, was solely within the discretion of the Carrier and we will not substitute our judgment for that of the Carrier since we do not find or consider it arbitrary or capricious, especially in view of the Claimant's past work record, which was none too favorable.

We will deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 did not violate the Agreement.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 10th day of May 1968.