Award No. 5026

Docket No. CL-5071

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. S. Parker, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood on the Lehigh Valley Railroad.

1. That James I. Galloway, Timekeeper, Manville, N. J., was improperly dismissed from service, February 21, 1949 account of arranging credit for the purchase of intoxicating liquors in a tavern at Manville, N. J. for ten men employed by the carrier as laborers on track work and housed in Labor Camp at Manville, N. J.

2. That violation of State Liquor Law claimed by carrier is in error. Bulletin No. 151, issued December 6, 1936, abrogated restriction placed in Bulletin No. 135, July 30, 1936 (See Employes' Exhibits "B" and "C" attached hereto).

3. That Mr. James I. Galloway was not accorded a fair and impartial investigation and hearing as contemplated by the rules of the existing clerical agreement.

4. James I. Galloway be returned to the service of the carrier with seniority rights unimpaired and reimbursed for monetary loss suffered as the result of carrier's action, from February 13, 1949.

OPINION OF BOARD: On January 18, 1949, the Carrier established a labor camp on its property at Manville, New Jersey, for housing M. of W. track laborers. At the opening of this camp the claimant herein, James I. Galloway, was assigned a position as timekeeper. Disturbances broke out periodically. One of these was found to be due to several employe becoming quarrelsome while under the influence of intoxicating liquor. The Carrier's police department officers were instructed to determine the source and manner in which the men at the camp had obtained their liquor. They discovered the claimant was at least partially responsible for the situation in that he had made arrangement with a local tavern owner for employes at the camp to buy intoxicating beverages on credit.

February 12, 1949, obviously on the theory his activities in arranging for the purchase of intoxicating liquor on credit were in violation of state law, some of the Carrier's police officers, along with other officials, took Galloway to the Manville Police Station where he was questioned and asked to and did identify another individual, as the son-in-law of a tavern keeper, Max Horbel. Following this identification he was taken to the Carrier's freight office where he was interrogated at considerable length regarding his acti-

vities in making the credit arrangements, through this son-in-law. Later he signed a statement, which for our purposes need not be detailed, admitting he had participated in the making of such arrangements, and outlining the extent of his activities in connection therewith. On the same day he was served with a written notice stating the Carrier would conduct a formal investigation of irregularities in the operation of the Manville Labor Camp, also his conduct in relation to the same, at the office of its Division Engineer in Jersey City on February 15, 1949, at 1:00 P.M., and instructing him to appear at such time and place for the investigation with any witnesses or representatives he might desire.

Galloway appeared at the investigation, as directed, in company with a representative. He was questioned at great length by the Carrier and by his own representative. In fact he was the only witness called at the hearing. No useful purpose would be served by encumbering the record with all the statements made by him on the occasion mentioned. It suffices to say after testifying he had been in the employ of the Carrier since 1920, during which time he had held assignments as Crew Caller, Interchange Clerk, Yard Clerk, Crew Dispatcher, Freight Rate Clerk, Freight Checker, Supervisor of Lighterage, Labor Agent, Time Keeper and Cashier, he made the following admissions respecting irregularities in the operation of the Manville camp and his conduct in connection therewith:

(1) That officials of the Carrier discussed with him the necessity for strict observance of all discipline rules in order to avoid any trouble at the camp; (2) As early as January 29 he had been called to Jersey City to discuss certain matters which the Carrier was dissatisfied with at the camp; (3) That he knew the drinking of liquor at the camp would cause trouble; (4) That notwithstanding he had taken it upon himself to arrange with Max Horbel to supply liquor on credit to some of the camp men and had actually made arrangements for 11 or 12 employes to obtain it in that manner; (5) That he knew he was violating a rule of the Carrier when he did so; (6) That he visited Max's tavern three or four times in the week beginning January 24th in connection with the arrangement, during the hours of his tour of duty, which he knew was in violation of another rule requiring employes to devote themselves exclusively to the service of the Carrier during prescribed hours; (7) That he requested the Carrier's Cashier to withhold cash from the paycheck of employes to whom credit had been extended, for payment of their liquor, and that he knew, as a former Cashier and as Timekeeper, that in so doing he was not only violating the Carrier's rules himself but was also attempting to have the Cashier do likewise; (8) That he made arrangements with Horbel to charge more than the prevailing price for a drink of liquor, a bottle of beer or a bottle of whiskey, with the understanding that at least a portion of this extra charge was to go to him and a man by the name of Hoy who had helped in making the credit arrangements.

In due time, based on the foregoing admissions and other statements supporting them, the Carrier notified Galloway he was dismissed from its service because of arranging credit for the purchase of intoxicating liquor in a saloon for several laborers working and living in the Manville Camps who were directly under his jurisdiction so far as computation of time was concerned.

It is not seriously argued that the admissions made by the claimant at the hearing do not sustain the Carrier's finding that he had arranged credit for the purchase of intoxicating liquor under the conditions and circumstances set forth in its notice of dismissal. In fact the fundamental premise upon which the Organization bases its right to have the claim sustained is that claimant has never had a hearing in conformity with the rules of the agreement and that hence the hearing given him must be regarded as a nullity and of no force and effect. The principal contention advanced in support of its position is that claimant was not apprized of the precise charge against him as required by the agreement. We doubt if the notice is subject to any such interpretation. Even so, and conceding that it might have been

more definite, the notice as given was clearly sufficient to apprize claimant of the fact he would be required to explain his responsibility for the irregularities in the operation of the Camp. Having been interrogated at length about those irregularities several days before it cannot be said he did not know what the charge was. Moreover, he appeared in company with his representatives and participated in the hearing without any objection being made to the sufficiency of the charge or to proceeding with the hearing. In that situation, our more recent and we believe sounder decisions (See Awards 4591 and 4749) hold that a claim to the effect lack of conciseness in the charge vitiates the entire discipline proceeding must be rejected as lacking in merit. Moreover, under the existing facts and circumstances there is sound authority (See Award 4239) to the effect claimant waived any and all defects in the notice.

Another contention on which claimant places much weight is that since Division Engineer Baker instigated the investigation, signed the charge, and also passed judgment upon the accused, it necessarily follows the hearing was so unfair as to compel the setting aside of the discipline imposed. We do not agree. The rule (See Award 4316) is that disciplinary action, even though assessed under such conditions and circumstances will not be disturbed unless it appears from the record that the conduct of the official acting as informant, prosecutor and judge has been so biased and prejudiced the accused has been deprived of a fair and impartial hearing or trial. Our examination of the record discloses nothing of that character. Therefore, the claimant's contention on this point cannot be upheld.

In this case the Carrier on February 12, 1949, commenced what, for want of a better name, has been described as a "preliminary investigation" at the Manville Police Station and at its freight house. Perhaps this action should have been classified an an "inquiry" on the part of the Carrier instead of a preliminary investigation, conducted for the purpose of ascertaining whether the facts would warrant the formal proceeding authorized by Rule 60 of the Agreement providing "an employe . . . shall not be disciplined or dismissed without investigation and hearing." Further proof that it should be so considered is to be found in the next sentence of the same rule which reads, "He may, however, be held out of service pending such investigation and hearing." Indication the Carrier regarded its preliminary action as merely an inquiry appears from the fact that it immediately notified claimant he would be held out of service pending the result of a formal investigation and hearing.

It is suggested the Carrier violated the agreement, particularly Rule 62, providing employes shall have reasonable opportunity to secure the presence of representatives or necessary witnesses at investigations or hearings, also Rule 63, stating a copy of the employes statements made a matter of record at the investigation or on appeal will be furnished upon request of the employe or his representatives; (1) by holding the preliminary investigation or inquiry without claimant's representative being present, (2) by taking a written statement from claimant at that time, and (3) by failing and refusing to furnish him with a copy of such statement. Our view, as we have heretofore indicated, is that under the agreement a preliminary inquiry is one thing and a formal investigation and hearing another. As we read them the foregoing rules of the agreement, on which claimant relies as support for this particular point, do not come into operation or govern the rights of the parties until after it has been determined there is to be a formal investigation and hearing. It follows the claimant's contention respecting a violation of the agreement at the preliminary inquiry cannot be upheld and, so far as the instant record is concerned, has little if any bearing upon the propriety of the Carrier's action following the formal investigation and hearing.

Next it is argued the Carrier's disciplinary action cannot be upheld because it is based upon the erroneous theory it was a violation of New Jersey Law to make arrangement for purchases of liquor on credit. The record does not warrant the sustaining of any such contention. It is true the Carrier started its investigation with the idea claimant had been violating

the state law as well as its own rules and that it later ascertained its theory as to the force and effect of the statute was erroneous. However, it is crystal clear discipline was assessed because of claimant's conceded violations of its own rules and regulations.

Finally claimant contends that the penalty fixed by the Carrier for his admitted misconduct, namely, dismissal from the service, is so clearly out of proportion to his offense as to require a finding that its action was so unjust, arbitrary and unreasonable as to require modification at our hands. Let us see. It must be conceded it is the prerogative of management to maintain discipline among its employes and take such steps with respect to matters of that character as will insure honest, loyal and efficient service. The established rule, as we have often said, is that where the Carrier's action with respect to such matters is sustainable by the record we have no right to disturb it. Without condoning for a single moment claimant's inexcusable conduct while serving the Carrier in a position of trust and responsibility we confess that in view of his long record of service we have searched the record with a sympathetic eye in the hope it might disclose some mitigating circumstance justifying a conclusion the Carrier might have acted hastily and abused its discretion. As careful as our review of the record has been we have failed to find any circumstance, except claimant's long service, which might tend to mitigate the gravity of his offense. Long service in and of itself does not permit us to substitute our judgment for that of the Carrier. There the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute 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 the record fails to disclose violation of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of September, 1950.