

NATIONAL RAILROAD ~~ADJUSTMENT~~ BOARD

THIRD DIVISION

Award Number 21341
Docket Number MU-21233

Frederick R. **Blackwell**, Referee

(Brotherhood of **Maintenance** of Way **Employees**

PARTIES TO DISPUTE: (

(**Norfolk and Western** Railway Company (**Lake** Region)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The-discipline assessed to Carpenters J. E. **McNutt** and E. H. **Lampella** on the charge of 'use of intoxicants while on duty at approximately **11:17** AM, January 8, 1974 at Conneaut, Ohio' was arbitrarily and capriciously imposed on the basis of unproven charges and, therefore, discipline was without any justification whatever (Carrier's File MW-BVE-74-100).

(2) Carpenters J. E. **McNutt** and E. H. **Lampella** shall each be allowed pay for all monetary loss suffered by them while under suspension from January 9, 1974 through February 7, 1974 and the charge of 'use of intoxicants' etc. shall be stricken from their records, all in **conformance** with Agreement Rule 22(e).

OPINION OF BOARD: This is an appeal of the Carrier's disciplinary action regarding the alleged use of intoxicants by the Claimants while on duty. Both Claimants were charged with the "use of intoxicants while on duty at approximately **11:17** A.M., on January 8, 1974, at Conneaut, Ohio." They were removed **from service** on January 8, 1974, and a hearing was held on January 23, 1974. Following hearing, both Claimants were found guilty as charged and suspended for thirty (30) days. The Organization has appealed the discipline on the grounds: (1) that the removal from service prior to hearing was without basis and thus improper; (2) that the Claimants were not on duty at the time of the incident as stated in the charge; and (3) that the hearing evidence does not prove that the Claimants were in fact using intoxicants as alleged.

The pertinent facts reflected by the hearing record now follow. On January 8, 1974, the Claimants were working an 8:00 A.M. to 5:00 P.M. assignment, with a 12:00 P.M. to 1:00 P.M. lunch period. At about **11:10** A.M. on January 8, 1974, the Claimants' supervising **foreman** gave them permission to leave work to cash their pay checks. Later, after the Claimants had been removed from service because of the alleged drinking incident,, the **foreman** was told by **Trainmaster Hardin** that the Claimants had been removed from service at 12:00 P.M. on **January 8**; however, after checking with his direct superior, the **forman** stopped the Claimants' time on the payroll record at the **time** of the permission to Leave work for the check business, i.e., at **11:10** A.M. At about **11:30** A.M., **Trainmaster Hardin** and another Carrier official observed the Claimants in a local cafe sitting at a bar with empty shot glasses and mixed drink glasses sitting on the bar in front of them. Because the mixed drink glasses appeared to the officials to contain an alcoholic beverage,

Trainmaster Hardin confronted the individuals and accused them of using an alcoholic beverage while on duty; he, the **trainmaster**, testified that the Claimants acknowledged at this time that they had done so. He also stated that they **were** requested to take blood tests and that they refused. At the hearing the Claimants denied that they had been drinking at the time and place testified to by **Trainmaster Hardin** and the other Carrier official, and their supervising foreman indicated that he did not detect any evidence of their having used intoxicants when they returned to the work area subsequent to the incident.

The **payroll** record, which reflects that the Claimants were marked off duty at **11:10 A.M.**, supports to an extent the Organization's contention that the Claimants were not on duty at the time of the incident observed by the two Carrier officials at **11:30 A.M.** However, the testimony of the supervising foreman indicates that he made the **11:10 A.M.** entry after learning that a questionable incident had occurred subsequent to the time he authorized the Claimants to leave work, and that he made the entry primarily to disassociate himself from the incident. In fact, the record establishes that he conferred with his superior about the entry, and that, together, they agreed to make the earlier entry despite the fact that **Trainmaster Hardin** had given 12:00 P.M. as the time to mark the **Claimants** off duty. More important, the record reflects that when confronted by **Trainmaster Hardin** at the local cafe, the Claimants referred to themselves as being on their Lunch hour and they gave no indication that they considered themselves as being in an off-duty status. Thus, the significance of the **11:10 A.M.** entry is rebutted by the evidence as a whole and it cannot be concluded that the Claimants were not on duty at the time of the incident. With respect to the merit question of whether the Claimants were in fact drinking intoxicants as alleged in the charge, the record presents a **sharp** credibility issue because the testimony of the two Carrier officials is in direct conflict with the testimony of the Claimants. The circumstances which gave rise to these official's lay opinion that the Claimants had used an alcoholic beverage have long been recognized as appropriate bases for lay opinion and testimony on the fact in issue; accordingly, the Carrier had a rational basis for determining the credibility issue against the Claimants and the record affords no basis for disturbing that determination.

In view of the foregoing, and on the whole record, the record contains substantial evidence to support the Carrier's finding of guilt on the charge and the dispensation of discipline therefor.

However, the Carrier's pre-hearing removal of the Claimants from service stands on a different footing. The provision under which the removal was effected provides that an **employee** under charges may "be held out of service pending such investigation, and such holding from service shall not

be deemed a violation of the principle of fair and impartial investigation and appeal." (Rule 22). As applied by the Carrier in this case, the foregoing provision has been given **a breadth** and scope which is out of all proportion **to the** language of the rule. The rule speaks only to the point that a pre-hearing removal from service will not be weighed against the Carrier in regard to an issue raised about the fairness and impartiality of the investigation and appeal. This rule thus protects the Carrier from a finding of unfairness or partiality attributable to a pre-hearing removal, but the rule does not relieve the Carrier of the obligation **to** have a rational and reasonable basis for making the removal in the first instance. In this case the record is barren of any indication that there was any compelling reason **or** urgency to remove the Claimants from service **immediately**. The record fails to show that they were intoxicated at the conclusion of the incident; the two Carrier officials made no statements to indicate that in their opinion the Claimants would be a menace to the operation if allowed to work; and there was nothing about the nature of their work which made it imperative **to** remove them from service. Both Claimants had good prior records of over twenty years of work in the Carrier's service. In these circumstances there was no proper basis for the pre-hearing removal from service and the Carrier's action in doing so was arbitrary and violative of the Agreement. Awards Nos. 5140, 6659, and 20055. Accordingly, the claim will be sustained to the extent that the Carrier shall compensate the Claimants for the time lost by reason of their removal from service prior to the hearing.

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 violated.

A W A R D

Claim sustained as per Opinion for the time lost from service as a result of the pre-hearing removal from service, such time to cover the time from removal up to but not including the date of the hearing.

RATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATL'EST:


Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.