Award No. 6012
Docket No. MW-6029

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System of the Brotherhood:

(1) That the Carrier violated the agreement when it dismissed Bridge and Building Mechanic J. V. McGee, from the Carrier's service in violation of Article 22, Rule 6 of the effective agreement;

(2) That Bridge and Building Mechanic J. V. McGee be restored to the Carrier's service in accordance with the provisions of Article 22, Rule 6.

OPINION OF BOARD: This is a discipline case. The Claimant, Bridge and Building Mechanic J. V. McGee, was charged with violation of Rule "G" which reads as follows: "The use of intoxicants while on or off duty, incapacitates men for railroad service and is prohibited. Any violation of this rule will be sufficient cause for dismissal." He was notified in writing the date of the hearing. Hearing was had on April 20, 1951. On April 23, 1951, Claimant was dismissed from the service. The claim is properly before this Board for decision.

The record discloses that on April 16, 1951, claimant was working as a painter for the Carrier at Dallas, Texas, under the supervision of Bridge and Building Foreman Joe W. Henderson, with assigned working hours from 8:00 A. M. to 5:00 P. M. There were two men on the Foreman's payroll April 16, 1951, the Claimant and Floyd F. Hathaway. The latter did not report for work on this date. The project upon which the men were engaged was painting the inside of the freight house at Dallas, Texas. The Foreman and Claimant worked from 8:00 A. M. to 11:00 A. M., when it was decided that the work could be done to better advantage when the employes in the freight house were off duty. This was agreeable to Claimant, to commence the work at 5:00 P. M., and work until 1:00 A. M. The Claimant had his noonday lunch with him. He decided to eat,, as it was near the noonhour. He admits consuming three bottles of beer as part of his meal.

The Claimant entered a plea of not guilty at the hearing.

The Foreman's testimony is to the effect that a bunk car is provided by the company as sleeping quarters for himself and crew, and is used by the men on occasions during their rest periods. The Claimant was to report to

work at 5:00 P. M. He came to the car about 4:15 P. M. When he entered the car he said to this witness: "I guess, God damn you, you are mad." The Foreman told Claimant he was not putting up with a drunk any longer and he was going to call Mr. Lytle who is the District Manager. When the Foreman left the car, the Claimant had gone to bed. He had on his working clothes. After leaving the car the Foreman called Mr. C. G. Parker and Mr. O. E. Norris, special agents, and both returned to the car with the Foreman, which was about 20 to 15 minutes before 5:00 P. M. The Claimant was asleep. The Claimant was unable to work, and the Foreman would not let him work, if he had reported for work.

The evidence of C. G. Parker, traveling special officer, is to the effect that when he reached the car the Claimant was lying in his bunk asleep. They had difficulty in awakening him. He was in a maudlin or "intoxicated mood—was unable to find his keys or pass, and we had to kind of throw his feet around off the bunk to get him on his feet." Then Mr. Henderson asked him if he wanted to resign. He said "No." Mr. Henderson said, "then you are out of service. Report to Mr. Lytle at Denison." He was highly intoxicated at that time. The Claimant was told he would have to leave the car. At that time Mr. Norris, the Claimant, and this witness left the car. Mr. Norris left with the Claimant. Claimant was unfit for service at that time.

The Claimant's testimony is to the effect that he needed no help to get to the bunk car. He had consumed three bottles of beer. He was not rudely awakened. He needed no physical assistance in leaving the car. He was not actually engaged in any compensated service for the Carrier at 4:15 P. M., April 16, 1951, and could have performed his assigned work if he had been permitted to go on duty at 5:00 P. M. He did not thoroughly understand the meaning of Rule "G" prior to the time he was removed from service. He had not been warned that drinking or drunkenness around the outfit car could not be tolerated.

The Employes cite the preamble to the effective agreement which reads as follows: "These rules are predicated upon the obligation of each employe to render honest, efficient, and economical service to the railway and the public. Discipline being necessary to safe, and efficient, and economical operation, the management will make such disciplinary rules as will secure that result. No discrimination will be practiced by management or members of Organizations as between members and non-members of organizations."

The Employes contend that the conduct of the Claimant did not adversely affect the safe, efficient, or economical operation of the Carrier in any way.

Employes also cite Article 22, Rule 6. "Article 22—Discipline and Grievances. Rule 6. If the result of the investigation is not such as to sustain the discipline or dismissal, the records shall be corrected accordingly, and, if the employe has been removed from the service, he shall be restored to his former position or status; if, in the meantime, former position is abolished, he may exercise his seniority; and he will be paid what he would have earned had he not been removed from the service; less what he may have been paid for his service in other work, or through unemployment compensation."

Certain rules are cited by the Employes—Rule 1 and 2 of Article 13, dealing with the meal period: Rule 2 of Article 7 referring to hours of service. The purpose of citing these rules is to demonstrate that the Carrier violated the same by not giving the Claimant the allotted time for his lunch period and by splitting his working assignment hours. Also, that the Claimant was loyal to the Carrier in agreeing to the same. We deem this to be collateral to the issue, the charge is violation of Rule "G."

There also appears in the record that the Carrier might have considered a plea of leniency on behalf of the Claimant. However, the Employes rejected this proposition on the theory that to do so would prevent a hearing on the merits.

The effect of the use of intoxicants is well known. It is not necessary to employ an expert to determine from the manner of speech or general conduct of a person whether or not he has used intoxicants. We believe in the instant case the evidence is in preponderance that the Claimant was under the influence of intoxicating liquor and unable to perform the duties assigned to him commencing at 5:00 P. M., April 16, 1951. There is substantial evidence supporting the charge and this is sufficient. See Award 13142, First Division.

"Although this Board has the power to order reinstatement of an employe, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the employer has acted arbitrarily, without just cause, or in bad faith." See Awards 135, 3342.

Our function in such cases is limited. We can pass on whether or not there has been a 'fair and impartial" hearing. If there is substantial evidence to support the Carrier's findings, we cannot weigh the evidence or endeavor to resolve the conflict thereon. We will not substitute our judgment for that of the Carrier in its construction of the use of intoxicants rule, or as to discipline imposed, unless in our opinion the Carrier's judgment was arbitrary, capricious, or in bad faith, and this notwithstanding the fact that had we been sitting in judgment originally we might have made other findings, construed the rule differently, or imposed more or less drastic discipline. See Award 13008, First Division.

For the reasons given in this opinion, the claim is denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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

The record sustains the findings made by the Carrier at the conclusion of the investigation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.