Award No. 4356

Docket No. 4239

2-PRR-MA-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Machinist W. F. Coleman was unjustly dealt with when he was deprived of his service rights and removed from Service February 15, 1961.

2. That, accordingly, the Carrier be ordered to restore this employe to service with seniority rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: William F. Coleman, hereinafter referred to as the claimant last entered service as a machinist on the Columbus Division on November 2, 1926, and was employed as a machinist on February 15, 1961, by the Pennsylvania Railroad Company, hereinbefore referred to as the carrier, at the carrier's Nelson Road Fueling Station, which is a part of the Buckeye Region, with a tour of duty from 3:00 P. M. to 11:00 P. M., with Thursday and Friday rest days.

At approximately 10:00 P. M., on February 15, 1961, Enginehouse Foreman R. J. Birch verbally notified claimant that he was being taken out of service and sent home pending trial and decision.

On February 16, 1961, carrier's Foreman Birch confirmed his statement of the previous evening in a letter addressed to the claimant, notifying him to appear for trial at St. Clair Enginehouse at 10:00 A. M., Friday, February 24, 1961.

Trial was held on February 24, 1961, at which time claimant was present and was accompanied by Local Chairman Charles L. Phillips and Committeeman W. H. Coleman. No relation.

Form G-32 Notice of Discipline, #2672, dated March 16, 1961 was delivered to Claimant Coleman at his home address 347 Southampton Avenue, Columbus, Ohio, for his signature to certify that he had been notified of discipline imposed in connection with the offense contained in G-32, #2672.

Claimant did not sign the G-32 when it was delivered by Clyde F. Cochran, assistant enginehouse foreman and O. D. Spencer, machinist.

The copy of G-32 Notice of Discipline furnished the claimant on March 16, 1961, by Mr. Cochran, did not state any discipline whatsoever in the notice.

Due to being held out of service claimant requested an appeal hearing with the superintendent of personnel. Appeal hearing was held on April 13, 1961, with J. V. O'Hara, Superintendent of Personnel, Buckeye Region, with the local chairman and general chairman attending the appeal hearing at which time O'Hara stated he would return claimant to service within one week, if we would agree that the time he was held out of service would be considered the discipline imposed. Claimant and his representative agreed to this orally.

In letter dated April 19, 1961, Mr. J. V. O'Hara, Superintendent, Personnel wrote Claimant denying the appeal.

Under date of May 20, 1961, claimant wrote J. V. O'Hara, superintendent of personnel, wherein he again requested that he would like to get back to work, after having a meeting with the general chairman and local chairman.

On May 24, 1961, the carrier's superintendent of Personnel J. V. O'Hara, wrote claimant again denying the appeal.

On May 26, 1961, Local Chairman Charles L. Phillips wrote Superintendent of Personnel O'Hara, requesting that he reconsider his April 19th and May 24th decisions and return Claimant to work.

Under date of August 1, 1961, the superintendent of personnel replied to Local Chairman Phillips that: "We are unwilling to make any change in the decision given Mr. Coleman in our letter of April 19, 1961, denying his appeal."

On August 4, 1961, the local chairman requested that a Joint Submission be prepared in order that the case can be progressed to the manager, labor relations.

The case was then turned over to the general chairman and he in turn docketed the case with the manager of labor relations under date of September 5, 1961, for regular meeting scheduled for October 10, 1961.

Joint submission was prepared and turned over to the general chairman for handling with the manager, labor relations, the highest officer of the carrier designated to handle grievances.

The case was discussed at regular meeting held on November 14, 1961. Manager of labor relations denied the claim in writing under date of December 13, 1961.

The agreement as to rules effective April 1, 1952, and October 15, 1960, and rates of pay effective February 1, 1951, as they have been subsequently amended, s controlling.

POSITION OF EMPLOYES: Claimant Coleman last hired with the carrier on November 2, 1926, and was employed as a machinist from that time until he was taken out of service on February 15, 1961. The last few years claimant held a regular assignment at Nelson Road Fueling Station

and was working the 3:00 P. M. to 11:00 P. M., tour of duty when taken out of service.

The employes desire to refer the Honorable Board's attention to G-32 Notice of Discipline #2672, dated March 16, 1961, and which was handed to Claimant personally by C. F. Cochran, assistant enginehouse foreman. All that is contained in that notice is the outline of offense, reading as follows:

> "Found in unfit condition to perform your duties as a Machinist at approximately 9:15 P. M., February 15, 1961, at Nelson Road Fueling Sta. Columbus, Ohio. Having intoxicant beverage in your possession while on duty, in violation of Rule #10, of the General Rules."

The employes wish to point out that there was not anything mentioned in that notice concerning any discipline. Therefore, when Cochran and Spencer delivered the notice, claimant did not sign it on account of there not being anything mentioned about discipline.

When Cochran and Spencer returned to St. Clair Enginehouse, from visiting claimant's home, they wrote the following memorandum:

> "G-32, #2672, dated March 16, 1961, was delivered to Mr. W. F. Coleman, Machinist, at 347 S. Southampton Avenue, Columbus, Ohio, on March 16, 1961, for his signature to certify that he had been notified of discipline imposed in connection with offense contained on G-32, #2672.
>
> "Mr. Coleman refused to sign G-32.
>
> "Copy of G-32 was given to Mr. Coleman, upon his refusal to sign same, in the presence of myself and O. D. Spencer, Machinist."

Therefore it can be plainly seen that there was not any mention made in the copy of G-32, notice to the effect that claimant was dismissed from the service, nor did he sign the notice to that effect. If the carrier claims it has a signed copy, then the claimant's signature is a forgery.

At the appeal hearing on April 13, 1961, it was orally suggested by Superintendent of Personnel O'Hara that if we would agree that the time claimant was held out of service that it would be considered the discipline, to which the claimant and his representatives agreed. However, on April 19, 1961, the Superintendent of Personnel replied as follows:

> "Your appeal heard at our office in Columbus, Ohio, on April 13, 1961, at which time you stated that the appeal was for leniency. The record in this case provides no basis for extending leniency. Your appeal is denied."

Thus, it can readily be seen that the carrier's superintendent of personnel had no intention of changing his previous order to keep holding claimant out of service. The only reason the employes agreed orally, was to get claimant back to work.

On May 20, 1961, the claimant again wrote Mr. O'Hara, Superintendent of Personnel, requesting that he would reconsider his previous decision, and

return claimant to work as soon as possible. Then on May 24, 1961, the Superintendent of Personnel replied to Claimant as follows:

> "We have again considered all of the circumstances in this case and we can only reiterate the decision contained in our letter of April 19, 1961 denying your appeal."

It is becoming very evident that the carrier is going to keep claimant from returning to service one way or another. In fact there has not been any reconsideration shown so far by the carrier in connection with this case.

On page 1 of the joint submission in the joint statement of agreed-upon-facts it states that: "Form G-32 Notice of Discipline was issued notifying claimant that he was disciplined by dismissal. The claimant signed the Form G-32 on March 16, 1961."

Here the employes wish to correct that statement even if it is in the joint statement of agreed upon facts. We refer the Honorable Board's attention to Form G-32 that was handed claimant on March 16, 1961, by Cochran and Spencer. You will note there is not anything mentioned regarding being disciplined by dismissal. Also you will note it is not signed. Also refer to the memo signed by Cochran and Spencer which states that claimant refused to sign G-32, however, they did furnish him with a copy, as the letter states.

The employes desire at this time to review the trial record as taken on February 24, 1961, by C. J. Cochran, assistant enginehouse foreman.

The charges that claimant is charged with have already been quoted in the G-32, Notice of Discipline.

The first witness called by the carrier was W. D. Barber, assistant road foreman of engines wherein the following questions were asked and his answers given:

> "Q. Did you observe Mr. Coleman at this time at Diesel Fueling Station, Nelson Road?
> "A. I did
> "Q. State in your own words and what you did about it.
> "A. I observed Mr. Coleman coming out of office at Nelson Road Diesel Sta. and he was staggering and I and Mr. Close followed him for a while until he went up the steps outside the building still staggering and we hollered at him to stop. We went up to him and I told him and asked him if he would come into the office. We wanted to talk to him. He said to me in an incoherent voice that he had to go over and take care of the engines. I informed him that he was in no condition to be around the engines for he may get hurt. He informed me that he was going over on the engines anyway. So I and Mr. Close went back into the office and Mr. Close called Mr. Godsey, the Asst. Enginehouse Foreman at St. Clair Ave. E.H."

Mr. Barber was asked another question and he made the following reply:

> "A. His eyes were blurry, there was a smell of liquor on his breath, incoherent speech. When we walked into the office Mr. Close and I, he was telephoning there was a sack on top of the filing cabinet in the office with a 5th of Old Taylor whiskey, approximately ⅓ gone. There was another little bottle that had pills in it, with Mr. Coleman's

name on the label and the label on the bottle in my opinion was a prescription issued from a doctor."

It is only assumption on the part of Mr. Barber as to the claimant owning the bottle of whiskey. There are many employes who use the facilities of the office and any number of people could have placed the bottle in claimant's bag.

The following questions and answers of Mr. Barber look suspicious and we believe it to be a put up job to frame the claimant and have him dismissed from the service of the carrier:

"Q. While you were present was anyone else other than Mr. Coleman involved?

"A. I had put the bottle back into the bag after Mr. Close examined same, walked out of the office then Mr. Birch, Enginehouse Foreman, arrived on the scene or at the office at Nelson Road Refueling Sta. and approximately after Mr. Birch arrived Mr. Godsey arrived with a Machinist at this time."

The employes desire to point out that when Mr. Barber was asked if anyone else was involved, he evaded the question completely and did not answer that question at all. Again it makes the employes suspicious of what the carrier is trying to do to the claimant.

Under cross examination of W. D. Barber, assistant road foreman of engines, by W. H. Coleman, committeeman, representing claimant, the following questions were asked:

"Q. Mr. Barber, can you swear that the sack and bottle of whiskey that you found in the office at Nelson Road Fueling Station beyond a doubt belongs to Machinist W. F. Coleman?

"A. As Mr. Coleman being in charge at Nelson Road Fueling Sta. and office facilities, I could not say whether the bottle belonged to Mr. Coleman or not.

"Q. Mr. Barber, is it possible that said bottle of whiskey could have been brought on Company property other than by Mr. Coleman?

"A. I never witnessed Mr. Coleman bringing said bottle on Company property."

Therefore, the testimony of this witness did not produce any evidence that the bottle of whiskey belonged to claimant nor that claimant was intoxicated or under the influence of liquor as charged.

The next witness called by the carrier was Mr. R. E. Close, assistant road foreman of engines. He and Mr. Barber went to Nelson Road Fueling Station together.

The employes desire to point out that these two supervisors of the carrier arrived together, however, their statements are entirely different and contradict one another. Mr. Barber makes this statement:

"I observed Mr. Coleman coming out of office at Nelson Road Fueling Station and he was staggering * * *."

Then when Mr. Close was called as a witness he makes the following statement:

"I walked into the little office at the fueling station and Mr. Coleman was sitting at the desk at that time."

Here are two supervisors of the carrier arriving at Nelson Road Fueling Station together and when they were questioned, made entirely different statements as to what they actually saw. The only conclusion that the employes can draw from their statements is, they went there to hang the claimant even though they had to make trumped up charges to substantiate their charges. You will noice Barber states—"Claimant was outside" and Close states "he was inside the office".

Under cross examination of Mr. Close by W. H. Coleman, Committeeman, the following questions were asked:

"Q. Mr. Close, did you see a bottle of whiskey sitting on the shelf when you arrived at Nelson Road?

"A. I saw a brown paper bag sitting on top of the filing cabinet just to the right of the desk. What was in the bag I did not look at that time, until Mr. Barber and I examined it.

"Q. Mr. Close, did you then observe the bottle of whiskey?

"A. I saw a bottle in the brown bag with the label Old Taylor with about ⅓ of it gone.

"Q. Can you state beyond a reasonable doubt that said whiskey belonged to Machinist W. F. Coleman?

"A. It is my opinion that this bottle belonged to Mr. Coleman due to the fact that in the same bag was a small bottle which was apparently medicine and had a prescription label on it for Mr. Coleman.

"Q. Mr. Close, is it possible that another individual could have put the bottle of whiskey in that sack.

"A. Most anything is possible.

"Q. Mr. Close, during the tour of duty from 3:00 P. M. to 11:00 P. M., on Feb. 15, 1961, are there any other employes of said Company have access to the facilities at Nelson Road Fueling Station Office?

"A. Yes sir."

From the testimony and cross examination of Mr. Close, there has not been anything established or proven that will substantiate the charges filed against the claimant. As stated by Mr. Close, there are numerous other employes have access to the office facilities at Nelson Road Fueling Station, other than the machinist craft employes.

When Mr. D. S. Godsey, assistant enginehouse foreman, was questioned the following questions were asked:

"Q. Mr. Cole claim ownership to the bottle?

"A. No, not to me he didn't.

"Q. Do you have any reason to believe that Mr. Coleman owned the bottle?

"A. There was a bottle that Mr. Close talked about in the sack with the bottle with his name on it."

Under cross examination of the witness by W. H. Coleman, committeeman, the following questions were asked:

"Q. Mr. Godsey, in your opinion, can you say that said bottle of whiskey belonged to Mr. Coleman.

"A. I presume the bottle of whiskey belonged to Mr. Coleman.

"Q. Is it possible that some other one other than Mr. Coleman, could have put the whiskey in the sack?

"A. That is possible, yes."

This witness is the same as the two previous witnesses in their statements, it is only an assumption on their part and there has not been anything factual that would indicate that the bottle of whiskey belonged to claimant or that he was under he influence of intoxicating beverages.

Under cross examination of Enginehouse Foreman R. J. Birch, by W. H. Coleman, committeeman, the following questions were asked:

"Q. Was W. F. Coleman given a urianalysis test?

"A. No.

"Q. Mr. Birch, can you state beyond a reasonable doubt that said bottle of whiskey belongs to Mr. W. F. Coleman?

"A. My opinion is yes.

"Q. Mr. Birch, could I, myself, Mr. W. H. Coleman, ask you for the same bottle or a drink out of said bottle?

"A. Yes, or anybody else could.

"Q. Mr. Birch, if I did ask you for the bottle or a drink out of said bottle, would that be a proven fact that the bottle belonged to me W. H. Coleman?

"A. Not a proven fact.

"Q. Mr. Birch, did this man change his clothes on his own free will and drive his own automobile home as far as you know? Approximately 9 miles across the city of Columbus without any difficulty?

"A. He did not change his clothes of his own free will. I told him he was relieved of his duties. I insisted that he leave Company property or I would call the company patrolman to take him off Company property.

"Q. Mr. Birch, did you hear rumors to effect that said medicine was nerve pills?

"A. No I was not told what the medicine was to my knowledge. After Mr. Coleman left company property one of the workmen at Nelson Road did state that he does take nerve pills.

"Q. Mr. Birch, you know it to be a fact that Mr. W. F. Coleman has a nervous condition and has been doctoring for it for some time?

"A. No I didn't know he was doctoring or that he had a nervous condition.

"Q. Mr. Birch, you know it to be a fact that Mr. Coleman injured an ankle approximately 9 months ago while working at Nelson Road. This ankle is still swollen and he has to keep a bandage on it to protect it.

"A. Yes, he turned his left ankle. Our records show he was taken to Grant Hospital and treated by Dr. Thomas, he returned to work.

"Q. Mr. Birch, in your opinion Mr. W. F. Coleman having a weak ankle, could that be a reason for him not walking steadily?

"A. I don't know.

Based on the testimony of Mr. Birch and his answers to the questions asked on cross examination, the employes are convinced that there was not any evidence produced that proves the bottle of whiskey belonged to claimant. Furthermore, from the testimony it would appear that Foreman Birch was prejudiced against claimant and he was out to get him one way or another.

Since claimant was bothered by a nervous condition and was doctoring and taking medicine, it seems logical that between the bad ankle that claimant had and taking the medicine for the nervous condition is the reason he did not walk properly, as well as the medicine affecting his speech.

The employes want to stress the point that there are only allegations made that claimant was under the influence of alcoholic beverages. There is nothing in the record that indicates that claimant was taken to a doctor to determine if he had been drinking or not. Therefore, it is only an assumption on the part of the carrier, which has not been proven in the trial proceedings.

The next person called by Mr. Cochran, the officer conducting the trial was the claimant himself. The following questions were asked by Mr. Cochran:

"Q. On the date in question, had you been drinking prior to or while on duty at Nelson Road?
"A. No.

"Q. You have heard several witnesses state that they smelled liquor, intoxicants or alcoholic beverage on your breath. How do you account for this?
"A. I think it is a very untrue statement.

"Q. You have heard witnesses state and with reason that this bottle here on this desk belonged to you. Did this bottle belong to you?
"A. I did not bring the bottle on Company property, it did not belong to me and I did not have a drink out of it.

"Q. Have you ever seen it before?
"A. No sir.

"Q. Then you definitely want it made a part of this record that you did not use any of the contents of this bottle nor you do not own it.
"A. Yes.

The answers to the questions asked by the trial officer surely do not indicate, nor do they prove the claimant is guilty of the offense for which he is charged.

When claimant was cross examined by W. H. Coleman, committeeman, the following questions were asked:

"Q. While you were working on engines you have no control over who goes in or out of the office that is provided for you. Is that correct?
"A. Yes. Road men, Yard men, Conductors, foremen, road foremen etc., go into the office.

"Q. In your opinion, could some other person, other than yourself left said whiskey in the office?
"A. Yes.

Here again there was nothing produced that would indicate that the bottle of whiskey found in the brown paper bag with claimant's medicine, belonged to him. It has been shown without a reasonable doubt that claimant is innocent of the charges filed against him and he should be restored to service immediately.

Claimant is 60 years of age and has been employed by the carrier continuously since he last entered service on November 2, 1962, making a total of 35 years of continuous service except while serving in Military Service for a period of three years during World War II. Claimant also has a clean record and has not been charged by the carrier for any improper workmanship or safety rule violations, or any other thing that would be cause for discipline.

Due to the fact the carrier acted arbitrarily in dismissing claimant from the service when he had a good clean record and was never disciplined before, the employes feel the enginehouse foreman was prejudiced toward claimant and used this excuse to get rid of him.

There has not been anything definitely proven in the trial record that would warrant this individual being dismissed from the service of the carrier. On the contrary, as pointed out previously in this submission, some of the carrier's witnesses could not keep the same story as to just what they did see or did not see.

Also, as stated previously in this submission, there was the statement made by carrier witnesses as well as the claimant himself, that there are other people who use the facilities of the office at Nelson Road Fueling Station. Therefore, anyone of a number of people could have placed the bottle of whiskey in the brown paper bag in order to frame the claimant and cause him to be dismissed from the service of the carrier.

In the current applicable agreement, of which this Board has a copy, we wish to refer to Rule 6-A-1, Paragraph (b), which reads as follows:

> "When a major offense has been committed an employ suspected by the Management to be guilty thereof may be held out of service pending trial and decision."

It is the position of the employes' that there was not any major offense committed, nor was there any justification in removing claimant from service prior to the trial. The carrier witnesses only thought they smelled liquor on claimant's breath. They did not take him to a doctor to have him examined to determine if he was drinking or not. Therefore, it is only an assumption on the part of the carrier's witnesses. Surely the statements made under cross examination did not prove the bottle of whiskey belonged to claimant, nor did he have a drink out of it, or that he was drinking.

Rule 7-A-1, Appeals, Paragraph (d), reads as follows:

> "When an employe, is held out of service on a charge and he is later exonerated, the charge shall be stricken from his record and he shall be compensated for the difference between the amount he earned while out of service or while otherwise employed and the amount he would have earned on the basis of his assigned working hours actually lost during the period."

Thus, the employe, if found not guilty by this Board, shall be compensated for all time lost on account of his being held out of service on a charge that could not be supported by facts.

This rule is clear, unambiguous and has been in the agreement without change since April 1, 1952. However, the employes feel that the carrier acted arbitrarily in this case, also from the record it appears the carrier's

supervisors were being prejudiced in their feelings toward the claimant.

Therefore, the employes having shown conclusively that the Carrier did violate the agreement, your Honorable Board is requested to sustain the claim of the employes in its entirety.

CARRIER'S STATEMENT OF FACTS: On February 15, 1961, Claimant W. F. Coleman was regularly assigned as a machinist at Nelson Road Fueling Station, Columbus, Ohio, on the carrier's Buckeye Region, with tour of duty 3:00 P. M. to 11:00 P. M.

By letter dated February 16, 1961, Enginehouse Foreman R. J. Birch advised the claimant as follows:

> "This will confirm verbal notification given you approximately 10:00 P. M., February 15, 1961, that you are being held out of service pending trial and decision account of being found in unfit condition to perform your duties as Machinist at 9:15 P. M., February 15, 1961, Nelson Road Fueling Station, Columbus, Ohio."

By notice dated February 16, 1961, claimant was instructed to attend trial at St. Clair Enginehouse on February 24, 1961, relative to the following charge:

> "Found in unfit condition to perform your duties as a Machinist, at approximately 9:15 P. M., February 15, 1961, at Nelson Road Fueling Station, Columbus, Ohio. Having intoxicant beverage in your possession while on duty, in violation of Rule #10, of the General Rules."

Rule 10 of carrier's General Rules For Employes Not Otherwise Subject To The Rules For Conducting Transportation, reads as follows:

> "10. The use of intoxicants by employes available for or while on duty is sufficient cause for dismissal."

The trial was held on February 24, 1961.

By Form G-32, Notice of Discipline, dated March 16, 1961, claimant was advised of his dismissal from service, the "Outline of Offense" reading the same as the charge quoted above.

On the same date, claimant appealed the discipline to the superintendent, personnel, Buckeye Region. The appeal was heard April 13, 1961, and by letter dated April 19, 1961, the superintendent, personnel advised the claimant as follows:

> "This refers to your letter of March 16, 1961, in which you requested a hearing to appeal discipline of dismissal for offense as shown on Form G-32, No. 2672.
>
> Your appeal was heard at our office in Columbus, Ohio, on April 13, 1961, at which time you stated that the appeal was for lenicency.
>
> The record in this case provides no basis for extending leniency.
>
> Your appeal is denied."

Under date of May 20, 1961, the claimant wrote the superintendent, personnel, as follows:

"I have had a meeting with Mr. Charles L. Phillips, Local Chairman and Mr. Dave Shriner, General Chairman in the past week.

I have decided to admit that I was warned by Mr. Birch about drinking on the job. I would like to get back to work as soon as possible and hope this letter will straighten matters out between all of us.

Thank you for your co-operation."

Under date of May 24, 1961, the superintendent, personnel, advised the claimant that, "We have again considered all of the circumstances in this case and can only reiterate the decision contained in our letter of April 19, 1961, denying your appeal."

By letter dated May 26, 1961, the local chairman, International Association of Machinists, advised the superintendent, personnel as follows:

"I have just finished talking to Mr. Coleman, on the phone and was surprised to hear that you turned down his appeal of May 20th.

Our conversation in your office you indicated a open mind on the subject, and was asking for admission from Mr. Coleman, that he had been warned by Mr. Birch, this he has done.

Let us consider he has made a mistake also he gave 35 years of good service to the Railroad Company, and at the age 60 years should receive consideration from the Company. I plea for you to reconsider this appeal and let him return to work."

Under date of August 1, 1961, the superintendent, personnel again declined to make any change in his original decision denying the appeal. Subsequently, at the request of the local chairman, a joint submission covering this matter was prepared.

At a meeting on November 14, 1961, the general chairman presented the matter to the manager, labor relations, the highest officer of the carrier designated to handle such disputes on the property. By letter of December 13, 1961, the manager, labor relations advised the general chairman that:

"The details in connection with this case are contained in the trial record and the Joint Submission, and there is no need for repeating them here.

In our discussion of this case, you asked that we give consideration to returning this man to service without any monetary payment.

We have given this case careful consideration and have concluded that there is no basis for changing the disciplinary action taken. Therefore, the appeal in this instance is denied."

POSITION OF CARRIER: The Carrier first wishes to emphasize the fact that, (1) there is no dispute between the parties that the claimant is guilty of the offense as charged and (2) that this case is presented by the employes to your Honorable Board solely on the basis of leniency.

In view of these indisputable facts, it is the carrier's position that the remission of an appropriate penalty on leniency is solely a matter of man-

agerial discretion, which your Honorable Board cannot exercise. Therefore, the carrier respectfully submits that a dismissal award is indicated in this matter. The carrier's position in this respect is fully supported by previous awards of the Third Division, excerpts from three of which are quoted as follows:

Award 6085—Referee Whiting

"There is a vast difference between the correction of an excessive penalty and reinstatement on a leniency basis. We can correct an excessive penalty because the imposition of such a penalty is a violation of those provisions of the Agreement which are adopted to protect employes from arbitrary, capricious or discriminatory discipline by the Carrier. **Reinstatement on a leniency basis is a discriminatory remission of an appropriate penalty. We do not remit penalties on a leniency basis because we have no power or right to exercise managerial discretion.**" (Emphasis ours.)

Award 8478—Referee Coburn

"The facts of record clearly support the finding that the Organization chose to treat this case on the property as one requiring reinstatement on a leniency basis and was precluded from making an appeal on the merits because of **Claimant's admission of guilt. Reinstatement on a leniency basis is solely within the managerial discretion of the Carrier.**

The claim, therefore, must be dismissed." (Emphasis ours.)

Award 8675—Referee Vokoun

"**The rule that this Board has no authority to order reinstatement on a leniency basis is well established.** It is aptly stated in Award 6085." (Emphasis ours.)

When the principles enunciated in the foregoing awards are applied to the instant case, the carrier submits that it is obvious that the employes' request for the reinstatement of the claimant is solely a matter of managerial discretion.

This fact is readily apparent from the correspondence between the parties quoted in the statement of facts above and in the Joint Statement of Agreed-Upon Facts in the Joint Submission contains the sentence "At the appeal hearing the claimant appealed for leniency." Also, in their position of the Joint Submission the employes state:

"Mr. Coleman is over 60 years of age and I am sure both parties will agree that this man will be indeed fortunate if he should be able to secure employment with another firm. This man entered the military service at the age of 41 which was rather unusual and did service for our country for three years. Therefore, this Union feels that this employe should not be classified as an alcoholic at this time but should be returned to service and be given an opportunity to redeem himself.

Therefore, we request that you consider this appeal in a humanitarian way and allow Mr. Coleman to return to service with seniority and vacation rights unimpaired."

In view of all of the foregoing, and based upon the wholly applicable findings of Awards 6058, 8478 and 8675, your Honorable Board is respectfully requested to dismiss the claim of the employes in this matter.

Without in any way waiving its position that this claim should be dismissed on the grounds that your Honorable Board has no authority to order reinstatement on a leniency basis, the carrier asserts that no basis whatsoever exists for overturning the discipline here properly assessed against the claimant.

In this regard the particular attention of your Honorable Board is directed to the position of company in the joint submission, wherein pertinent portions of the trial record are quoted and it is clearly established that after a fair and impartial trial the claimant was found guilty of the offense with which charged. In other words, carrier submits that this entire discipline proceeding was one to which the following language of Referee Burke in Second Division Award 3092 aptly applies:

> "Was the penalty of dismissal justified? We think the language contained in Award 1692 of this Division is persuasive. 'The question then remains, was the penalty imposed excessive? This and other Divisions of the Board have often said that they would not substitute their judgment for that of the Carrier unless its action in that respect can be said to be arbitrary, unreasonable, or unjust.' The claim must be denied."

The carrier asserts the record in this case shows conclusively that its action in disciplining the claimant was neither arbitrary, unreasonable, nor unjust. Therefore, no proper basis exists for overturning such action. To put it another way, the handling of this case represents compliance in every respect with the principles summarized by Referee Daugherty in Third Division Award 8431, to which the attention of your Honorable Board is directed.

Turning again to the position of employes in the joint submission, it will be noted there is nothing therein which offers the slightest support for their contention that claimant should be returned to service. In this respect, carrier will comment briefly upon certain allegations contained therein which are wholly erroneous and illogical.

For example, in the second paragraph of their Position the Employes state as follows:

> "In the transcript of the trial which was held on February 24, 1961, Mr. Coleman was represented by W. H. Coleman, committeeman and C. L. Phillips, Local Chairman, I.A.M.; however, no where in the trial record is there any evidence that trial officer Cochran offered an opportunity to Mr. Phillips to cross examine any witness or witnesses."

The carrier catagorically objects to this completely erroneous statement. Its only approach to accuracy is that the trial record reveals that Mr. Phillips did not cross examine any witnesses. He did not do so for the obvious reason, of which the employes are perfectly well aware, that he had left the trial proceedings before any witnesses were questioned. This is pointed out in the position of company in the joint submission wherein it is stated:

> "Local Chairman Phillips was present at the trial only during the preliminary preparation, he left before the actual questions and state-

ments were taken. The action of questioning witnesses in behalf of the claimant remained for Committeeman W. H. Coleman to perform and the Carrier submits that Committeeman Coleman was freely permitted to question all witnesses."

The carrier will not burden the record with further comments on this point, save to point out that the joint submission was signed for the employes by Local Chairman C. L. Phillips, and to respectfully suggest that it may give some indication of the validity of the employes' general position in this dispute.

Similarly, carrier asserts no proper basis exists for the employes' inference that claimant's rights were somehow abridged because carrier did not call certain employes as witnesses. The presence of such witnesses is the responsibility of the claimant. He was notified on February 16 to attend trial on February 24 and so had ample time to arrange for the presence of any witnesses he desired. As Referee Wenke succinctly stated in Third Division Award 6067:

"It is also contended that Carrier should have made available at the hearing all the Waiters who were in Dining Car 3614 when the incident occurred involving Claimant and Pullman Conductor R. A. Connery. If the Carrier adduces sufficient evidence to fully determine the facts, that is all that is required of it. If Claimant desires to question any witness the Carrier has not produced the burden rests upon him to call them, as the rules of the parties' Agreement provides he may."

In addition to the foregoing, in their position the employes, while in no way denying that claimant was guilty as charged, contend that the discipline imposed was too severe.

First in this regard, the particular attention of your Honorable Board is directed to the following language quoted from the Second Division Award 3151 (Referee Whiting):

"While there is a conflict in the evidence adduced at the hearing, the evidence of a company police sergeant and two supervisors supports the charge that claimant was under the influence of intoxicants while on duty. Under such circumstances, the carrier's decision that claimant was guilty of the charge may not be disturbed. **Since it appears that claimant had been warned previously about the use of intoxicants while on duty, the penalty is not excessive."** (Emphasis ours.)

The penalty in the case decided by Award 3151 was dismissal.

In the instant case, claimant had also been warned previously about drinking on duty, a fact which he denied at his trial and appeal hearing. It was only after his appeal had been denied that claimant admitted the truth, stating, "I have decided to admit that I was warned by Mr. Birch about drinking on the job."

In view of all of the foregoing, your Honorable Board is respectfully requested to dismiss or deny the claim of the employes in this matter.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

There is evidence on the record that while the Claimant was on duty, February 15, 1961, he was observed to be staggering; that his eyes were bloodshot; that he talked incoherently; and that he had the ordor of intoxicating liquor on his breath. It was the expressed opinion of the two witnesses who observed the Claimant that he was intoxicated and unfit for work. Immediately following, a paper bag containing some medicine and a partially filled bottle of whiskey was found on a filing cabinet, where the Claimant customarily performed a part of his duties. He admitted that the medicine was his, but denied all knowledge of the whiskey and that he had been drinking. However, when ordered off the job the Claimant inquired "How about the bottle?", and when told that it would be held as evidence he asked, "How about a drink before I go?"

The Carrier has a General Rule which provides that, "the use of intoxicants by employes available for or while on duty is sufficient cause for dismissal," and the Claimant has admitted in writing that he had been previously warned about drinking on the job.

Whether this case is considered from the point of view of the sufficiency of the charge or notice, the fairness of the hearing, the probative value of the evidence produced, the severity of the penalty imposed, the mitigating circumstances, or as a plea for leniency, there is no valid basis for a sustaining award of any character.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December, 1963.