

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number **19982**  
Docket Number CL-20084

Frederick R. **Blackwell**, Referee

(Brotherhood of Railway, **Airline** and Steamship Clerks;  
( Freight Handlers, Express & Station Employees

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the **Brotherhood** (GL-7215)  
that:

1) Carrier violated the Clerks' Rules Agreement when it failed to notify employe G. R. Schmidt in writing of the precise charge and/or charges being made.

2) Carrier's action in dismissing G. R. Schmidt **from** service was arbitrary and unjust, and the penalty assessed was harsh, excessive and out of proportion for mishandling of **way** bills on September 2'2, 1971.

3) Carrier shall now be required to reinstate **employe** G. R. Schmidt on his Train Clerk Position in Seniority District No. 30 with **all** rights **unim-**paired and compensate **him** for all losses sustained until he is returned to service.

OPINION OF BOARD: This is **a** discipline case in which claimant has already been restored to service. He was dismissed **on** October 15, **1971** and restored to service on February 10, 1972, without pay for time lost. Thus, the sole issue is whether the original discipline should be set aside so as to allow claimant to recover for time lost.

The **Employees** attack the discipline on the merits, but we **must** first consider the Carrier's contention that the claim has been settled and that, therefore, there is nothing for the Board to consider. The Carrier's settlement defense is based on its February 7, 1972 letter and the claimant's conduct in respect thereto. In pertinent part the February 7 letter, addressed to General **Chairman, H. C. Hopper**, copy to claimant, reads as follow:

"Effective **immediately** Mr. Schmidt is reinstated to Carrier's service with seniority rights unimpaired but without payment for time lost. This action is the result of Carrier's decision to exercise leniency in Mr. Schmidt's case.

Mr. Schmidt should arrange to report to Mr. R. L. **Tewell**, Superintendent, **Bensenville**, Ill. on or before February 14, **1972**."

Carrier characterizes the foregoing as an offer to reinstate claimant without back pay, which offer **was** accepted by claimant's action of reporting for duty at the designated time and place. However, the **Employee's** position, as stated in the following portion of General Chairman Hopper's February 16, 1972 letter, is that the back pay claim remains open despite claimant's return to work.

"...**since** no agreement was reached by the organization for acceptance of the Carrier's decision to reinstate **employee** Schmidt, unless he so notifies me that he is agreeable to the terms outlined in **your** letter, I am considering his return to service on elimination of **any** further accumulation of payment for time lost, but it will be my intent to progress the claim for time lost up to, but not including February 7, 1972. (Underline added)

The Employees also emphasize in their submission that no request for leniency was made and that, contrary to practice on this property, the Carrier did not obtain **claimant's** written release of his **wage** claim.

From our study of the two texts quoted above, along with the entire record, we conclude that claimant's return to work constituted an acceptance of Carrier's offer to reinstate him without back pay. In **reaching** this conclusion we have closely studied the weaknesses in Carrier's settlement defense, especially its failure to obtain a written release from claimant. However, such a release is a matter of evidence and its non-existence is not sufficient to override the other facts in this case.

Carrier's February 7, 1972 letter gave clear notice that Carrier's reinstatement was on a leniency basis and that the exclusion of back pay **was one** of the express terms of the reinstatement. The claimant's response to the **letter** was to return to work at the **time** and place designated by Carrier. The General Chairman's response was to write Carrier a letter in which he first recognized that "terms" were set forth in Carrier's letter (see underlined portion of General Chairman's **February 16**, 1972 letter). but he then conditioned the effectiveness of the terms on the claimant's giving positive notice of assent to such terms. In these circumstances we think that claimant's return to work is the decisive fact. He did so without **any** stated reservation of his **wage** claim and the record is barren of any evidence that he had any intent other than to accept leniency reinstatement on the terms stated by Carrier. Further, the claimant's failure to give positive notice to the General Chairman of his, **claimant's, assent** to Carrier's terms does not constitute evidence of a reservation of his wage claim. **Consequently**, on the whole record, we conclude that claimant's conduct **is** the **decisive** factor and that such conduct **clearly** and unequivocally evidenced claimant's acceptance of Carrier's terms. We shall dismiss the claim.

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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; end

The claim is dismissed es per Opinion.

A W A R D

Claim dismissed.

NATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of Third Division

ATTEST:

A. W. Paulos  
Executive Secretary

Dated at Chicago, Illinois, this 12th day of October 1973.