

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24346
Docket Number MW-24229

Edward L. Suntrup, 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 **Trackman H. L. Garland** for 'attempting to remove gasoline **from** the automobile of Conductor **T. F. McNamara**' was unwarranted and wholly disproportionate to such charge (System File **C-4(13)-HLB/12-39(80-21) H**).

(2) **Trackman H. L. Garland** shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, Mr. **H. L. Garland** entered service of the Carrier **approximately 3** years prior to the incident under consideration in this case. By letter dated January **14, 1980** Claimant was notified that he was charged **with** violation Of Carrier General Rule 18. This Rule reads, in pertinent part, as follows:

"Rule 18.

Disloyalty, dishonesty, desertion, intemperance, **immorality**, vicious or uncivil conduct. insubordination, sleeping **on** duty, **incompetency**, making false statements, or concealing facts concerning matters under investigation, will subject the offender to dismissal."

At approximately **4:00 PM** on January **4, 1980** Claimant was allegedly observed attempting to **remove** gas **from** the **automobile** of a fellow **employee** without this **employee's** knowledge. A hearing to **determine** Claimant's **responsibility**, if any, with respect to the violation of Rule 18 was held **on** January 22, **1980**. As a result of this **hearing** Claimant was dismissed from service on January **31, 1980**

The issue **in** this case is whether **Claimant** was, in fact, in **contravention** of Rule 18 for attempting to "steal" gas **from** a co-worker's car on January 4, **1980** in order to **make it home** in his own vehicle since he testified that he did not have **money on** his person to buy gas, or whether Claimant was caught in the act by Carrier in an attempt to "borrow" gas **from** a co-worker **who** was a friend. A review of the transcript reveals the following points. Both Claimant and conductor **T. F. McNamara**, **from** whose car the Claimant attempted to siphon gas, admitted that they were fairly close associates, that they had ridden to work together **on many** occasions, had drank beer together, **that McNamara** had **loaned** Claimant **money** in the past, and the **same McNamara** admitted that Claimant was, in his opinion, as honest as "the day is long". Further, **McNamara** admitted that he would have given **Claimant** permission to **take** gas from his car and/or would have loaned him money on this occasion to buy gas if Claimant had asked. **This Board** makes no judgment on the credibility of Claimant's testimony as this relates to a note and a watch as collateral **which** he claims was to have been left on **McNamara's**

windshield to inform him of Claimant's act . . . or on the validity of the note which was subsequently **found** behind a rain downspout **on** a building near to where the act originally took place a Carrier property. Prior Awards clearly establish that this Board, in its appellate function, is not a trier of facts (See Third Division 9230, 9322, 10113, 21612 inter alia). **This** Board does note, however, that **McNamara** states **in** hearing that he "**would** have accepted" this explanation after the fact if it had been available to him and/or if he **would** have found the note in question.

It is the determination of this Board, therefore, that while Claimant **may** not have been in violation of Carrier Rule 18 he did, as the **Organization** **utself** put it, exercise extremely "**poor** judgment when he attempted to borrow gasoline **from** his friend" at the **time** and place under consideration. He also created, as conductor **McNamara** put it in hearing, an "embarrassing situation", **to** say the least.

Sufficient sanction for **such** poor judgment, **in** the mind of **this** Board, is the **time** off which **Claimant** has already lost because of this whole incident. This should not, however, disallow him one **last** chance to prove his worth to the Carrier since the **Board** also notes that Claimant's past record is clear of all malfeasance as this relates to Rule 18. **The** Claimant should be returned to service with seniority **and** other rights **unimpaired** but without back pay for time lost while out of service.

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**.

That the discipline was excessive.

A W A R D

Claim sustained in accordance **with** the Opinion.

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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 27th day of April 1983.