

Award No. 11042
Docket No. CL-13053

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5064) that:

1. Carrier violated the Clerks' Agreement when, on December 19, 1960, following investigation held on December 14, 1960, it arbitrarily discharged Clerk D. L. Dickinson, Hope, Arkansas, from the service.
2. Carrier further violated the Clerks' Agreement when it failed to render decision within thirty (30) days after appeal was made by the General Chairman to the Assistant General Manager and subsequently refused to restore Clerk Dickinson to service with all rights unimpaired and compensation for all wage loss suffered.
3. Mr. D. L. Dickinson shall be restored to the service of the Carrier with seniority and all other rights unimpaired.
4. Mr. D. L. Dickson shall be compensated for all wage losses incurred on and after December 22, 1960 until reinstated.

OPINION OF BOARD: When this Division has been called upon to adjust a dispute growing out of a disciplinary proceedings we have said many times that where the evidence of record was conflicting, it was not the function of the Division to weigh the evidence. If the record contains substantial evidence which, if believed, supports the Carrier's finding that the employe was guilty of the charge, we will not disturb such finding. In the dispute now before the Division there is a sharp conflict in the evidence. But an examination of the evidence produced at the hearing by the Carrier in support of its charges is sufficient for the Carrier to base a finding that the Claimant was guilty of the charges. Upon such conclusion the Carrier dismissed the Claimant.

We do not modify or set aside a penalty imposed pursuant to a proper investigation under applicable rules of the Agreement unless we can conclude that the penalty was unreasonable, unfair or unconscionable

under the circumstances. The question now arises whether the action of the Carrier in dismissing the Claimant was unreasonable.

We have said above that there was evidence to support the finding of guilt. Such findings supports a penalty. In assessing a penalty the Carrier may consider the employes past record. In the development of the dispute on appeal the Carrier asserts that this record was considered. The principal item in the record is that of dismissal from service July 15, 1958, for being intoxicated in the colored waiting room. The Claimant was reinstated on a leniency basis seven months later. His record also shows that the Claimant entered the employ of the Carrier on February 14, 1942. At the time of his dismissal (December 19, 1960) he had been in service 18 years, and we believe that fairness also required that this past service should have been considered. He has now been out of service two years. While we cannot condone the conduct which the Carrier found in this case nevertheless we believe that a penalty of suspension in excess of two years would be harsh. We, therefore, conclude that he should be restored to service on December 19, 1962, with seniority and other rights unimpaired but without compensation for wage loss during the two year suspension.

In the light of this disposition of the case it is not necessary to comment on other issues.

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 not violated.

AWARD

Claims 1, 2, 3 and 4 disposed of as per the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.