NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22224
THIRD DIVISION Docket Number CL-22237

Nathan Lipson, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood GL-8431, that:

"(1) Carrier violated the Agreement between the parties when on the date of July 3, 1976, Mr. R. L. Potts was unjustly dismissed from service of the Company, and

(2) Carrier shall, by reason of the aforementioned, be required to reinstate Mr. R. L. Potts to his former position and compensate him for all wages lost, commencing July 3, 1976 and continuing until reinstated."

OPINION OF BOARD: On July 3, 1976 Claimant R. L. Potts was dismissed from the service of the Carrier. On June 19, 1976, the last day that Mr. Potts reported for work, he held the position of Chief Clerk; the Claimant had a good work record for over seven years prior to said date. The circumstances surrounding Mr. Potts' discharge will be considered below; at this point it seems appropriate to determine the effect of a "leniency" request that was made on the Claimant's behalf.

X-1

During the time that the instant claim was being processed between the Organization and the Carrier, a letter dated November 8, 1976 was directed from General Chairman Reynolds to B. C. Massie, Director Labor Relations, which read as follows:

> "Please refer to my letter of September 20, 1976 covering claim on behalf of Mr. R. L. Potts, Chicago, Illinois, your case #2-CG-11472.
>
> This is to advise that our Committee is agreeable with restoring Mr. Potts to Carrier's service on a

"leniency basis with all rights unimpaired but without pay for time lost. This offer is made without prejudice to our Committee's position regarding application of Rule 47 of our Agreement, and I will appreciate your advice regarding this matter.

"Please advise."

It has been held by numerous Boards on the various Divisions of the National Railroad Adjustment Board that a request for leniency effectively bars a claim on the merits. A frequent justification for that position is that to allow the processing of a claim as well as a request for leniency gives a claimant "two bites at the apple," and that leniency is a carrier prerogative and requests involving same are not within the discretion of a Board.

It appears to this Board that in addition, a request for leniency may be deemed to have two aspects: An admission of guilt of the offense, and a waiver of an adjudication on the merits. In other words, one who throws himself "on the mercy of the court" is acting inconsistently with any theory of innocence, and inconsistently with the right to trial.

But in the instant case, the leniency request is coupled with an express statement that the "offer is made without prejudice" to the Committee's position regarding Rule 47 of the Agreement. Rule 47 is the contractual provision regarding the processing of grievances involving discipline. It thus becomes clear that the "leniency" request was made with an express repudiation of any waiver aspect, and cannot bar this Board's processing of the matter on the merits. The inference that the letter and offer have implications of guilt, however, remains, and the significance of same will be considered below.

Turning to the facts and circumstances which existed on June 19, 1976, as established by the record, the following emerges. Mr. Potts was suffering from a lumbo-sacral sprain, and was under medical care for said condition. The Claimant stated that he was suffering extreme back pain at the start of the second trick, and was taking medication for his condition, although he did not establish by independent evidence that medication was either prescribed by his physician or that he was using same. Mr. Potts testified that he

arrived at work on time, but that at 4:10 p.m., because the medication was having effects on him, advised Clerk Mark Rasmussen to take over as Chief Clerk, or to arrange that someone be called in to take over the position, and that he thereupon left the job. The above version of the situation at the start of the trick is uncontradicted.

There was substantial disagreement between the employes and management as to the propriety of the above-described call-in procedure. The Carrier insisted that a management official must be notified in such cases, and must approve call-ins, while the Claimant and another witness insisted that the employes handle illness-caused vacancies in the above-described manner all the time. It is, in any event, clear, that no management official was present when Mr. Potts arrived at work and left the job just at the beginning of the trick.

Some time after the start of the shift, management officials became disturbed when they discovered that duties should have been performed by Mr. Potts were undone, and tried to determine the Claimant's whereabouts. The search for the Claimant ended at an automobile belonging to the Claimant's cousin, which was parked in the Carrier's parking lot. There, at approximately 6:45 p.m., the Claimant was seen stretched out in the back seat of the car. Two Carrier officials opened the automobile door and found an empty pint Beefeaters Gin bottle, together with a quart grapefruit juice bottle. The two containers were removed, and Polaroid pictures were taken of the Claimant while he was asleep.

The two management officials testified that the automobile and the Claimant reeked of alcohol. They further testified that when Mr. Potts was awakened his speech was slurred, distorted and incoherent, and that he swayed as he walked. Mr. Potts was taken to the Trainmaster's Office, where he was observed by two more management officials, both of whom testified that he smelled of alcohol and appeared to be under the influence of alcohol. The Claimant categorically denied that he had been drinking or was intoxicated when found.

The Union has strongly objected to the search of the automobile involved, to the taking of pictures of the Claimant without his consent, and to the seizure of the bottles described above, on the basis that constitutional and other basic rights were thereby violated. A similar argument was addressed in Award No. 5104, Docket

Number PM-4929, by a Third Division Board, with Jay S. Parker as Referee. The Board in the above case observed that "the guarantee of due process found in the 5th Amendment, and in the 14th Amendment to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen against another (citations provided)."

The Referee on this Board has faced similar problems in McLouth Steel Corp., 76-1 ARB ¶8093 and Dow Chemical Co., 65 LA 1295. It was there held constitutional guarantees do not prohibit searches in the work place, but neither can management be arbitrary, capricious or discriminatory in violating employes' rights to privacy. In the instant case, management was embarked on a search for the Claimant, believing that he had left the job under questionable or improper circumstances. The Claimant was, at the time, on Carrier property, so that the opening of the automobile cannot be deemed objectionable. Once the car was opened, the evidence therein unavoidably came to management's attention -- this would perforce include the Claimant's odor and appearance. Under such circumstances the instant gathering of evidence by management must be deemed acceptable.

But does all of the above support the Carrier's position that the Claimant was subject to discharge? The Carrier acted on the basis that the evidence supported a violation of Rule G of the Operating Rules, which reads as follows:

> "The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty or company property is prohibited."

The Board must certainly conclude that the Claimant was proved guilty of using intoxicants on company property. His appearance and the surrounding evidence some two hours and 45 minutes after the start of his trick compel the conclusion that after he left the job he proceeded to his cousin's automobile, and there proceeded to consume a substantial amount of gin. The Board believes that this is the reason that the "leniency request" was made, and that a reason for said position was the Claimant's knowledge that he was guilty of a Rule G violation, at least in terms of drinking on company property.

But the Carrier has failed to establish that the Claimant did not arrive at work on time, or that he arrived on the job in an intoxicated state. The Carrier certainly did not prove that the reason Mr. Potts reported off the job was that he was unable to perform same because he was under the influence of liquor. Accordingly, the more serious Rule G violations have not been proved by the Carrier, and the Claimant's version of the reasons for leaving the job early and that he arrived at work on time must be accepted.

In short, the conclusion reached by the Board from the record is that the Claimant arrived at work, and then decided that he was unable to perform his duties. He then arranged to leave the job in a manner he believed was normal and acceptable. Once leaving the job, however, the Claimant decided to begin drinking on company property.

Obviously, drinking on company property when off duty, while a Rule G violation, is not as serious as drinking on the job or arriving on the job under the influence of liquor. Rule G merely prohibits such a practice, but does not mandate discharge for same. For these reasons, the Board concludes that severe discipline is in order, but discharge is not.

Accordingly, it is determined that the penalty in this case was excessive, and that the Claimant's discharge should be reduced to a disciplinary suspension equivalent to time lost from discharge to the receipt of this Award. The Claimant shall be entitled to reinstatement with seniority unimpaired, but with no compensation for time lost. X-7

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

The Agreement was violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1978.