

Award No. 14874
Docket No. CL-15623

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5746) that:

(a) Carrier violated the Agreement at Knoxville, Tennessee, when it dismissed Clerk B. C. Barnhill from the service of the Carrier on January 8, 1964.

(b) Carrier shall compensate Mr. B. C. Barnhill for one day's pay each date his Consignment Clerk position was assigned to work from January 8, 1964 until February 21, 1964.

(c) Mr. Barnhill shall be given credit for all rights that should have accrued to him for the period of time claimed and the record of this dismissal shall be removed from his personal records.

OPINION OF BOARD: Claimant was a Consignment Clerk at Carrier's Sevier Yard, Knoxville, Tennessee, on December 22, 1963. He had been working for Carrier at this location as a Clerk since August 1, 1943. December 22, 1963 was one of Claimant's rest days. At 7:15 A. M., Sunday, December 22, 1963 Train No. 73 arrived at Sevier Yard with waybills including one for car CRR-60058, which was not in the train. Car CRR-60058 in error had moved North to Bristol, Virginia the previous day. Train Clerk Dyer testified at the investigation hearing that he (Dyer) had placed the waybill for CRR-60058 in the Ditto Clerk's basket when it arrived on December 22. Claimant worked his assignment from December 23 to January 2 and testified at the hearing that he did nothing about the astray car No. CRR-60058 or the waybill for the reason that he had no knowledge of either. On January 2, 1964, as a result of an inquiry from Carrier's Assistant Vice President-Transportation, the waybill was found by another Clerk in the 10-Hole rack, a rack for outgoing trains. There is no evidence in the record

as to who placed waybill CRR-60058 in the 10-Hole rack. On January 8, 1964 Claimant was dismissed from service for his failure to properly handle waybill CRR-60058. He was restored to service on a leniency basis on February 21, 1964 but did not return to work until Monday, March 2, 1964. At the investigation hearing requested by Claimant, Carrier read into the record an investigation report of Assistant Chief Clerk J. A. Ken. Claimant requested introduction in the record five affidavits stating that the waybill in question was not seen by affiants in the Ditto Clerk's basket on the days involved. These affidavits were never admitted in the record of the investigation hearing, but were included in the composite record of the case on appeal to this Board.

It appears to this Board that there is sufficient evidence in this record to show that the primary responsibility of checking astray cars and waybills lies on the shoulders of Claimant; that there was an astray car; that the waybill in question was ascertainable by the Claimant; that Claimant failed to detect the waybill; and that Claimant's failure resulted in a car being lost for eleven days. However, there are mitigating circumstances involved in this case: The waybill arrived on Claimant's day off and there is no evidence in the record to show that Claimant ever had knowledge of or ever handled this waybill. The record indicates that several different employees had access to and did look through Ditto Clerk's basket. The record is void as to which employee placed waybill CRR-60058 in the 10-Hole rack. The record indicates that it was never the custom or practice of the clerks at this station to check the 10-Hole rack for waybills without cars for the reason that the 10-Hole rack contained only waybills made up for outgoing trains. The record also indicated that Claimant had maintained an unblemished record for his entire service of more than twenty years prior to December 22, 1963.

It also appears from the record that the Superintendent conducting the investigation read into the record the investigating report of the investigating officer, thus precluding the right of cross examination by Claimant. However, the record is void of evidence indicating that the notarized affidavits in support of Claimant's defense were either admitted or considered. Fair practice compels us to observe that the same rules in conducting an investigation should apply to both parties.

This Board has held many times that we cannot substitute our judgment for that of the Carrier. Awards 13367 (Moore), 13129 (Kornblum), 9046 (Weston) and 10642 (LaBelle). However, this Board does have the right to mitigate the punishment. Awards 14375 (Zumas) and 14376 (Zumas). This Board also held many times that past good service should be considered in mitigation. Awards 14349 (Zack), 14376 (Zumas), 11042 (Boyd), 12000 (Dolnick), 12987 (Dorsey), and 14350 (Zack).

We believe that the primary responsibility of checking the waybills is on the Claimant and that he failed to meet his responsibility in this instance. However, we further believe that in view of the record and Claimant's past good service, the punishment was excessive. If we had heard the case, the penalty may have been a 15 or 30 day suspension. We believe that any penalty in excess of a 30 day suspension is excessive. The Claimant is restored to service beginning 30 days from January 8, 1964 and he shall be compensated for that period in accordance with the agreement between the parties. Claimant is restored with all rights unimpaired.

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 Agreement was violated to the extent that punishment was excessive.

AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1966.