

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **20005**
Docket Number CLX-20290

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship **Clerks,**
(Freight Handlers, Express and Station Employee

PARTIES TO DISPUTE: (
(REA Express, Inc.

STATEMENT OF CLAIM: Claim of the District **Committee** of the Brotherhood (Case No. 133) that:

(1) The Agreement governing **hours of service** and working conditions between the parties, effective January 1, 1967, **was** violated by the **Agency** at Atlanta, **Georgia**, when **on** December 7, 1971, **employee** 4. C. Smith **was notified** by Assistant Service Center Manager M. W. Ring that **he was dismissed from service** effective December **8**, 1971 as a result of investigation held on Wednesday, December 1, being allegedly charged with **violation of Rule 70(b) of the Company's General Rules and Instructions**, and charged **specifically** with **violation** of Rule 70(b) in that the accused was in employee' locker room at approximately **11:20 P.M.**, November 13, 1971, intoxicated after requesting **and being given** permission at 6:00 P.M. to go home after stating he **was** sick, and;

(2) That Mr. Smith shall be restored to **service** with seniority **rights** unimpaired, his record shall be cleared of the charges **and he shall be compensated** for all monetary loss of pay retroactive to December **8**, 1971 and continuing thereafter until such **time** as he is restored to service with seniority rights unimpaired and his record cleared of the **charges**, and;

(3) Mr. Smith shall be additionally compensated **for any overtime** which he would have received and any expense incurred by him due to the Agency **cancelling** health and welfare insurance policy with Blue Cross-Blue Shield Insurance Company and he having to assume premium payments.

OPINION OF BOARD: Claimant, with seniority date in October 1961, was **a** regularly assigned carloader when he **was** dismissed, effective December 7, 1971, after hearing and findings of guilt on the charge of intoxication in violation of Rule 70(b). The specific charge was that Claimant was in the **Employee's** locker room at approximately **11:20 P.M.**, **November 13, 1971**, in a state of intoxication, albeit he had obtained permission to leave work due to sickness at 6 P.M.

At the hearing the Claimant denied the **charges**. **His** explanation of the **situation** was that he had taken tranquilizers prescribed by a physician for a painful back condition. However, two Carrier witnesses testified that Claimant was intoxicated. One of them, Mr. J. L. **Biggs**, Platform Supervisor, testified as follows:

"MWK: Then on this night the next occasion **you saw** Mr. Smith was at approximately **8:00 P.M., is that correct?**

JLB: Yes, Sir.

MWK:" What wae Mr. Smith doing at this time?

JLB: He was lying on the bench asleep.

MWK: At this time did you awake Mr. Smith?

JLB: **Yes,** sir.

MWK: What **was** his response to being awakened?

JLB: He told me then that Mr. Jordan had **clocked him out end** he had been leaving.

MWK: Did you leave Mr. Smith in the locker **room et this time?**

JLB: Yea, sir.

MWK: Did you have occasion **to return to the locker room** later?

JLB: Yes, sir.

MWK: Approximately what **time** did you **return** to the **locker room?**

JLB: I am not sure but i would say **approximately 11:00 or 11:30 P.M.**

MWK: Was Mr. Smith at this time **still** asleep?

JLB: At this **time,** no sir.

MWK: **What** was he doing at this time?

JLB: **He was** sitting up on **the bench.**

MWK: Was there **anything** unusual in his actions and appearance?

JLB: Yea, **sir,** I would **say so.**

MWK: In **what** respect?

JLB: I would say the man was intoxicated.

MWK: **What** made you **believe** chat **he was** intoxicated?

"JLB: I had talked to him several minutes and he was • lou in his manner of speech and he told me he had to go upstairs add talk to Mr. Shirley, the clockman, about getting a ride home. At this time he stumbled and fell to the floor. I preceeded then to help him up and set him back on the bench and left.

MWK: Did you smell any odor that would lead you to believe that he had been drinking any alcoholic beverages?

JIB: Definitely so.

MWK: Mr. Biggs, in your opinion was Mr. A. C. Smith intoxicated?

JIB: Yes, sir, I would definitely say so."

While the fact of intoxication was amply covered by Carrier's evidence, the Carrier did not establish that intoxicating beverages were in Claimant's possession or on the premises when the incident occurred. In assessing the discipline the Carrier considered Claimant's prior record, which involved a two-week suspension in March of 1971 for having intoxicating beverages on company property.

In light of the foregoing, and on the whole record, we believe there was substantial evidence to support Carrier's findings of guilt and we further believe that discipline was warranted. Also, there is no doubt that, in determining the quantum of discipline, Carrier could properly consider Claimant's prior record. Nonetheless, on the question of excessiveness of discipline, we believe the case balances out in Claimant's favor. Claimant had almost a decade of service with only one two-week suspension prior to the instant infraction. Also, no intoxicating beverages were found in his possession or on the premises, he was not on duty at the time in question, and he did not conduct himself in a disorderly manner or otherwise cause any significant interference to Carrier's operations. In view of these mitigating facts, and on the whole record, we conclude that the penalty of permanent dismissal was unreasonably excessive and, consequently, we shall award that Claimant be restored to service without back pay.

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 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

The **discipline was** excessive.

A W A R D

The **claimant** shall be restored to service with seniority rights unimpaired, but with no pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order of** Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this **31st** day of October 1973.