Award No. 11796
Docket No. DC-14030

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYEES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: For and in behalf of Sidney Jones, Waiter, formerly employed by the Baltimore and Ohio Railroad Company.

Because the Baltimore and Ohio Railroad Co. did, under date of November 16, 1962, dismiss Mr. Jones from his position as a Waiter wrongfully, unjustly, unreasonably and in abuse of discretion.

And, further, because the incident contained in the alleged charges, upon which this dismissal was based, was an incident over which the Baltimore and Ohio Railroad Company had absolutely no jurisdiction; the alleged occurrence having happened at a time when Mr. Jones was off duty, and was in no way connected with his employment by the Baltimore and Ohio Railroad Company in the performance of service as a Waiter on B&O dining cars.

And, further, for Sidney Jones to be returned to his position as a Waiter with seniority and vacation rights unimpaired, and for him to be reimbursed for all pay loss as a result of this wrongful, unjust and unreasonable action on the part of the Baltimore and Ohio Railroad.

OPINION OF BOARD: The facts in this dispute are uncontroverted. Claimant, while off duty and attired in street clothes, was found asleep on a bench in the Union Station in Washington, D. C. He had in his possession a bottle of Scotch whiskey and was arrested for drunkenness. He did not appear in police court and forfeited collateral of $10.00. These incidents occurred on September 6, 1962. The next day, September 7, Claimant was due to report for work as a waiter at 3:15 P. M. in Washington; he phoned his supervisor at 11:30 A. M. to inform him that he had some personal business in New York, where he lives, which would make it impossible for him to report for work. The Supervisor, having received timely advance notice, secured a replacement waiter who covered the assignment of the Claimant, Sidney Jones.

Thereafter, a hearing was held by the Carrier on September 25, 1962, at which Mr. Jones appeared together with two representatives of his Organization. The Carrier charged Claimant with violation of Rule 4 in the book of rules governing employes: "Use of intoxicants or narcotics is prohibited", on the ground that he was arrested in Union Station, Washington, D. C., Septem-

ber 6, for being intoxicated, which situation caused his inability to cover his assignment on Train 5, leaving Washington, September 7, 1962.

The Carrier, based on the above undenied facts and Claimant's past record which was introduced into evidence at the hearing, dismissed the Petitioner. The said past record is studded with numerous similar occurrences in the past and other infractions of the rules.

The only question presented by the instant appeal is the Organization's contention that whatever the facts of the incident concerning Mr. Jones may be, he was off duty when they occurred, was not dressed in clothing that could identify him in the public mind with the Carrier and it is therefore beyond the Carrier's jurisdiction to impose discipline which in effect encroaches on the Claimant's private life. Further, that Petitioner is a waiter with 22 years of service for the Carrier, who was en route to his home in New York. The Organization takes the position that Rule 4 of the Carrier's Rules which forbids the use of intoxicants and narcotics does not extend to a man's behavior when he is not engaged in the duties of his employment. The Organization also objects to the fact that the Carrier, in its decision to discharge Mr. Jones, included in its record at the hearing complete information as to Claimant's past bad record.

There is an Exhibit from the Metropolitan Police Department, Washington, D. C., included in the record which consists of a transcript of 4 previous arrests and convictions. Three convictions involve being drunk and one, disorderly conduct; starting with his arrest and conviction for being drunk and disorderly in 1949 and continuing up to and including the incident of September 6, 1962; the police record shows a pattern of behavior of the same offenses; Claimant's service record shows that he has missed his assignment on 21 different occasions and has been late for duty on 11 separate occasions. His record is bad, and despite the frequency of his missing assignments and reporting late for duty, the Carrier has shown forbearance and treated Mr. Jones with leniency. If the purpose of discipline is to be corrective and not merely punitive, Claimant can hardly complain about the treatment he has received at the hands of the Carrier. He has learned nothing from his past experiences and it is likely that no improvement can be expected of him.

On behalf of the Organization it was argued that the Claimant's past record should play no part in the present proceeding; that the said past record should not be considered to establish the guilt of the employe. We agree with the latter, but not with the former. It seems clear that if an employe enjoyed an unblemished past record that this would not only be urged as an important factor for the Board's consideration but should be accorded weight in the Board's consideration of the case. It seems equally clear that a Claimant's past record showing undependable performance, e.g., 21 missed assignments and late arrival on the job 11 times, should also be given full consideration by the Board. Furthermore, past Awards of the Third and other Divisions have expressed accord on this specific point: Third Division, Award No. 1599: "In disciplinary matters it is not only proper, but essential, in the interest of justice, to take past record into consideration. What might be just and fair discipline to an employe whose past record is good might, and usually would be, utterly inadequate discipline for an employe with a bad record." Also see Awards 4740, 5707, 7018, 7071, 8844, 9511, 10572 and many other Awards too numerous to require mention.

The main thrust of the Organization's argument is that even if Petitioner was drunk while he was off duty, this fact is beyond the reach of the

Carrier's jurisdiction. At the outset it should be noted that the precise Rule which the Claimant was discharged for violating states:

"Rule 4 in the Book of Rules governing employes:

'Use of intoxicants or narcotics is prohibited'."

Different from some rules concerning the same subject matter in other Agreements, this rule does not say that the use of intoxicants or narcotics is prohibited while the employe is on duty. In any case, the overwhelming weight of past decisions on this specific contention of the Petitioner as found in Awards issued by the First, Fourth and Third Divisions hold, in agreement with Third Division Award 8993 (Hornbeck):

> "* * * We are not ready to hold that a serious offense of an employe, although committed while off duty and off the property of his employer, may not be a proper basis of a charge which, if proven, will support his dismissal."

To the same effect see First Division Award No. 17029, 16818, 16570, 16257 and 19465. Third Division Awards Nos. 9177, 5933, 3322, 9483, 6012, 5757 and 5707. The Carrier's action in dismissing Claimant from its service was neither arbitrary or capricious or an abuse of sound discretion. Therefore, the discipline imposed on this Claimant will not be disturbed.

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 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

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 25th day of October 1963.