

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerical Agreement when it removed Mr. E. L. Marsh from service October 23, 1947, that he be reinstated with full seniority rights unimpaired, returned to his former position of Assistant Boatmaster and compensated for any and all wage loss sustained retroactive to October 23, 1947.

OPINION OF BOARD: Petitioner contends that the record in this case does not sustain the action of the Carrier in discharging Assistant Boatmaster E. L. Marsh. Examination of the record shows that there is a conflict in the evidence as to whether or not claimant was intoxicated when he reported ten minutes late for duty on October 23, 1947.

Claimant denies that he was intoxicated but admits that he had been having trouble with his teeth and had taken a drug to ease the pain. The disciplinary action was taken under Rule 27 of the Agreement. Some words passed between claimant and his supervisor when he reported for work on the day in question and this is the basis for the charge of insubordination.

Prior to this time a warning had been given to employees on the matter of drinking. Claimant alleges that superior officers were too hasty in their judgment on the day in question and insisted on a hearing before claimant could secure additional witnesses who, it is contended, could have given evidence which would have disproved the charge.

Both Petitioner and Carrier cite numerous awards on the question of sufficiency of the evidence in disciplinary cases to sustain suspension and dismissal.

Petitioner contends that if Mr. Marsh was discourteous to a degree bordering on insubordination it was due to illness on his part and that the penalty by the Carrier was excessive and unreasonable. In the matter of intoxication some witnesses testified that they did not smell liquor on Mr. Marsh's breath and were of the opinion, from observation, that he was not intoxicated. Carrier's witness, a supervising official, who first contended Mr. Marsh was intoxicated testified that claimant in the course of a conversation relating to his condition shortly after he reported for duty, requested that he be permitted to go home and be reported sick. The superior officer refused the request and called the Superintendent, Mr. Newell. At this time it is alleged that Mr. Marsh made insulting remarks to the supervisor. The next morning when questioned in the matter of insulting remarks, Mr. Marsh

said he did not recall making any such remarks but if it was thought he had he desired to apologize.

The rule stated in the awards cited on behalf of the Carrier (Awards 419, 891, 1996, 2498, 2632, 2696, 2766, 2863, 3203, 4068 and others) is well recognized and is based upon good authority. In brief, the position taken is that the Board should not substitute its judgment for that of the Carrier, and if the evidence is substantial and supports the charge made, the findings of the Carrier will be sustained. However, there would seem to be extenuating circumstances in this case which would indicate that the action taken, if not arbitrary, was a bit hasty. And apparently little or no weight was attached, in the investigation, to evidence that claimant did not appear to be intoxicated; that he had pleaded illness and had asked to be sent home and reported sick. Also, that he had apologized for anything he might have said which could have been considered discourteous by the supervising official.

Viewing the record as a whole, it would seem that the Carrier acted too hastily and that the disciplinary action taken was too severe. It is pointed out by the Carrier in its presentation that under the provisions of Rule 27, claimant had a right of appeal which he did not exercise. In view of that fact and the fact that claimant used some lack of discretion in his remarks to his supervisor at the time in question, the ruling will be that claimant is to be reinstated with seniority rights, if he so desires, within thirty days from date hereof, but that Carrier should not be required to give him any back pay. This ruling on the theory that a penalty might be in order as against claimant but that the disciplinary action is considered to be too severe.

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 employe involved in this dispute are respectively carrier and employe 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 claimant is entitled to another chance if he desires the same. Also that suspension for a certain period of time seems to be the proper remedy rather than dismissal.

AWARD

The petitioner shall be reinstated as Assistant Boatmaster within five (5) days after reporting for duty, with seniority rights possessed by him on date of dismissal in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of November, 1948.