Award No. 10355
Docket No. CL-12490

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ben Harwood, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The discipline of dismissal imposed upon Elijah Edwards, Usher, Pennsylvania Station, New York, New York, New York Region, be set aside.

(b) Claimant Elijah Edwards be returned to service with all rights unimpaired and compensated for all monetary loss sustained commencing November 2, 1959, and continuing until adjusted.

OPINION OF BOARD: On December 10, 1959, the Claimant was discharged from the service of the Carrier after a hearing on the following charge:

> "Unfit for service. Accountable to being under the influence of intoxicants while on duty at approximately 9:30 P. M., November 2, 1959, Pennsylvania Station, N. Y."

Previously he had received due notice that he was being held out of service pending trial and decision on said charge and also notice of the date on which trial would be held.

Following receipt of Notice of Discipline, Claimant appealed the decision to the Superintendent—New York Division. The appeal was denied. Later the case was progressed in Joint Submission, but after discussion the claim was denied by the Manager—Labor Relations. Notice of intent to file an ex parte submission with this Board was filed March 9, 1961.

The Agreement in evidence is that effective May 1, 1942, except as otherwise specified.

In order properly to deal with the issues raised herein, it seems well to review the evidence in considerable detail. Claimant was an "Usher" at Pennsylvania Station on November 2, 1959. His tour of duty was from 3:40 P. M. to 11:40 P. M. and in course thereof he was assigned to relieve the operator of "E" elevator from 9:10 P. M. to 9:30 P. M. While he was acting

as such relief elevator operator, he was observed by witness, N. L. Butters, Superintendent, Method and Cost Control, as being a little unsteady on his feet and having the odor of intoxicating beverage on his breath when said witness boarded said elevator about 9:30 P. M. Mr. Butters' testimony continued as follows:

> "The elevator proceeded from the lobby floor, passed the 3rd floor. On approaching the 4th floor, there was no attempt to make any slowdown in the speed of the elevator and passing the 4th floor, I reached for Mr. Edward's hand and the limit on the safety switch had functioned. The control handle, the operating handle, was still in down position. The elevator came to rest approximately 3½ feet from the 4th floor level. Mr. Edwards opened the safety gate and doors and assisted myself and another person, unknown, out of the elevator."

> "During the time I waited for Mr. Keegan, Mr. Edwards carried my coat through the lobby of the Y, his speech was thick, incoherent, and he was unsteady on his feet."

During cross-examination, Mr. Butters also stated:

> "Well, I'll answer this question in this way. As I stated previously, in my opinion, he was under the influence of intoxicating beverage and I based this on his walk, his speech, his actions, and the smell of intoxicating beverage on his breath. I do not have to be a physician in order to determine that."

In the testimony of Mr. G. B. Keegan, Station Master, as to Claimant's condition we find:

> "Mr. Edwards staggered into the elevator and there was an odor of some alcoholic beverage on his breath." . . . , "I talked to Mr. Edwards—his speech was incoherent and he staggered several times." . . . "Then Mr. Edwards dozed off and fell asleep." . . . "The police officer came over and he refused to leave. He fell asleep again."

When asked the following question: "Mr. Keegan, did you relieve Mr. Edwards from duty account of being unfit for service, accountable to being under the influence of alcoholic beverage?", the witness answered: "Yes, sir, I did."

Patrolman, J. B. Ruffin testified:

> "Q. Did you observe anything unusual in connection with Mr. Edward's actions?
> A. Yes, sir, I did.
>
> Q. What were they?
> A. In my opinion, Mr. Edwards was under the influence of some alcoholic beverage.
>
> Q. Did he walk at any time in your presence?
> A. He did.
>
> Q. Did he stagger?
> A. He did. He was unsteady on his feet.

Q. Did you detect anything unusual about his breath?
A. Yes, sir, there was an alcoholic odor on his breath."

And later, in answer to the question:

"Q. Was there any doubt in your mind when you observed Mr. Edwards on the evening of November 2, 1959 that he was under the influence of some intoxicating beverage?"

the witness, Patrolman Ruffin answered:

"A. There wasn't any doubt."

Elevator operator J. M. Sloane, whom Claimant relieved from 9:10 P. M. to 9:30 P. M. on November 2, 1959, testified that he observed Claimant staggering; also that "He ran the car (indicating by hand approximately 2 feet) over the floor."

Mr. J. T. Kelly, Assistant Station Master, also testified that Claimant had an odor of alcohol on his breath; that his speech was thick and he was glassy eyed.

Contrary to the testimony set forth above, the Claimant denied being drunk or imbibing intoxicating beverage prior to reporting to duty at 3:40 P. M., November 2, 1959; said; "I don't feel well"; I had taken 2 aspirins around 6:00-7:00 and 3 at 8:55. He also denied using any intoxicating beverage while on duty during the period 3:45 P. M. to approximately 9:30 P. M.—"I had a glass of prune juice, that's all I had." Also, Mr. A. H. Harris, Baggageman, Pennsylvania Station, a witness called in behalf of Claimant, testified he found nothing different in Claimant's appearance around 9:03 P. M. of that particular date—that Claimant had told him he wasn't feeling too well—that later, "around 10:30 . . . I herd him state in the presence of the patrolman and the Night Station Master, Mr. Keegan, that he would like to be sent to a doctor or words to that effect." And again, with reference to approximately 10:30 P. M. that evening, Mr. Harris testified in answer to the inquiry:

"Q. Did you have any conversation with Mr. Edwards, or did you just pass by while these gentlemen were talking?
A. Well to be honest, to be candidly honest, I was in the vicinity of Track 16 and I was asked to see what I could do to constrain Mr. Edwards to leave the premises—if I could use my influence."

According to statement in Claimant's Submission of Dispute under "Position of Employes":

"The issue to be decided in the present case is whether or not the Carrier violated the Clerical Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 6-A-1, when the Night Station Master, who is neither qualified nor experienced as a medical doctor, declared the Claimant in this case to be under the influence of intoxicants and removed him from service without an examination of any kind by a qualified medical doctor, even though the Claimant requested and insisted that such an examination be made, and if so, whether or not our claim should be allowed."

When considering this issue we find from the transcript of evidence that

Claimant's request to be sent to a doctor was not made until about 10:30 P. M. of the night in question, whereas he was relieved from duty at approximately 10:00 P. M., after the Night Station Master, Mr. Keegan, had decided that Claimant was unfit for service due to being under the influence of alcoholic beverage. In passing, it should be observed that Claimant himself was free to consult a doctor at any time after he was relieved from duty, but no evidence was given at the trial that he had done so.

In Employes' Ex Parte Submission it is stated that "at many locations on the Carrier's property it is standard practice for the Carrier's supervisory officials and patrolmen to require employes to submit to a physical examination when they are suspected of being under the influence of alcohol." However, in Carrier's Rebuttal Brief it is said that "the 'Standard practice' to which the Employes refer, does not exist."

Rule 6-A-1(b) provides:

> "(b) When a major offense has been committed an employe suspected by the Management to be guilty thereof may, after the occurrence of the offense, be held out of service pending trial and decision."

Here a major offense—an employe who appeared to be under the influence of intoxicants while on duty—had come to the attention of the Night Station Master. The Agreement does not require the Carrier to secure medical advice as to whether an employe is under the influence of intoxicants; a layman is competent to make that determination. (Awards 10049, 10232 and many others of the Third Division; also First Division Awards 13142 and 19891, among others). The Agreement was not violated by the action of the Night Station Master in taking Claimant out of service on the night in question nor by Claimant's being held out of service pending trial and decision.

It is also contended that the charge on which Claimant was tried was neither "clear, specific nor exact" and thus violated Rule 6-C-1(a) which reads:

> "6-C-1. (a) An employe who is accused of an offense and who is directed to report for a trial therefor, will be given reasonable advance notice in writing of the exact charge for which he is to be tried and the time and place of the trial."

We do not believe this contention valid. The charge against Claimant read:

> "Unfit for service. Accountable to being under the influence of intoxicants while on duty at approximately 9:30 P. M., November 2, 1959, Pennsylvania Station, N. Y."

It specified clearly the offense; it stated the hour and date thereof; and it stated the place where the offense occurred. As pointed out in Award 4781 (Referee Stone) the purpose of the rule "was not to provide a technical loophole for escape from deserved discipline, but to enable the employe to prepare his defense." Also, it should be added, that at the trial the Claimant said he had received proper notice. The objection not having been raised at the trial is deemed waived (Award 4781, supra).

Mention is made in behalf of Claimant that he was not charged with violation of Carrier's Rule "G" which reads:

> "The use of intoxicants or narcotics by employes available for

or while on duty is prohibited and is sufficient cause for dismissal."

That claimant was not charged with violation of this particular rule is unimportant in view of the fact that he was charged with being under the influence of intoxicants while on duty. (7139).

It is next contended that Claimant could not possibly have had a fair and impartial trial in that it was Station Master Roach who (1) notified him in writing that he was held out of service pending trial and decision; (2) who sent him another written notice as to the charges and time and place of trial; and (3) who conducted and presided over the trial—thus, according to Claimant, occupying the roles of Accuser, Prosecutor and Judge. Despite this assertion, there is no showing whatsoever as to how Claimant was deprived of a fair and impartial trial. There is no provision made in Rule 6 as to who shall prefer charges, conduct the trial or render the decision. As was said in Award 2608:

> "The Board finds nothing in the rules of the controlling Agreement defining who shall prefer charges or conduct hearings. There being no such definition in the rules, the Board cannot supply same."

Furthermore, as has been pointed out in behalf of Carrier, the Station Master was not present when the occurrence for which Claimant was charged took place; did not act as a witness or otherwise offer testimony. Here, as in Award 6108, it may be observed that no substantial right of the Claimant was affected.

We should next determine whether there was competent persuasive evidence which reasonably supports the finding of Claimant's guilt. A painstaking study of the entire record convinces us that there was; further, that it was ample to support Carrier's finding to that effect and that the dismissal of Claimant was neither arbitrary nor unreasonable. As was well said in Award 5032:

> "Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion."

Claimant objects to the inclusion of his discipline record by Carrier "for the first time in its submissions" to the Board; however, in view of the seriousness of the offense we cannot say that the penalty assessed, without any reference to such past record, was unreasonable, unfair or capricious.

A review of the entire record fails to show that Claimant's discharge was in any way improper or without sufficient cause, or that the Agreement has been violated. The claim shall be denied.

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 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February, 1962.