

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award **Number** 20828
Docket **Number** CL-20956

Louis Norris, Referee

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

PARTIES TO DISPUTE:

(
(The Washington Terminal Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(GL-7727) that:

(a) The Carrier violated the **Rules** Agreement, effective **August 1, 1958**, particularly **Rule 24**, when it assessed discipline of dismissal on Claimant L. Boston, Baggage and Mail Handler at the Washington Terminal Company, Washington, D. C.

(b) Claimant L. Boston's record be cleared of the charges brought against him on November 9, 1973.

(c) Claimant L. Boston be restored to **service** with seniority and all other rights unimpaired, and be compensated for wage Loss sustained during the period **out of** service.

OPINION OF BOARD: On the date pertinent to this dispute, November 9, 1973, **Claimant** held the regular position of Baggage and Mail **Hand-**ler, with 31 years of service with Carrier. On said date, Baggage Agent Miller removed Claimant from service, pending a hearing, for being under the influence of intoxicants at about **3:55** p.m. On November 16, 1973, formal hearing was held for "being in an unfit condition to perform your duties" in violation of **Rule "G"**. Claimant was found guilty as charged and on November 23, 1973 he was dismissed from service.

General **Rule "G"** of the Washington Terminal Rules and Regulations effective August **1**, 1968, reads as follows:

"The use of intoxicants or narcotics by **employees** subject to duty is prohibited. Being under the influence of intoxicants or narcotics while on duty, or their **use or** possession while on duty is prohibited."

Petitioner raises several issues:

1. Was Claimant given a fair **and** impartial hearing.
2. Was he guilty of the offense charged.
3. Was the discipline **imposed** warranted.
4. Should his **record** be cleared, **with** compensation **for** monetary loss suffered.

Carrier **urges** that this claim is procedurally defective and should be dismissed inasmuch as it was brought under **Rule 24** of the Agreement effective August **1**, 1958 instead of under Article 18 of the Agreement effective July **1**, 1972. **Petitioner** responds that since the latter issue **was** not raised **on** the property **it** should not be given validity now. These two **positions**, however, are not **irreconcilable**. For, the fact **is** that although **Rule 24** and Article **18** are worded differently, both recognize the right of appeal and set forth the Grievance procedures to be followed. Insofar as the issues involved in this dispute, the procedures under **Rule 24** and Article 18 are almost **identical** and were fully complied with. The foregoing objections, therefore, are not of **sufficient** impact to deter this Board from disposition of this claim on the merits.

1. THE HEARING

Complete review of the **testimony** adduced and the method **in** which the hearing was conducted evidences the fact that there was no **impairment** or prejudice of any of Claimant's rights. **The** hearing **was** fairly and properly conducted, Claimant was represented by the Vice General Chairman and he was given full opportunity to testify **in** his **own** behalf and to bring such witnesses as he deemed proper. Petitioner's contention that the hearing officer asked Leading questions in some **instances, even** if true, is not well founded. For, the testimony of Witnesses Miller and Warner was clear, concise and completely factual. (**rp** 26-30). **Thus**, there was no **impairment** of Claimant's right to due process, particularly since there was ample opportunity for cross-examination.

We acknowledge, further, the objection by Petitioner that although the investigation was conducted by General For- **Farr**, the decision was **rendered** by Train Master McCabe. Petitioner contends this **was** improper and cites the following prior Awards as **precedents**.

In Award No. 13240 (**Dorsey**) there was a sharp issue of **credibility** as between statements of two complainants (passengers) and the directly **conflicting** testimony of Claimant. There **was** no corroborating testimony and the determination of **credibility** by the hearing officer became of paramount importance. In fact, however, the hearing officer never saw the complainants, made no finding of **credibility**, and made **no** decision. In these peculiarly limited circumstances, the Referee held that Carrier's decision **that Claimant** was guilty as charged was not supported by the evidence. Accordingly, the claim was sustained.

In Award No. 14267 (Hamilton), although the **Referee** made **concededly** "dicta" reference to the fact that the Carrier officer who made the decision did not see the witnesses, it was nevertheless concluded that "the Carrier established a prima facie case which was not successfully refuted **by** the Claimant". Here, the claim was in fact denied.

These cases therefore are clearly distinguishable **from** the dispute here involved. Carrier, on **the** other hand, cites **many** Third Division **cases** to the contrary, in which the following quotation **from** Award No. 16347 (Devise) is pertinent here:

"The primary contention of the Petitioner is that Claimant's procedural rights **were** violated because the decision following the **investigation** was rendered by other than the official who conducted the investigation, . . .

"We find no valid basis for such contention. There is nothing in the Agreement that prescribes who shall prefer charges, conduct hearings, or that the officer conducting the hearing must render the decision or assess the **discipline**. Awards 15714, 14021, 13383, 10015, 12001, 12138, **among** others."

See also: 9102 (Stone), 9819 (**McMahon**), and 12001 (**Dolnick**).

Accordingly, we find that Petitioner's objection to the decision having been rendered by Train Master McCabe **is not** supported by the weight of authority. Nor is it supported by the pertinent provisions of the Agreement between the parties.

Petitioner raises the further objection that review of **Claimant's** disciplinary record at the hearing precluded him from being accorded a fair and impartial investigation of the charge against him. Award No. 17156 (**McCandless**) supports this position and cites Awards Nos. 11130, 11308 and 13758.

Carrier on its part cites many cases to the contrary, including Award Nos. 16315 (**Engelstein**), 9863 (Weston), 13684 (**Coburn**) and 15184 (**Mesigh**). In 16315, supra, the guiding principle is set forth as follows:

"With reference **to** the contention that it was improper for Carrier to **review** Claimant's service record during the **investigation**, we find the use of such information to determine the measure of discipline to assess is valid. . ."

In any event, where the prior Awards **on** this issue are apparently **in** conflict, we must look to the testimony and the entire record to determine whether, notwithstanding Claimant's service record, the hearing was **in** fact properly conducted and whether the evidence, relevant **specifically** to the **charge**, sustained the Carrier's burden of proof by a clear preponderance.

We find in the affirmative on both these issues. Our **reasons** for concluding **that** the **hearing was** fairly and impartially conducted **are** set forth above. Our **reasons** for concluding **that** the record testimony **amply** supported Carrier's finding that Claimant **was** guilty of the offense charged are **set** forth in detail hereafter.

2. THE EVIDENCE

In support of its charge against Claimant, Carrier submitted the testimony of **two** witnesses, **Baggage Agent Miller and Mail Foreman Warner**. Each **was** absent from the hearing room during the testimony of the other.

Miller testified that on November 9, 1973 at about **3:55 p.m.** he observed Claimant in the Baggage Room. "He **was** unsteady on his feet, his **speech was** incoherent **and** he had the odor of intoxicants on his breath. I gave hr. Boston the option to go to Hunters Laboratory for **a** blood test to determine his condition. At first he said he would." **However**, when Miller returned from the office to get cab slips, Claimant refused to go for the blood test **"and** I sent him off duty for being in unfit condition to perform his duties." (rp. 26). Further, on record **page 27**:

"In determining at that time **-3:55 P.M.**, that Mr. Boston **was** under the influence of intoxicants; I detected **an** odor of intoxicants on his breath, his actions **were** not **normal**; he **was** waving his **arms**, dancing, jumping up **and down** - just not his **normal actions**."

In response to the question **that Claimant was** jumping up **and down** to prove he **was** not intoxicated, Miller replied:

"I **can't** really say **what** he **was** trying to prove, but those **were** his actions. Even as he jumped up **and** down, it wasn't in perfect fashion; it **was** just a sloppy, careless **manner**."

Mr. Warner corroborated **Miller as** to Claimant's condition by testifying that Claimant **"was** talking right loud, waving his **hands**" **and** when Miller left to get the cab tickets **"I saw** that **Mr. Boston wasn't** steady on his feet **and** he **was** waving his **hands**, still talking loud" **and**, finally, "Mr. Boston refused to go to the **Lab**" **and** **was** ordered off the property. (rp. 28) **Warner** testified further **that** there **was** no doubt in his mind that Claimant **"was** under the influence of **intoxicants**", **and** that "he wasn't **steady** when he walked away from me to the **foreman's** office." (rp 29)

Neither witness **was** shaken on **cross-examination**.

It is noteworthy that at one point during the testimony, Claimant interjected that he was "in a fit condition to work" and "wasn't drunk". (rp 29). However, when asked by way of formal testimony whether he had anything to say in his own behalf (rp 31), he offered nothing of any relevance to the charge against him. Peculiarly, although he had ample opportunity to do so, he did not deny that he had imbibed intoxicating liquors on that day. Other than his interjection above referred to, he offered no evidence and produced no witnesses to refute the charge. Appropos his statement that he was "fit", we quote from Award No. 20100 (Sickles):

"... the degree of impairment is not essential, and the Board will not condone the performance of work by those under even the slightest alcoholic impairment".

As to the qualifications of the witnesses to determine Claimant's condition, this Board has held in many prior Awards that laymen are competent to testify as to outward manifestations and physical actions on conclusions of intoxication. See 20100, supra, and other Awards cited therein.

In view of the testimony, therefore, and the absence of any probative refutation by Claimant, we are compelled to the conclusion that Carrier's finding that Claimant was guilty as charged was amply supported by the evidence. This Board has repeatedly held that it will not disturb the findings of the Carrier nor interfere with the discipline meted out where it is apparent on the record that Claimant received a fair and impartial trial and that none of his rights were capriciously or arbitrarily violated. See Award No. 17156 (McCandless), among many others. The foregoing principle is directly applicable to the instant dispute.

3. THE DISCIPLINE IMPOSED

This Board has consistently held that an employee who is under the influence of intoxicants while on duty, and thereby unfit for duty, is guilty of a serious disciplinary offense and is subject to dismissal, particularly where warranted by his disciplinary record.

See Award Nos. 15184 (Mesigh), 15714 (Engelstein), 18036 (Dolnick) and 20100 (Sickles).

Claimant's disciplinary record reveals serious personal incidents consisting of "attempting to strike Assistant Foreman Phelps with his fist" on January 29, 1964; threatening Phelps "with bodily harm" on July 10, 1964; for which offenses Claimant received two five days suspensions. On November 26, 1965, he was discharged for insubordination, but was restored to duty on a leniency basis.

On the entire record, therefore, and in view of Claimant's disciplinary record and the authorities cited herein, the discipline of dismissal imposed by Carrier in this case cannot be held to be arbitrary, capricious or an abuse of discretion. See Award Nos. 16074 (Perelson), 17914 (Quinn), 18550 (O'Brien), 19487 (Brent) and 19708 (Lieberman).

The claim here involved must therefore be denied in its entirety.

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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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

R. W. Paulsen
Executive Secretary

Dated at **Chicago, Illinois**, this **30th day** of September 1975.