Award No. 1741
Docket No. 1719

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that —

(1) Yardmaster J. T. Jump, Jr., was improperly disqualified as a Yardmaster;

(2) Yardmaster J. T. Jump, Jr., be restored to his position of Yardmaster;

(3) Yardmaster J. T. Jump, Jr., be properly compensated at the appropriate Yardmaster rate for all monetary inconveniences, including rest day and vacation allowances, from the date of his suspension on November 17, 1960, forward until reinstated to the position of Yardmaster, Cincinnati, Ohio.

OPINION OF BOARD: On November 22, 1960, Claimant was disqualified from service as a yardmaster, a position he had held for seven years, for gambling while on duty with crew members under his jurisdiction.

Pursuant to the provisions of the applicable Agreement, Claimant was accorded a hearing before his disqualification. Carrier produced no evidence in support of the charges except for testimony by the Assistant Trainmaster and Assistant Car Shop Foreman that Claimant had admitted to them that he had been gambling with crew members on Company property. This testimony was not supported by a signed written confession or any evidence that anyone had observed Claimant gambling while on duty. As a matter of fact, apart from Claimant's alleged oral confession to the two aforementioned employes, which he disputes, there is not a scintilla of evidence that any gambling had been engaged in on Company property.

Under the circumstances, we do not regard the alleged confession as a sufficient basis for disciplinary action in this case. We have taken into consideration the gravity of the offense charged and the well established principle in disciplinary cases (consistently adhered to by this Referee) that this Board will not disturb Carrier's findings when supported by credible, competent, though denied, evidence. These considerations are not in issue in the present

case since before they can properly come into play, we must be satisfied that the record contains adequate evidence to substantiate Carrier's conclusions.

While it may be a matter of common knowledge on the property that gambling takes place during working hours, this Board is limited in its consideration to the record developed by the parties.

In the light of the foregoing considerations, we have no alternative but to find that Claimant's disqualification is unreasonable and arbitrary and to sustain the claim.

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

The carrier and the 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.

The parties to said dispute were given due notice of hearing thereon.

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 30th day of January, 1963.

CARRIER MEMBERS' DISSENT TO AWARD 1741, DOCKET 1719, RYA vs. PRR

The evidence in this case, contrary to the conclusion of the majority, proved beyond doubt claimant was guilty of the charges for which disciplined. The Assistant Trainmaster and Assistant Foreman Car Shop testified that from 11:30 P. M., November 16th, to 12:25 A. M., November 17th, none of the yard crews under claimant's supervision performed any work; that when questioned about the conditions existing in the yard resulting in excessive overtime claimant readily admitted that card playing had been permitted for about a week or 10 days and that between 11:00 P. M. and 12:00 Midnight, November 15, 1960, and around 5:00 A. M. on the morning of November 16th, he had played cards with other employes for money while on duty. Both were subjected to cross-examination by claimant's representatives. Their testimony was not impeached in any way. The claimant testified he talked to the Assistant Trainmaster and Assistant Foreman Car Shop about conditions in the yard but denied that he told them he had participated in any card playing while on duty; that his statement to the Assistant Trainmaster was that any card playing "which I have done [was] while not in performance of my duties or on company property." The only witness appearing at the investigation in claimant's behalf,

Yard Conductor Seyfried, refused on the advice of his representative to answer the question:

> "Did you play cards on your tour of duty which started 11:59 P. M., Nov. 16, or previous tours of duty?"

because it might "tend to be self incriminating." As stated in First Division **Award 16818**, T. v. UP, Referee Loring, "The inferences are obvious." from such refusal. This refusal in itself is substantial evidence of the truth of the charges against claimant.

In an investigation of an employe's conduct, such as the claimant's here, it is not necessary to produce eyewitnesses who "observed Claimant's gambling while on duty." First Division **Awards 12091; 18094;** Third Division **Awards 7657; 10440;** Fourth Division **Awards 896; 935.** All that is required is "evidence which would convince some reasonable men of its truth." First Division **Award 19477,** and such evidence may be "circumstantial."

The rule is succinctly stated by Referee Carey in Third Division **Award 7657,** as follows:

> "In both civil and criminal cases issues may be determined on the basis of circumstantial evidence — that is by way of inference from proven circumstances. In many instances facts can be proved only by circumstantial evidence, and in some instances even though there is direct testimony, the circumstantial evidence given may outweigh or be more convincing than direct or positive testimony. Circumstances may so contradict the positive testimony of a witness as to warrant the trier of the facts in disregarding it. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, be sufficient to constitute conclusive proof. See 20 American Jurisprudence, Sec. 1189."

Recent Third Division **Award 10440,** MW v. Wabash, Referee Rose, involved the dismissal of a crossing watchman for sleeping on duty. The record in that case showed that the track supervisor and assistant track supervisor went to claimant's place of duty, Taft Street Gate Tower, ascended the stairs and knocked on the door at 5:05 A. M.; that a blind was pulled down over the window in the door so they could not see into the tower; that they waited approximately 37 minutes and again knocked on the door and were admitted by claimant; that they asked the claimant "How long have you been asleep" and he answered "About 40 or 45 minutes"; that during the conversation an alarm clock rang at approximately 6:00 A. M. and the claimant grabbed it and shut it off. The claimant stated that the testimony of the supervisors was "not true"; denied he had been asleep; denied he told the supervisors he was; he admitted the alarm clock rang at 6:00 A. M. and stated he had set it for that time to remind him to take some cough syrup for a bad cold. In upholding the investigating officer's determination that the supervisors' testimony, in spite of the fact that they could not and did not observe the claimant asleep, was sufficient proof of the charge, Referee Rose said:

> "It is argued in support of the claim that the charge against Claimant was not established by material and probative evidence. The transcript of the first investigation shows Claimant's denial that he was asleep on duty and the testimony of two supervisors, on personal knowledge, as to the circumstances from which the conclusion was drawn that Claimant was asleep while on duty. Thus, Carrier's

finding of Claimant's misconduct rests on circumstantial evidence and the resolution of conflicting factual testimony involving questions of credibility.

"Circumstantial evidence is valid and sufficient to support a charge of wrongdoing. See Award 7657. In addition, this Division will not weigh evidence and resolve credibility conflicts in discipline cases. See Awards 8488, 7139, 4796. As a result, we cannot say on the record here that there is no support in evidence for the Carrier's findings that Claimant was asleep while on duty and did not properly perform his duties."

and denied the claim for reinstatement.

It is a firmly established principle of this Board that the degree of proof required to support a finding upon which discipline may be based is to be determined by the investigating officer. It is his duty to determine the credibility of those who testify and to weigh and evaluate their testimony. If he finds the charge has been proved by evidence, albeit circumstantial, which would convince some reasonable men of its truth, we have no right to disturb such finding. First Division Awards 12072; 13356; 14693; 14863; 15319; 16265; 18660; 19477. Second Division Awards 1809; 2688; 3266. Third Division Awards 8575; 9045; 9449; 10571; 10642. Fourth Division Awards 575; 935; 978; 1152; 1406; 1687.

What we said in Award 575, RYA v. PRR, Referee Munro, is particularly appropriate here:

"The primary duty in a grievance matter is upon the carrier. This Board in reviewing the matter does not have the benefit of being able to observe the demeanor of the principals and of the witnesses nor of the atmosphere prevailing at the hearing nor of any of the other numerous factors which influence a decision. It may be that had this Board the right to hear the instant case it would have reached a contrary conclusion but on the record before it we can only hold there was evidence upon which to base the ruling of disqualification and we cannot say the same was unreasonable."

If we, and particularly the referee, had been able to observe the demeanor and the candor — or lack of it — of the claimant, his "corroborating" witness Seyfried, the Assistant Trainmaster and the Assistant Foreman Car Shop, we could have determined their credibility and the weight to be assigned to their conflicting testimony. But all we have before us is the record and "we should not from the cold record ground a decision reversing the investigating officers of the Carrier upon the testimony of certain witnesses as opposed to others." First Division Awards 10687; 12040; 12072; 16343; 16968; 19362.

The award here is clearly erroneous and we dissent.

CARRIER MEMBERS
A. H. Deane
J. R. Wolfe
C. A. Conway

REFEREE'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 1741, DOCKET 1719

Award 1741 is not at variance with Third Division Awards 7657 and 10440 and other awards cited in the Dissent. The principle laid down in Award 1741

is that an employe's discharge should not be based solely on an alleged oral confession. We consider that holding sound and practical. Credibility was not in issue since we concluded that Carrier's evidence, even if credited, provided an inadequate foundation for discharge. There was no question of circumstantial evidence, as there was in Third Division Awards 7657 and 10440, for the alleged confession was unsupported, in our judgment, by any persuasive evidence, direct or circumstantial.

The Dissent might have been relevant if it had disputed the above mentioned principle or our view that there was insufficient evidence. As it stands, however, neither the Dissent nor the Awards cited therein have any material bearing upon Award 1741.