Award No. 6745
Docket No. CLX-6788

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated in the Northern New England Maine Division District No. 3. Messengers' Seniority District, in the treatment accorded L. B. Wise by dismissing him from service as a result of an alleged investigation conducted November 26, 1952; and

(b) He shall now be restored to service with seniority rights unimpaired and compensated for salary loss sustained, retroactive to and including November 22, 1952.

OPINION OF BOARD: This is a discipline case in which there is no dispute as to the controlling facts.

Prior to November 11, 1952, Claimant L. B. Wise was an Express Messenger in service of the Carrier, running on Bangor and Aroostook Train No. 8 and Maine Central Train No. 507, enroute to Bangor, Maine. He had been in such service for approximately 22 years and, so far as the record discloses, the offense resulting in his dismissal from service was his first infraction of Company rules or instructions during that period of time.

On November 11, 1952, while assigned as heretofore related, a deer carcass was delivered for shipment at Patten, Mass., destination Gloucester, Massachusetts, and loaded on Train No. 8 in charge of Claimant. Shortly after delivery at destination it was learned the tenderloins had been removed from the carcass. The shipper promptly complained to the Carrier and advised that action had taken place during course of shipment.

Upon receipt of the foregoing information an immediate investigation was started. When questioned by Carrier's supervisor and by one of its Special Agents Claimant promptly confessed theft of the tenderloins and admitted taking them home where they were cooked by his wife and placed

on the family table. In addition he voluntarily signed a statement wherein he fully and frankly admitted the offense and detailed the manner in which it had been accomplished.

Following receipt of the foregoing information Claimant was cited for investigation and given what, in view of the existing conditions and circumstances, we regard to be a fair and impartial hearing. As a result of such hearing he was dismissed from service. Upon confirmation by the Carrier's highest reviewing officer of the discipline assessed the case was progressed to this Board in form as set forth in the claim appearing in the forepart of the present record.

Since there can be no question regarding Claimant's guilt, in fact it is frankly conceded, the sole question involved in this case is whether the penalty imposed, i.e., dismissal from service, is to be disturbed. Under our Awards, when the guilt of a claimant is conceded, or has been fairly determined in a proper proceeding, there can be little question regarding the rule of this Division respecting when the Carrier's action in assessing discipline can be interfered with or overthrown. Long ago, with direct reference to such question, we said in Award No. 2621 (Referee Parker):

> "It is pointed out that the penalty imposed—permanent dismissal from service of the company—was severe. Quite true. However, under the rule our function is not to substitute our judgment for that of the Carrier or to decide what we might have imposed had we been present at the hearing. The severity of punishment standing alone even though it means permanent severance of relations between the employe and carrier is not enough to warrant our interference on the grounds of abuse of discretion. The record must furnish some evidence from which we can say the carrier acted arbitrarily and capriciously. * * * *"

Much later in Award No. 5032 (Referee Parker) the following statement appears:

> "Once that question (guilt) is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. * * *"

The foregoing quotations suffice to illustrate the established rule. Nevertheless it should be stated the principle is recognized and applied in numerous other Awards of the Division where divers other Referees were sitting with the Division on the date of their adoption.

We are not impressed with arguments advanced by Claimant to the effect his admitted action was more thoughtless than dishonest and frankly concede that ordinarily, although the theft itself was of little consequence from a money standpoint, the rule to which we have referred would compel us to deny this claim, even for reinstatement. However, it can be said the record discloses one extenuating circumstance which we believe the Carrier failed to give any consideration in determining the severity of the punishment it imposed. That is that Claimant was honest enough to freely and frankly confess his guilt when Carrier first interrogated him on the complaint it had received, thereby saving it from the trouble, expense and hazards of establishing his guilt by a prolonged investigation. Of course, this commendable action on Claimant's part did not make him any the less guilty or render him immune from punishment for the inexcusable offense he had committed. Notwithstanding we believe it was a circumstance the Carrier should have weighed and taken into consideration before it exacted the supreme penalty. If it had done so we believe a reasonable penalty would have been extended suspension instead of dismissal from service.

Therefore, solely on the basis of the extenuating circumstance to which we have referred we hold the record discloses sufficient evidence to warrant a conclusion outright dismissal was unreasonable. On the other hand, adherence to the rule heretofore mentioned does not permit or warrant a conclusion that, under the confronting facts and circumstances, suspension from service without pay from November 22, 1952, to the date of the adoption of this Award would have been so unjust, unreasonable or arbitrary as to constitute an abuse of the discretionary powers vested in the Carrier under its terms.

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 as indicated in the Opinion outright dismissal from service was unreasonable.

AWARD

Claimant to be reinstated with seniority rights unimpaired effective not later than September 1, 1954, but without compensation or pay, for salary loss or from any other source prior thereto.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1954.