

Award No. 12996
Docket No. CL-14391

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

TULSA UNION DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5446) that:

(1) Carrier violated the terms of the current Clerks' Agreement and abused sound discretion when it arbitrarily discharged Mr. Earl W. Carter, Mail and Baggage Handler at Tulsa, Oklahoma, effective at the close of business on October 1, 1962, without just cause.

(2) Mr. E. W. Carter shall now be restored to service with seniority and all other rights unimpaired.

(3) Mr. E. W. Carter shall now be paid for all time lost.

OPINION OF BOARD: This is a discipline case. Claimant, a Mail and Baggage Handler at Tulsa, Oklahoma, on a third trick assignment, was assigned to work, regularly, 3:59 P. M. to 11:59 P. M. On the evenings before August 14 and August 15, 1962, Claimant was told by Carriers' representatives at 11:00 P. M. to report and work an assignment depending upon the arrival of Frisco passenger train No. 9 scheduled to arrive at Tulsa 4:40 A. M.—this was to take care of work formerly assigned to an abolished position. Claimant failed to protect the calls on the mornings of August 14 and August 15, 1962.

On September 17, 1962, the Claimant received the following notice from the Carrier.

"Please report to my office at 9:30 A. M. Saturday, September 22, 1962, for an investigation to develop the facts and determine your responsibility, if any, in connection with your alleged failure to protect calls for 4:30 A. M. August 14, 1962, and 4:30 A. M. August 15, 1962, which resulted in delay to Train No. 9 and also mail for Star Routes on these dates.

You may have a representative as specified by Agreement rules if one is desired.

/s/ L. J. King"

Claimant contends that at the time Carrier's representatives told Claimant that he was to protect these early morning assignments, he suggested that he be called later by telephone, as he claims he was entitled to be in compliance with the rules of the Agreement; that so far as he knows the Carrier did not call him by telephone; that at no time did he refuse to protect the assignment.

Carrier contends to the contrary that Claimant had been notified that he was to protect these assignments the following mornings; that, though Carrier was not obligated under the agreement to give further notice, telephone calls were made to Claimant's home on both mornings and there was no response to the telephone calls; that Claimant failed to protect the calls as directed.

Hearings were subsequently held and on October 1, 1962, the Claimant was notified that as a result of the investigation he was dismissed from the service.

Under the record there is evidence which supports the conclusion of the Carrier that Claimant failed to protect these assignments and that his failure to do so was not justified. We are asked by the Claimant to interpret certain rules of the Agreement in our consideration of this matter. This, we must remember, is a discipline case.

In Award 3218 (Carter) we find language which is appropriate to the situation we are confronted with in the instant case. We quote, in part:

" . . . The Carrier is obliged to make the initial interpretation of the rules and direct how the work shall be done. If the contract is violated by the Carrier in so doing, it subjects itself to prescribed penalties. Employees as a general rule must perform the work as directed and in case of contract violation, seek redress under the terms of the Agreement. If each employe can interpret the Agreement, however complex, and refrain from doing work with impunity in accordance with his own version of its meaning, the service rendered by the Carrier will be reduced to a chaotic and intermittent condition, a thing which the Railway Labor Act was designed to prevent. . . ."

Claimant should have reported to work as directed and sought redress under the grievance machinery of the Agreement.

See also Award 11447, Coburn; Award 5170, Wenke; Awards 8711 and 8712, Weston.

It is further contended by Petitioner that the complete removal from service of Claimant by the Carrier was unreasonable, whimsical, arbitrary and capricious. The right of the Carrier to discipline Claimant is beyond doubt. It is the general rule of this Board, as indicated in past awards, that the punishment assessed by the Carrier will not be set aside just because the Carrier provided a more severe punishment than the members of the Board would have awarded for a similar dereliction of duty. Nor have we any right to extend leniency to a Claimant if we find that the discipline imposed by the Carrier was justified. Carrier's disciplinary action can only be successfully challenged before this Board on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion.

See Second Division Award 4103; Award 10878, Hall.

Dismissal is the extreme penalty administered by Carrier. In examining Carrier's conduct in assessing discipline, there is some significance in the fact that Claimant is charged with a "failure" to protect assignments, not a "refusal" to do so; a "failure" is an omission to perform, a "refusal" is a declination to perform. Discipline for insubordination in removing the alleged offender from the service has been regarded as a proper measure of discipline on the part of the Carrier and it might well be argued here that Claimant's conduct smacks somewhat of insubordination, but Claimant denied that he refused to protect these assignments, but insists that his failure to report was due only to the fact that he was not called by telephone by Carrier to his knowledge.

It is to be noted also that a separate grievance was being processed on the property by the Organization in connection with using employees on a call basis to protect work, in connection with Train No. 9, which arose in part out of the abolishment of a position and such grievance had not been handled to a conclusion. It would not seem inappropriate to mention here, also, that Claimant in both instances involved was notified to protect assignments at 4:00 or 4:30 A. M., while on his regular assignment which was concluded at 11:59 P. M.

It appears that Claimant had been with the Company for over 14 years and bore a good record except for one previous occasion when he received demerits for failing to protect a call.

It is essential that the gravity of the offense, misconduct or dereliction of duty in the setting under the circumstances should determine the severity of the penalty. A review of this entire record and surrounding circumstances convinces us that Claimant's dismissal from the service was not commensurate with the gravity of the dereliction of duty charged against the Claimant; the discipline was excessive, arbitrary and an abuse of managerial discretion. Hence, we hold that Claimant shall be reinstated to his former position with accumulating seniority rights and with compensation for all time lost since his dismissal, except that no compensation shall be paid for the period from October 1, 1962, to January 1, 1963. Moreover, from the compensation due to him, there shall be deducted any remuneration which he had earned in other gainful employment from and after January 1, 1963, until his re-instatement.

We would suggest that in the negotiations between the parties on the property as what amount is due Claimant consistent with this opinion, consideration be given to the fact, as appears from the record, that at the time Claimant was withheld from the service and for a time prior thereto he had hauled trash to implement his earnings outside of the hours he was regularly employed by the Carrier.

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 Employees involved in this dispute are respectively Carrier and Employees 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

The discipline assessed against Claimant by Carrier is excessive, arbitrary and an abuse of managerial discretion, and Claimant shall be reimbursed for any monetary loss in accordance with the Opinion.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1964.