Award No. 13481

Docket No. CL-14898

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, 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 (GL-5511) that:

(a) Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the discipline rules, when it imposed discipline of dismissal from service upon Mr. E. M. Taylor, Station Baggageman, 30th Street Station, Philadelphia, Pennsylvania, Philadelphia Region, effective June 3, 1961.

(b) E. M. Taylor should be restored to service of Carrier with seniority and all other rights unimpaired and his record cleared.

(c) E. M. Taylor should be reimbursed for all wage loss sustained as a result of the Carrier's action, as provided in Rule 7-A-1 (d), commencing June 3, 1961, and continuing until adjusted. (Docket 1374)

OPINION OF BOARD: Claimant was a Station Baggageman. He had a seniority date of September 27, 1941. He was discharged, effective June 3, 1961. for "Being under the influence of liquor and unfit for work following absence from post of duty at 30th Street Mail Shed on April 9, 1961." This result followed an investigation conducted on the property on April 26, 1961, and a trial on May 24, 1961, at both of which Claimant appeared in person and was represented by the Local Chairman of the Organization.

The Organization challenges the Carrier's determination (1) as having been reached without a fair and impartial trial, (2) as lacking in any substantial or corroborative evidence, and (3) as excessive in the extreme measure of discipline imposed.

The burden of the Organization's argument as to denial of due process is that the identical supervisory employe conducted both the investigation and trial on behalf of the Carrier and that he "functioned in the multiple capacity of complaining witness, prosecuting attorney and trial judge" (citing Opinion in Award 4317, Robertson). There is nothing in this record to show that the hearing officer who conducted these proceedings on the property appeared or testified as a witness at all, much less as the "complaining witness". Thus, there is no support for the assertion that he acted in a "tripartite" capacity

in these proceedings (cf, Award 4317, supra). And while it may well be regretted that in trials of this kind on the property the presiding officer is also an employe of the Carrier, it remains, as has so frequently been recognized in the past, that there is "nothing in the rules of the controlling Agreement defining who shall prefer charges or conduct hearings" (Award 2608; see also, e.g. Awards 10355—Harwood, 11153—McMahon, 10571—La Belle, 9322—Johnson). Moreover, in the transcripts of the record of both the investigation and trial in this matter there is no indication that any objection was raised as to the propriety or right of the given presiding officer to conduct these proceedings below.

We come then to the more critical issue in this dispute: the substantiality of the evidence. The Carrier's case rests largely, if not entirely, on the testimony of the one witness it produced, its Acting General Foreman. It will be seen, however, that in some essential details this testimony is corroborated, perhaps unwittingly, by that of the Claimant himself.

In summary, this testimony is that on the day of the occurrence, April 9th, the Claimant had been assigned to work on the mail during the first portion of his shift from 8:00 A. M. to about 11:00 A. M. that Sunday. He was then not only seemingly in fit condition, but, as was readily conceded, did "a hell of a good job until 11:00 A. M." Thereafter, according to his General Foreman, the Claimant was not seen again until about 12:55 P. M. that day when he was observed staggering down a track to one of the platforms where the General Foreman was standing. In the interim, the latter had wanted to assign the Claimant to "work parcels", but after his lunch period and between 12 noon and 12:55 P. M. the Claimant was nowhere to be found on the premises. When the Claimant finally appeared in a markedly unsteady condition the General Foreman testified that "his breath smelled strongly of liquor" and also that Claimant declared, "I want to check out". His further testimony is that if the Claimant had not volunteered to check out he would not have been allowed to continue to work anyway because he was obviously in no fit condition to do so.

It developed that the Claimant did not punch out that day, but rather was signed out under instructions from the General Foreman at about 1:10 P. M. Instead, the Claimant admitted that after seeing (but not talking) to the General Foreman he had gone directly to the locker room, gotten dressed and left the premises without more. He accounts for his failure to sign out by his testimony that when he was on the way back to work after noon time he had talked to a fellow employe who informed him that he had heard the General Foreman say, "I just had to check (the Claimant) out cause he was drunk". Claimant also testified that when he got to the time clock his card was already gone so he assumed that someone in authority had punched out for him. The telling point about this aspect of the Claimant's own testimony is that, despite the admission that he had already been alerted to the fact that the General Foreman considered he was drunk, he Claimant never sought him out, or for that matter his immediate work foreman, to disabuse management of any impression that he was drunk or to advise them he was sick.

Claimant denied that he had imbibed any alcoholic beverages that day. He contended that he had become ill during work hours that morning with a severe attack of dysentery. By that time, about 11:10 A. M., he had finished his mail work. He then left the platform where he was working ultimately to go to the drug store in the railroad station upstairs. He had not received permission from the General Foreman to leave his assigned work area, an omission which he admitted was a "mistake". He said it was then very close

to his regular lunch period. But instead of lunch he said he got a bromo seltzer at the drug store. He then started back to work sometime after 12 noon at which time he encountered his immediate work foreman. But while he claimed that he was still feeling sick and in discomfort, admittedly in this encounter he said nothing about it to his foreman. Yet he acknowledged that he had earlier been told by his foreman that he was expected to "work parcels" later that day. And when asked at the trial why he never told the General Foreman about his claimed illness or the reason for his leave-taking, he said "I realized at that time I made a mistake".

Although allegedly suffering from dysentery, the Claimant said when he returned home early that day he did not call or visit a doctor for treatment. Instead he said he mixed his own home remedy of flour and water to arrest the attack. Apparently he was well enough the next morning to report ready for work.

The Organization's main attack on the substantiality of the supporting proof is that it represents the testimony of the lone witness produced by the Carrier and "no man should be found guilty of a disciplinary charge solely on the unsubstantiated evidence of a sole witness" (quoting from Findings in Award No. 39, Special Board of Adjustment No. 374, E. A. Lynch, Chairman). Whether or not the language cited, especially in its scanty reported context, represents the weight of opinion of this Board, its prime postulate is that the testimony in question must be "unsubstantiated". In the case at hand, however, the testimony of the Carrier's lone witness is not unsubstantiated. On the contrary, we have seen that in some very significant aspects it is confirmed by the testimony of the Claimant himself. When, therefore, this record is viewed in its entirety, as it must be, it cannot be said that the trier of the facts had no substantial evidence before him upon which to credit the testimony of the Carrier's witness and discredit the denial of the Claimant. As was recently said by this Board in Award 13179 (Dorsey):

> "We do not weigh the evidence de novo. If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

See also, Awards 6108 (Messmore), 9449 (Johnson), 10571 (La Belle), 10595 (Hall), 11803 (Dolnick).

But carrying its argument further the Organization protests that the finding that the Claimant was not ill but rather under the influence of liquor, not only was based on the testimony of a sole witness, but, what is more, someone who "is not medically qualified to make such a diagnosis". It has been repeatedly held by this Board that laymen are competent to testify as to the usual indicia of intoxication, such as strong odor of alcohol on the breath, unsteadiness of balance, etc. (See e.g., Awards 10049—Dugan, 6012—Messmore, 10365—Harwood, 10595—Hall, 10928—Dolnick).

The Organization's last point is that the discipline was "unduly severe". It contends that the Carrier was improperly and erroneously influenced by two prior suspensions of the Claimant on like charges and, in effect, Claimant was thus placed "in triple jeopardy". The fact is that Claimant's prior personnel record shows four disciplinary suspensions, two of which were for possession of alcoholic beverages, and two for being absent without leave. And in one of the alcohol violations, Claimant had originally been dismissed for "possession of partially filled bottle of whisky in locker room", but this dismissal was converted into a 2 month suspension.

There is nothing in this record to show that Claimant's previous record in any way influenced the Carrier's separate determination of his guilt of the instant charges. And it is well settled by this Board that in determining the quantum of discipline, as here, a Carrier is privileged to take into consideration an employe's prior service record (e.g. Awards 10739, Levinson, 12492, Ives, 13063, Engelstein, 11796, Seff, 12126, Dolnick, 12301, Rock, 12738, 12985, Coburn).

FINDINGS: The Third Division of the Adjustment Board, upon the whole records 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1965.