Award No. 14212
Docket No. CLX-15560

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood (GLX-149) that:

(a) The Agreement Governing Hours of Service and Working Conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949 was violated at the Boston, Massachusetts Agency in the treatment accorded Employe John M. Cass in suspending him from service following an investigation held January 3, 1964;

(b) He shall now be compensated in conformity with the Wage and Working Agreements for salary and earnings loss sustained covering the period December 28, 1963 to and including January 11, 1964; and

(c) Carrier should be required to make a joint check of the payroll records — in the seniority district where Claimant was employed — for the purpose of ascertaining the amount of reparation due.

OPINION OF BOARD: This is a discipline case.

The Claimant John M. Cass, with a seniority date of May 29, 1941, is the regular occupant of the position "Car Sorter and Loader," Group 73, Position 348, his hours of assignment being 3:15 P. M. to 11:45 P. M. His work week assignment is Friday through Tuesday, with Wednesday and Thursday as rest days.

On December 30, 1963, Claimant Cass was charged with a violation of Rule 831, which reads as follows:

"RULE 831.

Drinking intoxicating liquor, gambling or the use of profane or vulgar language while on duty or excessive use of intoxicating liquor

or disreputable conduct while off duty will be sufficient cause for investigation and dismissal. Any employe arrested for any cause is required to immediately advise his Agent or Superintendent. Any employe known to have a criminal record must not be retained in the service."

The specific charge was that on December 28, 1963, Claimant Cass was drinking intoxicating liquor while on duty. He was also advised that he may be represented at the investigation.

Pursuant to the said notice of violation of Rule 831 and in accordance with and pursuant the Agreement between the parties an investigation was held on January 3, 1964. After the investigation, and on the 9th day of January, 1964, a decision was rendered finding Claimant Cass guilty as charged and he was suspended from December 28, 1963 through January 10, 1964.

On January 17, 1964, an appeal was taken from the decision rendered, the appeal being addressed to Mr. O. R. Ethier, the General Agent of the Carrier. On January 31, 1964, Mr. Ethier, the General Agent, sustained the decision of Supervisor Bradley. An appeal was then taken from Mr. Ethier affirmance of the original decision to Mr. R. J. Corgel, the Superintendent of the Carrier. On February 7, 1964, Mr. Corgel confirmed the previous decisions. On February 17, 1964, a further appeal was made to Mr. E. M. Benson, the General Manager of the Carrier, who on April 2, 1964, sustained the decision heretofore made in this matter.

On April 6, 1964, a request was made on behalf of the Claimant to Mr. Benson that a "Joint Statement of Facts" be entered into or whether or not Mr. Benson desired that the Claimant proceed ex parte in the case. By letter dated April 21, 1964, Mr. Benson declined to enter into a joint statement of facts.

Claimant contends that the Carrier violated the agreement between the parties of September 1, 1949, in the treatment accorded him when after the hearing of January 3, 1964, he was suspended and further requests that he be compensated in conformity with the Wage and Working Agreements for salary and earnings lost for the period December 28, 1963 to and including January 11, 1964.

Carrier's position is two fold. It contends:

1. The claim should be dismissed, for consideration on the merits is barred by reason of the Petitioner's unreasonable delay in progresssing it to the Board;

2. If the claim is to be considered on its merits, it should be denied as there is substantial evidence in the record to support the find that the claimant was guilty.

With reference to position No. 1 of the Carrier, in support of that position it contends that one of the "General Purposes" of the Railway Labor Act and more particularly subdivision 5 of Section 2 states as follows:

"(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or

application of agreements covering rates of pay, rules or working conditions." (Emphasis ours.)

There is nothing in the statute that sets forth any time limit within which proceedings must be brought. It therefore must be assumed that what the statute meant was within a reasonable time. What constitutes a reasonable time in a large measure depends on the circumstances of each particular case. In this case there is a lapse of 13 months between the date when the decision was upheld and the date when the Organization's notice of intention to file ex parte submission was received by the Board. The Carrier further contends that the failure of the Organization to submit a rebuttal argument in this case, in which it could have denied the allegation of unreasonable delay in presenting this claim, must be accepted as true by this Board. In support of this contention the Carrier cites Award 14032 (Hamilton) wherein we said:

> "The Organization is contending that, 'work involving a position,' was transferred from one seniority district to another without conference and agreement. The Carrier defends against this charge by asserting that the employes in the second seniority district are, 'unloading non-messenger classification traffic.' This allegation is not denied by the Organization in their initial submission and they failed to submit a rebuttal argument in this case. Therefore, we are forced to accept as true, those unchallenged allegations contained in Carrier's submission."

Technically the Carrier is correct in its assertion but in view of the state of the record and the failure of the Organization to submit a rebuttal argument, we are in no position to determine as to whether or not in this particular case 13 months was an unreasonable time. We do feel, however, that this case should not be decided on mere technicalities but in justice to all concerned should be decided on the merits.

A full and complete transcript of the hearing is set forth in the record pages 16 to 26 (Organization's Submission).

An examination of the transcript discloses that the Claimant admitted that he purchased the bottle of whiskey on his way to work (Page 3); that he had taken two drinks from the bottle (Page 4); he also testified that when he exhibited the whiskey bottle to Atwood it was half full (Page 4); Atwood in his testimony stated that when Cass exhibited the bottle of whiskey to him it had very little in it, about 1 drink left (Page 8); Decareau testified that about 10:20 P. M., Cass, in the presence of Atwood, admitted that he had a few drinks and that he had a bottle on him and that Decareau informed Atwood that he, Decareau; "would have Cass clocked off duty and make my report to the General Agent" (Page 5).

On Page 9 of the transcript, we find the following testimony:

"T. Casey: Mr. Cass, you went to work at 3:15. What was the condition of the weather at that time?

J. M. Cass: It was quite cold.

T. Casey: Between 3:15 and suppertime, did you have any liquor out of that bottle?

J. M. Cass: No, sir.

T. Casey: On your supper period, did you have anything out of the bottle?

J. M. Cass: Yes, sir.

T. Casey: You were off the clock at that time.

J. M. Cass: Yes.

T. Casey: Between the time you returned from your supper hour until the time you spoke with Mr. Atwood, you didn't have any more liquor, did you?

J. M. Cass: No sir.

T. Casey: In other words, the only drink you had was the drink you took out of the bottle at suppertime, when you were not on duty.

J. M. Cass: That's right."

It is significant to note that at no time during the time Cass was questioned by Bradley or when Decareau was testifying as to admissions, made by Cass was there any statement that drinks were taken from the bottle during suppertime. The statement that drinks were taken from the bottle at suppertime appears for the first time when Cass is questioned by Casey and only in answer to leading questions.

There is no claim here that the actions of the Carrier were not fair; that they were arbitrary nor unreasonable.

We have in numerous awards set forth the function of this Board in a discipline case. In Award 5032, we said:

> "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."

A study of the entire record convinces us that there was competent persuasive evidence which reasonably supports the finding of Claimant's guilt and that it was ample to support the Carrier's findings, to that effect. The suspension of the Claimant was neither arbitrary nor unreasonable.

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 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.

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