

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21121
Docket Number CL-21173

James C. McBrearty, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(Southern Pacific Transportation Company
(Pacific Lines)

STATEMENT OF CUM: Claim of the System Committee of the Brotherhood,
GL-7873, that:

(a) The Southern Pacific Transportation Company violated the Agreement when it dismissed Mr. S. A. Garrett from service following investigation at which he was charged with allegedly being under the influence of intoxicants while on duty November 5, 1973, involving possible violation of its Rule 0, General Rules and Regulations; and,

(b) The Southern Pacific Transportation Company shall now be required to allow Mr. S. A. Garrett eight hours' compensation at the rate of Ticket Clerk, Burlingame, California, beginning November 6, 1973 and continuing each date thereafter until he is restored to service with all seniority rights unimpaired; and,

(c) For any month in which claim is here made for compensation on behalf of the claimant involved, the Carrier shall also make premium payments on behalf of the claimant in the appropriate amounts required under, Travelers Group Policy Contract GA-23000 as amended, for all benefits prescribed in that contract.

OPINION OF BOARD: Claimant began service with the Carrier on March 6, 1946. At the time of the incident giving rise to this dispute, Claimant was regularly assigned to the position of Ticket Clerk at Burlingame, California, working the 10:00 AM to 6:30 PM shift.

On November 5, 1973, at 11:40 AM, Claimant was removed from service by Carrier's officer pending investigation, on the ground that the Claimant was not capable of successfully discharging his duties, since he had the odor of intoxicants on his breath, his speech was slurred, and his equilibrium was poor.

A formal investigation into this matter was held on November 16, 1973. As a result of the evidence adduced at this investigation, Claimant was dismissed from service by letter dated November 27, 1973. Claimant was

found by Carrier to have violated Rule 0 of the Carrier's General Rules and Regulations, which reads as follows:

"RULE 0. The use of alcoholic beverages, Intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited.

Employees shall not report for duty under the influence of any drug, medication or other substance, including those prescribed by a doctor or dentist, that will in any way adversely affect their alertness, coordination, reaction, response, or safety; nor shall such drug, medication, or other substance be used by employees while on duty."

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's nor 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 substantial evidence 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. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

Looking at the record as a whole, the Board finds that despite some conflicting testimony, there is a preponderance of the evidence indicating that Claimant was under the influence of intoxicants on November 5, 1973.

Carrier's two officers state that Claimant had a "definite odor of intoxicants on his breath." In addition, they allege that Claimant "was not able to walk in a straight line, and when standing, he had to use the desk to keep from losing his balance." (h., pp. 7 and 9).

However, Carrier's third witness, Agent R. W. Moon, testified specifically that, "I was close enough to him, but I couldn't detect any alcohol." (Tr., p. 15, emphasis added). Moreover, although Mr. Moon stated that Claimant was not able to walk a straight line, nevertheless, he also indicated that Claimant did not have to use the desk to keep from losing his balance.

Q. Did you notice him while he was there in the office leaning on a desk to be able to • taad upt

A. As I recall, he never touched a desk that day at all.

Q. Did you notice him using his arm or hand to maintain his balance by leaning against a desk?

A. No. (Tr., p. 16).

Despite this inconsistency in testimony, however, all three (3) of Carrier's witnesses are in agreement that Claimant was unable to perform his duties as ticket clerk, which involved personal contact with the public, as well as the handling of money. Five (5) checks in Claimant's cash box were found torn; two (2) of them being torn completely in half.

Claimant argues that he was indeed able to perform his duties on the morning of November 5. He insists the checks were taken in the night before (although by him). Moreover, he thinks his inner ear disorder and bad legs (particularly the left one) contributed to his not being able to walk a straight line. Nevertheless, Claimant does admit to having had his last drink "before midnight" (Tr., p. 26). Claimant further states in his "Submission of Dispute" that "...a preponderance of evidence...may tend to support a finding that Claimant may have been under the influence of Intoxicants...".

The Board thus finds that there is a preponderance of evidence that Claimant was unable to perform his duties involving personal contact with the public, as well as the handling of cash, on the morning of November 5, 1973.

Nevertheless, the Board finds the punishment of dismissal in light of Claimant's 27 years and eight months of service to be unjust, unreasonable, and excessive. Carrier argues that Claimant has a bad record in light of his two (2) previous warnings about the use of intoxicants prior to assuming duty. One of these was in 1972, and the most recent in September 1973. Yet, Carrier did not indicate if these warnings were oral or written, nor whether Claimant was warned that dismissal would result the next time the offense occurred.

In addition, looking at the Claimant's totality of service over the past 27 years and eight months, it would seem on the whole Claimant has been a good and faithful servant of Carrier. Two warnings hardly convert an otherwise unblemished record, into a "bad record."

FINDINGS: **The Third** Division of the Adjustment Board, **upon** the **whole** record and all the evidence, finds and holder

That the parties waived oral hearing;

That the Carrier and the **Employes** involved in this dispute are respectively Carrier and **Employes** 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 **discipline** imposed was **unreasonable, unjust, and excessive to** the extent indicated in **this Opinion.**

A W A R D

Part (a) of Claim **is** sustained to the **extent** indicated in **this** opinion.

Part (b) of Claim **is** sustained with respect to seniority, but denied with respect to back pay.

Part (c) of Claim **is denied** in its entirety.

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

ATTEST;


Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

CARRIER **MEMBERS' DISSENT TO AWARD 21121, DOCKET CL-21173**

(Referee McBrearty)

We dissent. The matters of record which clearly establish this **claim** is invalid are **discussed** in the **memorandum** submitted by the Carrier **Members**. That **memorandum** is retained in the **Master** File and by reference is **incorporated in** this dissent.

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JUL 23 1976

H. G. HARPER

H. J. Naylor
D. B. Carter
W. E. Linn
Sam Young
Johnson