

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number 20164
Docket Number CL-20260

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(station **Employees**

PARTIES TO DISPUTE:(

(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of Adjustment (GL-7361) that the Carrier:

1. Violated the rules of the March 3, 1970 Rules Agreement by discharging Mr. M.L. Ray, Clerk, Yard Office, Tacoma, Washington, from the service of the Railway Company, effective January 7, 1972.

2. Shall now reinstate **Mr.** M.L. Ray into the service of the Railway Company with seniority and other rights unimpaired, and payment for all wage loss, **commencing** December 21, 1971.

OPINION OF BOARD: Initially, the Organization asserts a procedural deficiency, allegedly prejudicial to Claimant. The Docket shows that the Superintendent who preferred charges also rendered the decision and assessed the penalty, even though he was not physically present at the investigation. Claimant raised this procedural issue during the handling of the matter on the property.

We have noted, in Award 20099, conflicting authority on **the** subject of a meaningful determination being rendered by an individual other than the Hearing Officer.

This Board is precluded from making determinations of credibility. Thus, in a case where sharply divided testimony is crucial to a determination of guilt or innocence, it may well be that a Claimant's procedural rights require that an individual who was present at the investigation and observed the demeanor, actions, etc. of the witnesses personally resolve questions of credibility.

However, in this dispute, any possible procedural error was not prejudicial to Claimant due to his **own** admissions at the investigation.

Claimant was charged with (1) being under the influence of **alcoholic** beverages while on duty; (2) being quarrelsome or otherwise vicious; and (3) not being alert and attentive to duties.

Witnesses testified that Claimant admitted consuming three glasses of punch, which contained intoxicants, **immediately** prior to reporting for duty. They also testified as to certain physical manifestations suggesting alcoholic consumption.

Claimant conceded, at the investigation, consumption of alcoholic beverages, and a smell of liquor about him, but denied he was under the influence of alcohol "to any great extent." Thus, resolving any possible procedural deficiencies in favor of Claimant, the Board is of the **view** that Carrier established the charge of **being** under **the** influence of alcohol.

Concerning the charges of being "quarrelsome and otherwise **vicious**" and "not being alert and attentive to duty", the record is less clear. The words admit of subjective determinations of conduct, which may vary among individual observers. However, we do note that Claimant was not a model of decorum at the time in question. In any event, the finding of intoxication **is** sufficient for a denial of the claim.

Claimant has urged that the penalty of discharge **was** not warranted, citing Awards which have modified assessments of punishment due to mitigating circumstances, abuse of discretion, etc. We have carefully reviewed the cited Awards, but do not find them controlling here.

Substantial and credible evidence was presented at the investigation, including **Claimant's** own statements, to support the charge of being under the influence of alcoholic beverages while on duty. We will not disturb the assessed penalty absent a showing that the Carrier's decision **was so unjust**, unreasonable, arbitrary, capricious or **discriminatory** so as to **amount** to an abuse of discretion. We are unable to make such a finding in this case. The claim will be denied.

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;

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That the Agreement was not violated.

Claim denied.

Dated at Chicago, Illinois, this **28th** day of February 1974.