

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23821
Docket Number MW-23699

Paul C. Carter, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System **Committee** of the Brotherhood that:

(1) The dismissal of Cook Ellis Johnson, Jr. was without just and sufficient cause and on the basis of unproven charges (System File **37-SCL-79-79/12-39 (79-26) J**).

(2) Cook Ellis Johnson, Jr. shall be **returned** to service with seniority and all other **rights unimpaired** and be **compensated** for all wage loss suffered."

OPINION OF BOARD: Prior to the occurrence giving rise to the dispute herein, Claimant was employed by the Carrier as a cook, assigned to Timbering Force working in the vicinity of Pearson, Ga., under the supervision of Foreman W. J. **Sumner** and Assistant **Foreman** I. L. Walden, having been assigned to that force about two **months**.

According to the Carrier, the Foreman of the Timbering Gang received **numerous** complaints from the man in the gang about the **quality** of the food that was **being served**. There were two cooks assigned to the **force** and as the other cook had been with the force longer and there had been no complaints about the meals he had prepared prior to Claimant joining the force, the **Foreman** instructed the Claimant to assist in the kitchen, to bring the meals to the men **in** the field, leaving the actual preparation **of** the meals to the other cook, who was junior in seniority to Claimant. We have been referred to no agreement rule providing who will be a so-called chief cook and a second cook.

On **March 8, 1979**, Carrier's Division Engineer notified the Claimant:

"**Reference** is made to Assistant Roadmaster **L. E. Wainwright's** letter to you dated **March 6, 1979**, in which you were charged with violation of portion of Operating Rule G, which reads as follows:

'The use of intoxicants, narcotics, sedatives, stimulants or a derivative or combination of any of these, when subject to call, when reporting for duty, while on duty, while on Company property **is** sufficient cause for dismissal.'

and also Rule No. **16** in the Safety Rule Book, **which** reads as follows:

'**Employees** on duty must not use or be under the influence of intoxicants, drugs or anything which may **impair** senses or alertness.'

Portions of Rule No. 18 in the Safety Rule Book, which reads as follows,:

'vicious or uncivil conduct, insubordination or concealing facts concerning matters **under** investigation **will** subject the offender to dismissal.'

In this connection you will be granted a hearing in accordance with the current Working **Agreement** in my office at 315 Plant Avenue, Waycross, Georgia to begin at 1:30 P.M., Friday, March 16, 1979. You may have representation if you so desire, in accordance with the agreement under which you are employed, and you may arrange to have present any witnesses who have knowledge of this matter.

Your personal record file will be reviewed at this hearing."

The investigation was conducted as scheduled. A copy of the transcript of the investigation, or hearing, has been made a part of the record. **Claimant** was present throughout the hearing and was represented.

The For- testified in the investigation, or hearing, that he told the Assistant For- Walden:

"... to tell Johnson that Dixon was going to (be) the cook from there on out cause the men were complaining about his cooking and they were not **complaining** before he got there. so, I told **him that when** they went **in that afternoon**, I went on put out the water and before I started to go **home**, I called Mr. Walden and asked **him was** everybody in and everything okay, and he said yes. **So when** I got to work the next **morning**, I ask Mr. Walden and he told **me** that he (claimant) said he was not going to be the flunkee cook that he was the oldest in seniority and that he was not **coming** out on the line of road and I told Mr. Walden well we'll see. Well. at dinner he did not **show** up. **Dixon came** back out on the line of road and Mr. **Wainright** (Assistant Roadmaster) & we up about that time and I asked him to go with me to the camps to see what was the trouble. We drove up the camps, Johnson told us that he was not going to be the flunkee cook, that he was the oldest **man** in seniority and that he would call the **Union**. And before we left from out there, Walden also told us that he was **drinking on** the camp. And when we got there after we asked him about why he wouldn't **come** out there, he told us that he was senior man and he was not cowering out and we asked him about was he drinking and he said yes he was drinking in his car, which **measured**

about 24 feet from the camp car. Then we went to the phone at **Axon** and called you, called **Mr. Cooper** -

Q. **Mr. Sumner**, did you personally tell Mr. Johnson the problem that you felt like he was having as a cook.

A. Yes, sir, I told him when me and **Mr. Wainright** arrived at the **camp** and he told me then that he was the senior **man** and he was not going out on **line** of road that he would call the **Union** and see what he could get done.

Q. Did you personally instruct him as to what you want him to do?

&Yes, sir, he told me that the kitchen was not my job, that that was his job and I told him my job **exists** from one end of the camp cars to the other.

Q. While you and Mr. Wainright was at the camp car and you questioned **Mr. Johnson** about the drinking and he admitted that he was drinking in his automobile?

A. Yes, sir, he admitted that he was drinking in his automobile.

Q. Did you and Mr. Wainright measure **from** the **automobile** to the camp cars?

A. Yes, sir."

Assistant Foreman Walden testified in part:

"... So **when** I was there at camp that afternoou, Mr. Johnson, I told him what was Mr. **Sumner** told **me** to tell him. **Mr. Johnson** say he was the senior cook, he was the oldest **man**, and that Mr. **Sumner** wanted him to come out on the truck the next day. So **Mr. Johnson** told **me** that I could take my **money** and go to the restaurant and eat. So I told him that Mr. **Sumner** said for him to come out there on the dinner truck to **ses** dinner. He said he not going to go anywhere, if he go out there his mama is a - , those are the words he told **me**, and the newt day **Mr. Johnson** did not come out there and I asked Mr. Leonard, the second cook, where was **Mr. Johnson**. He said he wasn't coming anywhere because he's the oldes man. So that time I told Mr. **Sumner** about it.

Q. Mr. Walden, was you present **on** the camp cars on the night of March 5, which would be **Monday night**?

A. That is correct.

Q. Did you observe or see anything **actions** or anything that Mr.

Johnson was doing on that night?

- A. Yes., sir, **on** that same night, I was standing at one end of the camp car, the kitchen, peeping out looking out. **Mr.** Johnson and two **more other** men, they weren't no Railroad employees. He was sitting on the step with one leg crossed like I got wine now, half bottle **in** his hand with a, in a bag, half way fold down. It was a whiskey bottle. He was drinking out of **it**. And I showed Mr. Leonard **Beecham** to him."

The Assistant Roadmaster (Mr. Wainright) **in** answer to a question from the General Chairman, stated:

"**Q.** DO you have any specifics as far as the insubordination. What did he actually do that you feel that he was being insubordinate?

- A. Well, not **following** the instructions that the Foreman had relayed to him, and he said he didn't have to follow those instructions, that he was the oldest man, he didn't have to do that."

In the investigation the Claimant denied drinking on Company property. He admitted drinking in his automobile as he was leaving the property, but contended that it was not on Carrier's property. He also denied refusing to comply with instructions concerning the cooking and delivery of food to the men in the field, but simply said that he would get the matter clarified.

There were various conflicts in the investigation as between Claimant's statement and the statements of others; however, it **is** well settled that this Board does not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of **witnesses**. Such functions are reserved to the hearing officer.

Claimant's prior record, which has been made a part of the record, is far **from** satisfactory. It shows a thirteen day suspension in **1971**, a dismissal in 1972, re-entry to service in **1973** and a letter of warning for not protecting his **assignment in 1974**.

Based upon the entire record, the Board finds that Carrier's dismissal of Claimant was not arbitrary, capricious or in bad faith. There is no proper basis for this Board to interfere with the discipline imposed.

FINDINGS: **The** Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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: **Acting** Executive Secretary
National Railroad **Adjustment** Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, **Illinois**, this **26th** day of March 1982.

