Award No. 14063
Docket No. CL-15121

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

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

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5640), that:

1. The Carrier violated the Clerks' Agreement, except as amended and supplemented, when it disqualified Crew Caller R. K. Offterdinger from the position of Crew Caller after he had worked same for a period of some ten months, following investigation on a dissimilar alleged charge.

2. R. K. Offterdinger shall be restored to the position of Crew Caller, Roanoke Terminal, and be compensated for all wage loss sustained on and after November 27, 1963.

EMPLOYES' STATEMENT OF FACTS: R. K. Offterdinger, age 42, was employed by the Carrier in its Transportation Department on the Group 2 position of Messenger at Lynchburg, Virginia on November 1, 1948, and worked this postion continuously until same was abolished on February 1, 1963. As a result, it was necessary for Offterdinger to exercise seniority displacement rights on the position of Crew Caller at Roanoke, Virginia, approximately fifty miles distant. Such displacement was made in February, 1963, and, after several weeks of training at his own expense, Claimant actually began work during March of 1963. He worked this assignment continuously until 8:00 A. M. on November 26, 1963, at which time he was held out of service by the Carrier.

Offterdinger was instructed to report for formal investigation on December 2, 1963. This investigation was postponed until December 6, 1963, at the request of the Employes. Such investigation was held at 8:00 A. M. on this date, the charge reading as follows:

"Responsibility in connection with your failure to comply with Rules and Instructions governing the use and operation of Norfolk and Western owned Highway Motor Vehicles." (Employes' Exhibit A, Pages 1 and 2).

Under date of December 20, 1963, the Superintendent of Terminals advised Claimant as follows:

of Claimant's own craft and subject to the same Agreement. Copies of these three statements were furnished Claimant's representatives during property conference. No refutation of the import of these statements was even attempted, nor was Claimant's lack of ability ever questioned or denied. These statements provide ample support for the veracity of Carrier's decision to disqualify Claimant, and they prove the absence of any arbitrariness, capriciousness, or unreasonableness on Carrier's part in administering that decision.

Summarizing, Employe grounds of belated disqualification (sole defense advanced in Claimant's behalf) are defeated by your Board's holdings in previous Awards cited herein; Claimant's lack of ability is affirmed by other closely associated employes, including members of his own craft; ample justification of disqualification is demonstrated by the deficiencies outlined by employe affiants in Carrier's Attachments D, E, and F; propriety of disqualification in the light of such circumstances is fully supported by the previous Board decisions cited in reference thereto. The case is clearly devoid of merit and denial in its entirety is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant herein was initially employed by the Carrier on November 1, 1948 as a messenger. This position was abolished on February 1, 1963, whereupon he exercised displacement rights to position of Crew-Caller at Roanoke, Va. approximately fifty miles distant. Although the Claimant was not required to operate a motor vehicle while previously working as a messenger, as a Crew Caller his duties entailed such operation in order to call for and transport train crews.

On November 26, 1963, about twenty minutes after reporting for duty, the Claimant was involved in an accident while driving a Company vehicle. This vehicle proceeding about 15 miles per hour, on wet pavement, struck the rear of a privately owned automobile traveling in the same direction in the city of Roanoke. Damages to the private car amounted to approximately $10.00 and to the Company-owned vehicle $300.00.

Thereafter, the Claimant drove the vehicle from the scene of the accident without, at that time, notifying the police department. Subsequently, his supervisors as well as the police authorities were notified of the said accident.

Predicated upon the Claimant's failure to report the incident to the police department prior to moving his vehicle from the scene, a formal investigation was conducted into the matter. What occurred thereafter is best depicted by the following statement contained in the Carrier's ex parte submission:

> "Having found Claimant guilty by his own admission of failure to report the accident as required, there remained the question of discipline to be applied. However, consideration of the matter led to discovery of other factors which showed the case to merit disqualification, rather than an application of discipline that, in view of the conditions involved, could not be expected to effect any material improvement. Consequently, instead of applying any form of discipline, Offterdinger was, by letter dated December 20, 1963, notified that '* * * you are being disqualified from the Group 2 Clerk-Caller position which you now hold'."

Prior to analyzing the merits of this dispute we are required to dispose of the Carrier's contention that the claim submitted to this Board was expanded from the one originally pursued on the property.

The Claimant was notified by letter dated December 20, 1963, of the results of the investigation. Thereafter, the General Chairman by letter dated December 30, 1963, appealed the December 20th decision. Said letter follows:

"BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
N&W SYSTEM BOARD OF ADJUSTMENT NO. 218
603 Carlton Terrace Bldg.
Roanoke, Virginia

December 30, 1963

File No. 731-4

Subject: Disqualification of Clerk-Caller
R. K. Offterdinger, Roanoke
Terminal

Mr. R. F.Dunlap, General Superintendent
Norfolk & Western Railway Company
Roanoke, Virginia

Dear Sir:

As provided for in Rule 27 of the Clerks' Agreement, we hereby appeal the decision of Mr. J. R. Neikirk, Superintendent Terminals, as contained in his letter dated December 20, 1963, concerning disqualification of Clerk-Caller R. K. Offterdinger account violation of instructions when he failed to report collision between N&W Vehicle No. 811 and auto owned by Mr. K. R. Lovern.

This disqualification was a result of formal investigation conducted at 12th Street Yard Office on December 6, 1963.

It is the position of the Employes that Clerk-Caller R. K. Offterdinger cannot be disqualified from the position of Clerk-Caller after having worked the position for a period of 10 months.

Therefore, we request that Clerk-Caller Offterdinger be returned to the position of Clerk-Caller, Roanoke Terminal, and that he be compensated for all wage loss sustained on and after November 27, 1963.

Please acknowledge, advising

Yours truly

/s/ E. J. Neal
General Chairman

cc: Mr. J. R. Neikirk,
Supt. Terminals

Your decision as contained in your letter of Dec. 20, 1963, addressed to Clerk-Caller R. K. Offterdinger, is not acceptable and is hereby rejected

E. J. N.

cc: Mr. J. E. Buckley, LC"

A reading of this appeal letter indicates that it refers to a formal investigation . . . account violation of instructions when he failed to report collision * * * cannot be disqualified from the position of Clerk-Caller after having worked the position for a period of ten months.

The Carrier takes exception to the phrase contained in Part I of the Organization's claim to wit:

"following investigation on a dissimilar alleged charge."

The facts contained in the record do not support the Carrier. We need only refer to the correspondence conducted on the property to recognize that an investigation was conducted for failure to report collision. This investigation was held pursuant to Rule 27–Discipline–Investigation, as provided therein:

"(a) An employe who has been in the service sixty calendar days or more, or whose application has been approved, will not be disciplined or dismissed without investigation and hearing and will have the right to be present. An employe may, however, be held out of service pending such investigation and hearing. If he desires to be represented at such investigation and hearing he may be accompanied by the 'duty accredited representative' as that term in defined in this Agreement.

(b) An employe charged with an offense shall be apprised in writing of the specific charge or charges against him at the time charge is made, and will have reasonable opportunity to secure the presence of necessary witnesses and representatives. The investigation and hearing will be held within ten calendar days from date charged with the offense or held out of service, and a decision will be rendered within twenty calendar days after completion of the investigation and hearing. A record of the investigation and hearing will be made and a copy of this record will be furnished the employe or his representative upon request."

The facts as presented in the record support the conclusion that the investigation was conducted for the purpose of determining whether any discipline was warranted. Nevertheless, the Carrier insists that it did not discipline the Claimant, but instead, it disqualified him. Therefore, the claim as submitted to this Board is not contrary to the Organization's claim on the property, i.e., disqualification after ten months in same position following investigation on a dissimilar alleged charge (failure to comply with Rules and Instructions governing the use and operation of Norfolk & Western owned Highway Motor Vehicles).

It is, therefore, the considered opinion of this Board that the matter is properly before us at this time. Hence, having disposed of the threshold question, we now can proceed to the merits of the dispute.

There are a number of issues raised in this controversy which we feel constrained to discuss. These issues may be stated as follows:

(a) Can the Carrier disqualify an employe after the qualifying period of 30 days has elapsed, as set forth in Rule 10, of the effective agreement?

(b) Is a Carrier required to initially conduct an investigation as to employe's capability before it may disqualify him?

(c) Can a Carrier disqualify an employe as a disciplinary measure?

The Carrier concedes that the Claimant herein held this position for approximately ten months before he was held out of service. It is, therefore, the Organization's contention that once an employe has complied with Rule 10, i.e., he has held the position for thirty days or longer, he cannot thereafter be disqualified. In effect, the Organization is advancing a principle which is alien to the labor relations field. Undoubtedly, we would agree that once an employe has acquired seniority in a classification, he cannot arbitrarily be disqualified or displaced by a junior employe. However, it is also recognized that under certain conditions, one may be disqualified if he subsequently demonstrates his lack of ability to perform the assigned job duties. In the absence of specific language to the contrary, and this agreement is silent on this phase, there is no guarantee that an employe will continue to remain on a job even though he has met the initial time period qualification. (See Award 5071.)

In addition, the Organization further argues that Rule 10(e) requires that the Local Chairman "be notified in writing, the reason for any disqualification." Here, Section (e) refers to the condition set forth in Section (d) of Rule 10 — that one may be removed from the position at any time before the expiration of the qualifying period of thirty working days. Under such situation, the Carrier is required to notify the Local Chairman. In the instant dispute, therefore, this provision of Rule 10 is not applicable.

The next issue to be discussed concerns the question whether the Carrier may disqualify an employe as a disciplinary measure. The record indicates that following the accident in which the employe was involved, an investigation was conducted under Rule 27, the discipline rule. The purpose of this investigation was to determine whether the employe violated instructions in failure to notify police authorities of such accident, prior to removal of his vehicle. The investigation was concerned solely with this single question — and it was found that the Claimant had moved the company-owned vehicle without following the prescribed procedure. Thereupon, having found the employe guilty of the alleged charge, the Carrier properly could have exercised its right to discipline him for a violation of the rule. In assessing a penalty, previous infractions may be considered in order to determine a proper penalty. A time-honored principle followed in disciplinary procedure is the requirement that the penalty should reasonably conform to the breach.

Without necessarily conceding that disqualification is a proper penalty, under certain circumstances, for the purpose of this analysis we are prepared to accept the principle that disqualification could properly be imposed as a form of discipline. However, the Carrier now contends that it did not discipline the Claimant, following the investigation. Instead, it disqualified him on the basis of certain documents submitted after the investigation was concluded.

We cannot agree that the Carrier complied with the proper procedure in this instance. We would be more inclined to support the Carrier's position in the instant dispute, if the discipline imposed on the Claimant was based

on the investigation and it was then determined that the proper penalty was disqualification. By its action, the Carrier lulled the Claimant into neglecting to exercise his rights under Rule 28. Pursuant to said Rule, an employe who considers himself otherwise unjustly treated could file a written request for a hearing. Thus, if the Carrier had initially acted to disqualify the Claimant, the employe would then have been relegated to Rule 28.

We would be inclined to accept the Carrier's argument that the employe lacked the qualifications to properly perform his job, nevertheless, we believe that it was incumbent upon the Carrier to accord the employe and his representatives the right of due process. (See Awards 2654 and 4607.)

In view of the conclusions reached by us that the Carrier failed to follow the proper procedure in the instant dispute, the third issue as posited, namely, whether the Carrier was required to initially conduct an investigation as to such employe's qualifications before it could disqualify him, becomes academic. However, in passing, it may be noted that reference was made to Rule 28. Under proper conditions, action could have been instituted by the Carrier to disqualify the employe, and the employe would then have been required to request a hearing pursuant to Rule 28.

We are compelled to deny the Carrier's assertion that the results would have been the same even if it had not subsequently changed the label from discipline to disqualification. As we have indicated, if the Carrier had proceeded on the disqualification principle initially, the employe if he so desired could have requested a hearing under Rule 28, which was his prerogative. Hence, the claim is required to be sustained, irrespective of the merits of the dispute.

The Board having determined that the Carrier wrongfully disqualified the Claimant, it is directed that he be reinstated with all seniority rights preserved and that he be compensated for any loss of earnings from November 26, 1963. In this respect, the Carrier is entitled to deduct from such payment, any wages which the Claimant earned or could have earned with reasonable diligence.

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 the Carrier violated the Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of December 1965.

LABOR MEMBER'S CONCURRENCE AND DISSENT TO AWARD 14063, DOCKET CL-15121

We are in accord with a portion of the Opinion of Board in which, after properly analyzing Carrier's violative actions clearly set forth in the Record, the Referee held in part:

> "* * * Hence, the claim is required to be sustained, irrespective of the merits of the dispute.
>
> The Board having determined that the Carrier wrongfully disqualified the Claimant, it is directed that he be reinstated with all seniority rights preserved and that he be compensated for any loss of earnings from November 26, 1963. * * *"

The Referee also properly concluded by the facts in evidence that:

> "We cannot agree that the Carrier complied with the proper procedure in this instance. We would be more inclined to support the Carrier's position in the instant dispute, if the discipline imposed on the Claimant was based on the investigation and it was then determined that the proper penalty was disqualification. By its action, the Carrier lulled the Claimant into neglecting to exercise his rights under Rule 28. * * *"

We are inclined toward the proposition that Claimant was not the only one "lulled." After a proper review and decision based on the issues before him, the Referee then embodied in his "Opinion" a new issue, which was not raised by the parties on the property, or by any Member of this Division. The Referee stepped far beyond the authority vested in him by the Railway Labor Act and Circular No. 1, by concluding that:

> "In this respect, the Carrier is entitled to deduct from such payment, any wages which the claimant earned **or could have earned with reasonable diligence.**"

As heretofore stated, that "conclusion" has no business in the Award, as it is raising an issue which neither of the parties to this dispute brought before this Board for adjudication. It has, of necessity, **created** an issue, in that who is to now be the judge of what is "reasonable diligence" and what is not?

For sake of argument, let us consider an employe who had **abundant** diligence, and worked extra jobs for additional income, working outside his regular hours for 2 hours a day, or on his rest days, while also being actually employed by Carrier during **other** hours. Are we to accept an argument that a Carrier would be permitted to **deduct** from his Carrier earnings any supplemental earnings he had made in such outside employment? Do we have the right to conclude that Carrier had the prerogative to invade the privacy of that individual? That would be involuntary servitude. The Board has held that what an employe does when off duty and not on the property of his employer is of no concern of an employer (Award 6332).

In Award 12996, Referee Levi M. Hall properly held:

> "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.**" (Emphasis ours.)

In many fields of endeavor, outside employment is acceptable. As a general rule, the railroad industry is not an exception, as many railroad employes have and still do supplement their railroad compensation with outside earnings in one way or another. It is a miscarriage of justice that this Referee did not consider that such a condition could have prevailed in this dispute and, further, that the parties to the Agreement, and not this Board, have the right to decide such an issue consistent with the Award.

Looking at it another way, if an employe rests on his "laurels," he will be fully compensated for what Carrier should have paid him but, because of such violation, did not pay him; but if this same employe gets off his "laurels" and finds a job so that he can support his family, he is penalized for so doing.

We are convinced that the Railroad Unemployment Compensation division of the Retirement Board has a fair concept of what is "reasonable diligence" and what is not, and that subject should have been left for decision by that Tribunal if such a question became an issue between the parties as a result of this Award. It was not an issue raised by either party to this dispute.

Editorializing is not a function and is beyond the authority of this Board.

In this adoption session, this Labor Member asked the Referee the reason for the inclusion of the last sentence in his "Opinion of Board." His answer was that it was the Board's "policy" to include such language. This "policy" to which he referred, and with which he now contends he is so familiar, differs considerably from the "Opinion of Board" and "Award" in the following Awards:

Award No.	Referee	Adopted
388	I. L. Sharfman	2-25-37
3113	Luther W. Youngdahl	2-1-46
4623	John M. Carmody	10-26-49
5543	Edward F. Carter	11-2-51
5980	Fred W. Messmore	10-31-52
6056	Thomas C. Begley	1-26-53
6116	Fred W. Messmore	2-26-53
6295	Livingston Smith	8-3-53
6827	Fred W. Messmore	12-3-54
6958	A. Langley Coffey	4-12-55
8088	Edward A. Lynch	10-2-57
10692	Richard F. Mitchell	7-19-62
11014	Robert J. Ables	12-20-62
11050	David Dolnick	1-23-63
11650	Charles W. Webster	7-26-63

	12254	Bernard J. Seff	2-27-64
	12535	Louis Yagoda	5-22-64
	13126	John H. Dorsey	12-11-64
	13180	John H. Dorsey	12-16-64
	13367	Preston J. Moore	2-26-65
	13632	Kieran P. O'Gallagher	5-28-65
(1st Div)	20-790	Carroll R. Daugherty	12-2-65

It is also not a "policy" of this Board to raise new issues, evidenced by the following interpretations:

In **Award 388, Referee I. L. Sharfman** held "Claim Sustained." On April 16, 1938, in Interpretation No. 1 to Award 388, Serial No. 10, he further held:

> "Since the claim was sustained without condition or limitation, the measure of relief to which the employe is entitled must be determined by the terms of the claim. These terms, based upon the contention that the employe was improperly displaced from his regularly assigned position, embraced two requests; first, that he be restored to his regularly assigned position; and second, that he be 'compensated in full for any monetary loss resulting from the carrier's action in removing him from his assignment.' The fact that the claimant is not now required to return to his former position is immaterial, since this arrangement was reached by agreement of the parties subsequent to the award. The sole issue concerns the extent of the compensation to which the claimant is entitled under the original award. When the claim as to compensation was sustained, it was sustained in the terms in which it had been submitted and argued on behalf of the employe; and this claim was not limited to net wage loss, but included 'any monetary loss' resulting from the carrier's action. The substantive position of the carrier in the original proceeding had been directed solely to a denial that any provision of the prevailing agreement between the parties had been violated. The Board expressly found otherwise, and liability on the part of the carrier for the full measure of compensation as specified in the claim naturally followed."

In Award 3113, Referee Luther W. Youngdahl held in the Opinion of Board, in part pertinent hereto, as follows:

> "* * * Six months' loss of wages is too severe a penalty and is disproportionate to the facts disclosed. It is our opinion that the loss of one month's pay is adequate discipline for the offense committed."

and in the Findings:

> "That discipline meted out by Carrier is disproportionate to the offense committed by employe and that one month's loss of pay is adequate punishment."

In Interpretation No. 1 to Award 3113, Serial No. 58, issued October 4, 1946, it was held:

"In this award the Board held that the discipline meted out by Carrier was disproportionate to the offense committed by employe and that one month's loss of pay was adequate punishment.

Now through an interpretation, Carrier seeks to have deducted certain wages in (sic) it contends Claimant earned in outside employment during the period of discipline. No claim was made for such an offset at the time of the original hearing before the Board. This Referee did not consider the propriety of such an offset or determine the effect of any rule of the Agreement in regard to such an offset because the issue was not discussed or argued before him.

Under the circumstances of this case, therefore, it is not now proper, through an interpretation, to consider this issue."

Thus, what this learned Referee proposes to be the "policy" of the Board is not supported by fact, and his giving rise to a "new issue" is abortive of a Referee's authority before this Board.

For the above reasons, I dissent.

C. E. Kief
Labor Member
1-13-66