Award No. 6821
Docket No. CL-6727

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the Agreement when, on March 4, 1952, it dismissed Mr. Herschel R. Briscoe from service on charges unproved and which charges concerned an alleged conviction in the State Courts for drunken driving at a time when Claimant Briscoe was not in active service of the Carrier, and

(b) The Carrier shall now restore Claimant Briscoe to service with seniority, vacation, and all other rights unimpaired and compensate him for all loss of time in accordance with the provisions of Rule 40 of the Clerks' Agreement (Agreement revised as of June 1, 1952).

OPINION OF BOARD: Claimant was dismissed from service for violation of Rule "G". The basis for the Carrier's action was its finding that on January 9, 1952, the Claimant had pleaded guilty to driving while drunk following arrest on that charge on July 29, 1951.

The Claimant was not in service with the Carrier at the time of the alleged drunken driving incident. He had been dismissed because of failing to protect his assignment on January 22, 1951. As evidenced by a letter from the Carrier dated July 12, 1951, it was agreed by the Carrier and the Organization that he would be restored to duty. On July 24, 1951, he reported to the Superintendent's office and was told to report for physical examination which he underwent on July 25, 1951. He bid on a vacancy on September 8, 1951, and commenced active service thereon on September 24, 1951.

The "Discipline and Grievance" Rule of the applicable Agreement provides that employes will not be discharged or dismissed except for cause. Numerous contentions and considerable irrelevant matter appear in the record but the focal point upon which the disposition of the claim turns is

simply whether or not the Carrier was justified in using the incident of July 29, 1951, as a basis for its disciplinary action.

The salient point in this controversy is that on July 29, 1951, Claimant held no assignment nor was he liable to service with the Carrier on that date or on the following date for the record is clear that he was not cleared by company physicians for service as a clerk until August 11, 1951. Consequently, no matter to what extent he may have indulged in the consumption of alcoholic beverage on July 29, 1951, it could not have impaired his ability to serve the Carrier. As said in Award 5748 and other awards of this Division, it is an unreasonable exercise of authority for Carrier to attempt to prevent the use of intoxicating liquor by its employes when off duty and off the Carrier's property. So long as the consumption of intoxicants while off duty and off the property does not affect the employe's ability to perform service Carrier cannot be heard to complain. In the instant case there is considerable conflict as to whether the Claimant was convicted of driving while drunk and the transcript of the Court's record submitted as an Exhibit is somewhat confusing on the point. In any event, however, it appears that the sole basis upon which the Claimant was dismissed was for violation of Rule "G" based on the incident of July 29, 1951. For reasons indicated above, on the record here presented that would not constitute "just cause". It follows that the claim should be sustained.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of November, 1954.

DISSENT TO AWARD NO. 6821, DOCKET NO. CL-6727

This award can be no more than a shocking affront to the sincerity patiently demonstrated by the carrier in its treatment of the employe. He, having a record of demerits and reprimands, had irresponsibly wandered through four dismissals and four reinstatements, without pay. The decision, if it can be thus dignified, purports to order the **fifth** reinstatement, this time with pay. We will show that it is based upon the purest of caprice growing

out of judicial ineptitude and hindsight. The case will stand as a monumental deterrent against carrier management lending an ear to sobbing pleas for leniency.

The employe was dismissed for the **fourth time** for failure to protect his job on January 22, 1951. For the **fourth time** the carrier was asked to exercise leniency and forgiveness. It was agreed between the carrier and the organization that the employe would be given the **fifth chance** if he would "mend his ways", if he would "protect his assignment", if he would "work regularly". The organization recognized their subject's shortcomings and agreed to impair his seniority by withholding him, restricting him, from any service as a chief yard clerk. With this understanding the carrier did, in good faith, notify the employe that he was reinstated on July 24, 1951. The employe reported to the carrier's examining medical officer the next day — a thing which he would not have done or had any right to do had he not been reinstated the preceding day. Then he actively violated the understanding that he would "mend his ways" and went back to his cups. But this violation has been accorded the referee's silent approval — he skirted it.

Five days after the claimant was reinstated, and **four days** after he had reported to the carrier's doctor, he became uproariously drunk. He was apprehended while driving an automobile on a public street in such a state of inebriation as to be in active violation of the peace and dignity of the state and against the law. He pleaded guilty and that is a matter of court record. This Division has held many times that court or police records are admissible as evidence in carrier investigations **(Awards 4749, 5104, 5336, 5385, 6572).** But the writer of this award says "there is considerable conflict as to whether the claimant was CONVICTED of driving while drunk." It should suffice to say that he was certainly not acquitted; but, we are not concerned whatever with either conviction or acquittal. This Board has soundly settled the principle that neither is a bar to disciplinary action by the carrier. **(Awards 14272 and 15577,** First Division, and **Award 332,** Fourth Division.)

The subject employe did not deny that he was drunk. The writer of the award, however, heaps approbation upon his drunkenness irrespective of the quantity of his quaffing or the degree of his insobriety. The Opinion says: **"No matter to what extent he may have indulged** in the consumption of alcoholic beverage on July 29, 1951, it could not have impaired his ability to serve the carrier." Just how does the neutral referee know that?

An injudicious hindsight raised the conclusion in the award Opinion that "The salient point in this controversy is that on July 29, 1951, Claimant held no assignment **nor was he liable to service** with the Carrier **on that date or on the following date . . .**". This is apparently garnered from the fact that the doctor had not "cleared" him as of the time he became so violently intoxicated. Looking back at the case, that is true. Was the employe "looking back at the case"? Of course not. He had been dismissed for failure to protect his assignment on January 22, 1951. He had been reinstated on July 24, 1951. He had been to the doctor on July 25, 1951. In these circumstances this employe should have expected to take up service at any moment. His liability to return to service was imminent. It hung over his head at the very time that he proceeded to become so censurably drunk that police authorities had to take him from behind the wheel and off the street. The referee's statement, based upon the benefit of a record history of later happenings, that he was not "liable to service with the carrier on that date or on the following date" is nonsense. He had, through his representatives, pleaded for reinstatement just so that he would be "liable to service with the carrier".

With a full knowledge of the purpose of discipline and the obligations of carrier management to administer its regulations to insure the safety of persons and property and secure the efficient performance of its quasi-public

duty, we dissent seriously to this referee's captious denunciation of the carrier's action against an employe whose work performance record reflects repeated separations from railroad service.

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp