

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26238
Docket Number CL-26612

Edwin H. Benn, Referee

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

PARTIES TO DISPUTE: (

(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10016) that:

1. Carrier violated the rules of the agreement when it withheld William Walters from service and subsequently dismissed **him** from service following an investigation held on December 1, 1983.

2. Carrier shall reinstate William Walters to service, clear his record of the discipline and compensate him for all time lost commencing November 11, 1983, the date withheld from service, and continuing until he is restored to service.

OPINION OF BOARD: Prior to the incident involved in this matter, Claimant had been employed for four years by the Carrier as an Extra Clerk at the Carrier's Baltimore Terminal Services Center.

Claimant "as charged by letter dated November 14, 1983, with being under the influence of intoxicants and/or narcotics at or **about** 7:00 P.M. on November 11, 1983. After Investigation held December 1, 1983, and by letter dated December 20, 1983, Claimant was dismissed from service.

The record demonstrates that Claimant reported to work at 3:00 P.M. on November 11, 1983. Three witnesses produced by the Carrier (a Supervisor and two Police Officers) testified, in sum, that while on duty Claimant swayed back and forth and from side to side, staggered and had to take backward steps to maintain his balance. Further, the Carrier's witnesses testified that **Claimant's** conversational speech "as slurred and at times Claimant appeared as though he "as going to fall asleep, his eyes appeared red and his pupils were dilated and he had difficulty lighting a cigarette. However, the witnesses further testified that they could not smell any odor of alcohol on Claimant.

Claimant testified and provided documentation from his doctor that he had an ear infection **that** caused slurred speech and imbalance along with blurred vision and that he "as using ear drops along with antibiotics prescribed by his doctor. The documentation provided by Claimant's doctor stated that Claimant "**was under** my professional care from 11/7/83 to 11/14/83 inclusive, and was totally incapacitated during this time" and "diagnosis: ear infection causing slurred speech, unbalance, blurred vision. Medication prescribed."

During the Investigation, the Organization produced statements from various **employees** and other documentation to the effect that Claimant was a good **employee** and performed his normal work activities on the date of the incident. Claimant has had no prior discipline.

Our function is well defined in that in discipline cases we do not substitute our judgment for the Carrier's and do not decide the matter in accord with what we might or might not have done had the discipline been ours to determine. We only pass upon the question of whether or not substantial evidence exists in the record to sustain the Carrier's **conclusion** that discipline was appropriate. With respect to the penalty (in this case dismissal), if we find that substantial evidence exists to sustain the imposition of discipline, then the penalty imposed is within the discretion of the Carrier unless we can say the record demonstrates that the penalty was discriminatory, unjust, unreasonable, capricious or arbitrary so as to constitute an abuse of that discretion. See Fourth Division Award 3490; Third Division Award 16280.

With respect to the first prong of the above analysis, we find that substantial evidence exists in this record to support the Carrier's determination that Claimant violated the prohibitions against the use or possession of intoxicants, narcotics or drugs which includes any use of medication that will adversely affect the **employee's** alertness, coordination, reaction, judgment, vision or gait when subject to duty. There **is** no real dispute that Claimant exhibited difficulty in maintaining balance, had slurred speech and showed other outward manifestations that could reasonably lead one to conclude that Claimant was under the influence as related by the Carrier's witnesses. First, laymen are competent to testify as to outward manifestations, physical actions and activities, and conclusions of being under the influence. Third Division Awards 26098; 20100. Here, three witnesses produced by the Carrier so testified. Second, Claimant admits to the difficulties in speech and balance and further admits that he was taking medication (ear drops and antibiotics). Third, Claimant's doctor's statements refer to his "slurred speech, unbalance [and] blurred vision" along with "medication prescribed." Finally, Claimant's doctor's statements disclose that during the period November 7, 1983 through November 14, 1983, Claimant was "totally incapacitated." This incident occurred on November 11 when Claimant was diagnosed by his own doctor as being totally incapacitated. Thus, in our review capacity, we need not determine, based upon our examination of the record whether, in fact, Claimant's condition was caused solely by his ear infection or existed as a result of the medication for that infection. The Carrier concluded that Claimant was under the influence, irrespective of the validity of the reason for taking the medication or drug and such conduct violated its rules. The above enumerated factors lead us to find that substantial evidence exists in this record to support that conclusion.

Nevertheless, the second prong of our analysis leads **us** to conclude that although the Carrier's decision to impose discipline cannot be set aside, the imposition of the penalty of dismissal was unjust, unreasonable, capricious and arbitrary so as to constitute an abuse of discretion. At most, the record demonstrates that Claimant's condition was a result of taking medication for his ear infection and coming to work at a time when he was "totally incapacitated." There is no evidence of substance abuse. Thus, at most,

Claimant exhibited poor judgment by coming to work in that condition. We are also cognizant of the fact that the record shows Claimant was a well regarded **employee** and has had no prior disciplinary problems. However, Claimant's actions still violated the prohibitions against coming to work in the condition that he demonstrated on November 11, 1983. Considering and balancing the foregoing, under the circumstances presented, dismissal was too severe a penalty and no basis **exists to support** that penalty. We shall therefore award that Claimant be reinstated with seniority unimpaired but without compensation for time lost.

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

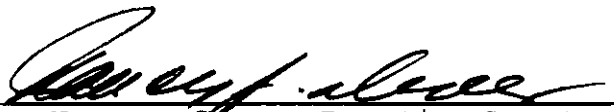
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1987.