Award No. 9049
Docket No. CL-11022

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

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

> G. B. Figge, Mail Handler, be reinstated in the service of the Carrier, his record cleared of charges and that he be paid for all time lost as provided in [1]Rule 24 of the agreement between the parties retroactive to August 25, 1958, the date his physician released him.

OPINION OF BOARD: The Claimant, a Mail Handler with a seniority date of November 6, 1950, was dismissed from service on August 15, 1958.

He was duly notified of the charges against him and appears to have had a fair hearing and investigation, although it would be better practice not to have the Carrier's Superintendent serve as the officer filing charges, presiding over the hearing and constituting the first appellate step.

The charges upon which Claimant's discharge is predicated are the following:

> 1. Falsification of his age on his original application for employment.
>
> 2. Engaged in outside business without proper authority.

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[1] RULE 24—EXONERATION. If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charges; if suspended or dismissed, the employee shall be reinstated and paid for all time lost, less amount earned elsewhere during suspension or dismissal.

3. Absent without proper authority since being given a release to return to service by Carrier's doctor on July 16, 1958.

4. Insubordination in failing to report back to work after agreeing to do so in Assistant Superintendent Parks' office on July 29, 1958.

An examination of the record establishes that the fourth charge is without foundation. There is no evidence of insubordination, the only claim in that regard being that Claimant did not return to work at a designated time although he had agreed to do so and been cleared by the Carrier's doctor, but instead notified the secretary of a subordinate official rather than the Assistant Superintendent, with whom he had been dealing in the matter, that he had consulted his own doctor who advised him not to return to work at the time. This evidence does not constitute insubordination and it may be noted that the Claimant had every right to consult his own doctor in the matter and not to rely exclusively on the Carrier doctor's diagnosis. Accordingly, the fourth charge does not provide a basis for Claimant's dismissal.

Regarding the first of the four charges listed above, it is noted that while Claimant did falsely indicate in writing on a company employment form that he was over 21 years of age when he was first employed, it affirmatively appears that he corrected it in a supplementary written personnel form over one year prior to the date the charges in question were filed against Claimant. We do not consider this evidence of sufficient force to justify discharge.

Similarly, with respect to the third charge, we find that while there is some evidence of absenteeism in the record, it is not so flagrant in nature as to constitute a valid basis for the dismissal penalty, in the absence of other rule infractions.

However, the second charge, that alleging that Claimant engaged in other business, is more serious. Claimant was employed in his family's rug cleaning business, although Rule 27 of the Carrier's "General Rules" states:

"Employes must not engage in outside employment or business without permission of the proper authority."

While this rule was unilaterally adopted and indeed was vigorously objected to by the Petitioner's General Chairman, we do not find it unreasonable, extraordinary or improper. See Award 6277. It is to be noted that the record clearly shows that Claimant's outside employment activity was not confined to a mere financial interest. The undisputed testimony in this case is that Claimant, during at least part of 1958 and a substantial period prior thereto, was actively engaged in actual physical work with the rug company. Despite this interest and manual activity, he did not obtain the Carrier's consent to engage in the rug business. The mere fact that some of the supervisory employes were aware of Claimant's interest is not the equivalent of consent, and consent can not be implied from such knowledge.

Apparently, Claimant never received any prior warning regarding his infraction of Rule 27. While that fact would lead this Referee to believe that the dismissal punishment is more severe than he considers appropriate, it can not validly be said to be arbitrary, capricious and unsupported by the record even if based solely on the second and third charges. Accordingly, in view of the broad latitude given Carriers by this Board in the matter of

assessing discipline, we will not upset the punishment decided upon by the Carrier and will deny the claim. See Awards 8711, 7363, 7072, 3874.

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

That the parties waived hearing on this dispute;

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 not violated.

AWARD

Claim denied

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1959.