NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24224
Docket Number CL-23760

THIRD DIVISION

Robert E. Peterson, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9283) that:

Carrier violated the Agreement at Atlanta, Georgia, when on April 24, 1979, it dismissed Mr. W. A. Smith, III, from the service for alleged conduct unbecoming an employee, in that he purportedly reported for duty on Thursday, April 5, 1979, in an intoxicated condition and was unable to perform his assigned duties.

For this violation, the Carrier shall be required to restore Mr. W. A. Smith, III, to service with all rights unimpaired, and fully compensate him for all time lost, commencing April 24, 1979, and continuing on a Monday through Friday daily basis until such restoration has been accomplished.

OPINION OF BOARD: Claimant was dismissed from Carrier's service on a charge of reporting for duty in an intoxicated condition and being unable to perform his assigned duties. Carrier based its conclusion upon results of a blood alcohol test and observations of witnesses to Claimant's physical condition and behavior.

Contrary to Carrier's determination, the Brotherhood submits Claimant was not intoxicated. It maintains Claimant's unusual and unsteady behavior on the date in question was "post traumatic syndrome", a condition resulting from a mild cerebral concussion which it submitted Claimant had sustained from an off-duty accident several days earlier. In this regard, according to Claimant, a truck in which he was a passenger had turned over two and one-half times. The Brotherhood also challenges the credibility of the alcoholic blood content as reported to the Carrier, contending, in particular, that the laboratory test results are not supported by the personal observations, statements or reports of a company nurse or two company-selected doctors who had examined Claimant. The Brotherhood also urges that the claim be sustained account Claimant not being afforded his fundamental rights to due process. It maintains Claimant was not apprised of the specific nature of the charges against him; he was denied a fair and impartial hearing in that the same Carrier officer who had been Claimant's accuser appeared at the investigation in the capacity of a Carrier witness and then was utilized in the dual capacity of assisting the hearing officer; the Carrier's decision was not supported by a preponderance of evidence presented in the hearing; Claimant was not found guilty of the charge beyond a reasonable doubt; Claimant never received any decision from "the designated Carrier official" who conducted the hearing; and, that it was improper for Carrier to have permitted a witness to introduce a resume of Claimant's attendance record

into the hearing record in an effort to place Claimant "in the worst possible position".

As concerns the Brotherhood's procedural objections, we do not find that Carrier had been negligent in not notifying Claimant of the precise charge or reasons for his dismissal from service. He had been advised by letter dated April 24, 1979 that it was "for conduct unbecoming an employee in that you reported for duty on Thursday, April 5, 1979, in an intoxicated condition and were unable to perform your assigned duties". This letter also related, as had apparently been explained to Claimant by telephone, "the blood test administered by Howell Clinic on April 5, 1979, with your written consent, disclosed that you were under the influence of alcohol". We fail to see where this notice was other than clear and precise.

In regard to the dual roles assumed by the Carrier officer, while we do not find it to be a fatal defect for one individual to be assigned several roles in the disciplinary process, a carrier does so at its peril, forcing the issue to be considered on the basis of facts as found to exist in each individual case. In the instant case, while we believe the Carrier was flirting with reversible error, a careful and objective review of the transcript fails to show that by such action Carrier had here denied Claimant of a fair and impartial hearing. It is also to be noted that at the time the hearing officer announced the fact the Carrier official was going to serve in a dual capacity that there was no objection from Claimant or any one of three representatives he had representing and assisting him at the hearing. The objection only came after a number of witnesses had testified. In effect, it would appear the objection was not timely voiced.

It must be borne in mind that the conduct of a hearing in a disciplinary proceeding does not require an adherence to all the attributes of a trial of a criminal proceedings in the courts. A company hearing is more in the nature of an administrative proceeding than a formal action at law. It is not governed by technical rules pertaining to the admission or consideration of evidence or testimony as with criminal trials or civil court actions. Carriers likewise are not bound to "prove beyond a reasonable doubt" as in criminal cases the guilt of the employee being tried. In other words, discipline cases are not like criminal cases. Although the Carrier must show that it acted upon evidence that warranted application of discipline, and that it had not acted unreasonably or arbitrarily, evidence is considered sufficient if, considering all the relevant facts and testimony presented at the hearing, the conclusion may be reached that the charge or complaint is true. (See Award Nos. 13140, 13606, and 20071 of the First Division, amongst others.)

In regard to the Brotherhood's further protests about the conduct of the trial, the duties performed by the Carrier officers, including the fact the designated hearing officer did not render a decision relative to the disciplinary hearing, the Carrier has shown by the introduction of past correspondence that it has been an accepted practice for the conducting officer to write the officer who had rendered the initial discipline as to his findings so that the latter could in turn then write the concerned Local Chairman either affirming or modifying the discipline assessed. Accordingly, we find nothing unusual in the handling of discipline assessed in this case as being contrary to the accepted practice on the property, nor do we find that all concerned had not been permitted

to fully and objectively present evidence or to examine and cross-examine each of the witnesses.

Finally, as concerns the introduction of Claimant's past record, while it may have been prematurely introduced at the beginning of the hearing, that fact alone is not cause for reversible error, since it is recognized that a carrier may use an employe's personal record in an investigative and give it consideration in arriving at the measure of discipline. Thus, while it is preferable such records be introduced at the end of the examination of the accused employe so that it may be given its proper consideration, and refuted to the extent necessary, as in the instant case, the mere fact the hearing officer permitted it to be done at the outset of the hearing in this instance may not be said to have denied Claimant of a fair and impartial hearing.

Turning now to consideration of the merits of the dispute, after reporting for work at about 8:20 A.M. on April 5, 1979, Claimant was observed by a Carrier Chief Clerk to have had problems holding onto the handrail coming down several steps leading to the office area, the Chief Clerk stating that Claimant was weaving and wobbling and having trouble negotiating steps and getting to his desk. Another Carrier witness reports that after Claimant had been at his desk for but a few minutes that he fell to the floor when he attempted to stand up. This same witness, who rushed to Claimant's side together with several other employes, when asked if he detected an odor of alcohol on Claimant at that time, states: "I thought I did at first, but that was the only time I was close enough to tell." This witness had thereafter helped Claimant to his feet and to the company's first aid room and then to the two examinating physicians.

According to the company nurse at the first aid station, "Bill (Claimant) was apparently in a stupor when I came into work." She also states that she had been instructed to send Claimant to Howell Clinic for a blood test for alcohol. However, as concerns her own personal observations, she states Claimant's breath "was very bad but to me was more acedotic than alcoholic." Insofar as the nurse's written and initial report of injury is concerned, it was prepared the date after the incident, the nurse indicating on the form: "I did not fill this out 4-5-79 as Bill became very agitated when having to think and answer questions. During the morning he told me he had been in an automobile accident Sunday afternoon and he had (11) stitches in his head where he had been injured. Much of this information was gleaned from others and Bill during the day." The nurse also noted in her written report that Claimant was "carried" to Howell Clinic by a supervisor in his department. Asked at the hearing by one of Claimant's representatives if, in her medical opinion, she felt Claimant was intoxicated, the nurse replied: "That's so hard to say. A lot of the symptoms that he had, they could also have when they are very inebriated. Personally, I don't feel that he was -- if he had had anything to drink, he definitely wasn't that drunk."

A written report furnished the Carrier by Howell Clinic reveals Claimant was previously treated at Northside Hospital; a laceration to his head had been sutured; he takes Hydrodiuril for hypertension; the examining physican advised Claimant be re-examined and have some x-rays taken relating to his reported injuries; the examining physician "detected no odor of ethynolic by-products" on Claimant's breath while examining him; and, while the examining physician suggested Claimant return to work, when it was later reported to him that

Claimant was still very dizzy, he then made arrangements for Claimant to be evaluated or examined that afternoon by a neurosurgeon. The Clinic's report also states that as requested by the Carrier blood was drawn with the standard precautions for a blood alcohol test and that when the Clinic later received the test results it revealed a blood alcohol of 260 mg. percent (indicating, according to an attached laboratory report, severe alcohol poisoning). The report from the Clinic was dated April 13, 1979 and was addressed to Carrier's Chief Surgeon in Washington, D. C. Carrier's local officials in Atlanta, Georgia maintain they were not apprised of the report or the results of the blood alcohol test until April 18, 1979.

The report of the neurosurgeon, dated April 9, 1979, was introduced into the transcript of hearing by Claimant's representatives. This, notwithstanding the report was addressed, "To Whom It May Concern," and showed copy to the attention of a local Carrier official. This report reads: "Mr. William A. Smith is a patient in my care who suffered a mild cerebral concussion and a post traumatic syndrome. He was in my office today and felt considerably better. It is now possible for him to return to work." Also introduced by Claimant's representatives was a memorandum, dated May 9, 1979, from this same neurosurgeon, describing the sumptoms of "post traumatic syndrome," the doctor stating, in pertinent part:

> "With a post traumatic syndrome, a patient may experience forgetfulness, vertigo, a tendency to 'black out', an inability to concentrate, some loss of memory for recent events as well as familiar faces, restlessness, an inability to sleep and headaches, which are usually diffuse rather than localized. A patient with this problem may also note some difficulty in reading, writing and comprehension of both written and verbal memoranda."

As concerns Claimant's explanation of the accident and the extent of injuries and treatment he had received at Northside Hospital, the Board notes he submits that on Sunday afternoon, April 1, 1979, he was in a truck that was "crawling along" a dirt pathway at two miles per hour toward an old fishing place down on the Chattahoochee River when the shoulder of the pathway gave way and the truck started turning over. He states no extensive damage was done to the vehicle and no accident report was filed with the local police as the accident had not taken place on a public street. Although Claimant submits he sustained a head laceration which eventually required 11 sutures, he did not seek medical attention until the following day, Monday, April 2, 1979. In this regard, an "Industrial Release Form" issued by the hospital and which was introduced into the record by Claimant's representatives, shows Claimant had been treated in its emergency room at 1:00 P.M. on Monday, April 2, 1979 for a scalp contusion and laceration. At the time, the treating physician advised Claimant return home for rest and, according to the form, said Claimant "may return to work tomorrow (Tuesday, April 3, 1979)." As part of the hospital's general instructions, Claimant was also advised to see another doctor for follow up care on April 10, 1979.

According to the record as presented, Claimant was scheduled to work on Monday, April 2, 1979, and although released by the emergency room's treating physician to report for work on Tuesday, April 3, 1979, Claimant did not report for work until April 5, 1979, the date involved in the incident in dispute.

The record does show however, that Claimant did call a Carrier supervisor on two separate occasions at about 5:00 P.M. on Wednesday, April 4, 1979. Apparently Claimant was concerned about not having reported to work and having been warned in the past about his attendance, for the supervisor maintains that for the most part it was a one-way conversation, with Claimant doing the talking and expressing concern as to what was going to happen to him for not having reported to work. It was the supervisor's further testimony that although Claimant was upset, even to the extent of crying, that he told Claimant he did not know what was going to happen to him, nor did he advise Claimant to return to work; the Claimant having reportedly said he would be at work the following day. The supervisor said, "concern has been shown before, and this situation didn't correct itself."

During the formal investigation it was developed that Claimant had admittedly been drinking alcoholic beverages the night of April 4, 1979, and as he had "the worst headache that (he) ever had in (his) life" he took "Excedrin. Tylenol. Anything (he) could find" to relieve his headache. Asked how much he had to drink, Claimant responded that he did not know, remarking further: "Have you never been injured to the point to where -- this letter in here (from the neurosurgeon) states that you can have loss of memory ... I don't know what I did the night before."

The record also reveals testimony of a fellow clerk who states she had walked from the parking lot to the office building with Claimant on the date in question and, in her opinion, he walked, talked, negotiated crossings, curbs, etc., in a normal manner and did not display signs of a person who was drunk or inebriated. She did not accompany Claimant to his work area in the building. There is also testimony of a Carrier officer who had initially requested the blood alcohol test be administered to Claimant, attesting to his having contacted the Clinic upon receiving the test results and being assured the test results had been double checked because of the high alcoholic content reading.

While it is unquestioned there are conflicts and inconsistencies in the record, the Board is not persuaded Claimant's actions were totally related to his head injury, nor are we moved by his convenient loss of memory as to how many drinks he had consumed the night before he reported for duty, especially in the light of the detail with which he was able to recall numerous other incidents or activities following the purported truck accident. It is also recognized, in this regard, that following emergency treatment he had received on April 2, 1979, the treating physician had approved Claimant for work on April 3, 1979, and that when examined at the Clinic on April 5, 1979, he was again approved for work. In our view, there is sufficient probative evidence to support a finding that Claimant was intoxicated, or at least in an intoxicated condition that may well have been the result of Claimant having taken medication for hypertension, various acetaminophen tablets, i.e., Excedrin, Tylenol, etc., together with alcoholic beverages. This, notwithstanding the fact it cannot be denied, even if one were to allow for a possible inaccuracy in the blood alcohol test results, that the test did at least indicate Claimant was intoxicated, let alone suffering alcohol poisoning. It should be borne in mind that whereas the word <u>intoxicated</u> may be not exactly synonomous with <u>drunk</u>, it is often applied more or less euphemistically to one who is but slightly <u>under</u> the influence of liquor and that drunkenness pertains to or proceeds from intoxication. Thus, one may separate the terms drunk, inebriated, drunkard, and drunken from the term intoxicated. In this particular instance

we believe the record supports a conclusion that Claimant was at least in an intoxicated condition on the morning of April 5, 1979, as opposed to the weight Claimant would place in the neurosurgeon's report of April 9, 1979 relating to a post traumatic syndrome.

As to the discipline imposed, we believe dismissal from service is too severe a penalty, particularly as it is recognized that certain of Claimant's problems may well have been related to conditions which lend themselves to correction. We believe the time Claimant will have served up to the date of this Award will be sufficient penalty. Therefore, it will be this Board's finding that Claimant be reinstated to service, without back pay, but with seniority and all other rights unimpaired, and with an admonishment to seek counselling, if indeed he is an alcoholic, as being necessary and critical to any continuing employment relationship.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.