

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

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

PORT TERMINAL RAILROAD ASSOCIATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6683) that:

- (a) The Carrier violated the current Clerks' Agreement when on December 24, 1968, it arbitrarily and capriciously discharged Clerk M. R. Peacock from the service of the Port Terminal Railroad Association effective December 21, 1968.
- (b) Clerk Peacock be paid a day's pay for December 21, 1968 and each subsequent date that he could have worked had he not been arbitrarily and capriciously discharged from the service of the Port Terminal Railroad Association.

OPINION OF BOARD: Upon consideration of the testimony presented, exhibits introduced and the Agreement between Port Terminal Railroad Association and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, it is clear that the Carrier has sound warrant to expect accurate job performance. The Carriers have a duty to the public and other employees to employ only those who are careful, competent and obedient to rules regarding the performance of work. This obligation, running both to the public and to other employees, cannot be avoided or delegated. The Railway Labor Act does not interfere with the normal exercise by Carrier of its right to select and properly discharge employees.

However, it is also clear that members of this Board are not free to apply their own brand of industrial justice. They cannot legally disregard evidence properly before them and cannot legally assume facts that are not validly established by the record before them.

Article 7 spells out Discipline and Grievance procedure as follows:

"Rule 26

- (a) An employee, disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided, written request is presented to his immediate superior within five (5) days of the date of the advice of discipline and the hearing shall be granted within ten (10) days thereafter.

* * * * *

(f) If the final decision decrees that charge against employe was not sustained, the record shall be cleared of the charge; if suspended or dismissed, employe will be returned to former position and compensated for the wage loss, if any is suffered."

Another pertinent contract provision is found in Article 3—Rule 8 (Meal Period).

"(a) The time and length of the lunch period shall be subject to mutual agreement.

(b) When a meal period is allowed, it will be between the ending of the fourth hour and beginning of the seventh hour after starting work, unless otherwise agreed upon by employes and the employer.

(c) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and twenty (2) minutes, with pay, in which to eat shall be afforded at the first opportunity.

(d) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a days work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, without deduction in pay, when the nature of the work permits."

While we agree that unauthorized absences from duty, if proven, are serious offenses and often result in dismissal from service; that an employe who sleeps on his job is derelict in the performance of his duties; that a clear violation of the provisions of an operating rule such as Rule G constitutes sufficient basis for dismissal, we find lack of substantial evidence that the Claimant was under the influence of an intoxicant; that he absented himself from his duties for a period of an hour; that he was asleep during the tour of duty.

The record submitted by the Carrier indicates that Mr. M. R. Peacock may be faulted for a too casual attention to the accuracy demanded by his assignment. Hindsight makes Mr. Peacock vulnerable. The charge that he was involved in conduct prohibited by Rule "G"—indulging in intoxicating liquor while on duty has not been established. Neither was the length of absence from his post been established. His claim of sickness and post-nausea dizziness did not remove his obligation to see that proper crews were alerted. Lack of substantial evidence of prolonged absence and intoxication does have an arbitrary if not capricious ring to it.

Although the record supports Carrier's contention that Claimant left his assigned position as Assistant Crew Clerk without specific authorization, it appears that Claimant had done so in the past without any previous warnings from his supervisor.

Although the Carrier properly found that Claimant's pattern of conduct warranted disciplinary action, we find the extreme penalty of discharge to be unduly harsh and excessive under the peculiar circumstances involved in this case. On the basis of all the evidence of record, a suspension of thirty (30) days would have been the maximum penalty justified. Therefore, Claimant will be restored to service as of January 21, 1969, with seniority rights unimpaired and the monetary loss suffered be paid less amounts earned in other employment.