

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20077
Docket Number CL-20242

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
PARTIES TO DISPUTE: (
(The Chesapeake and Ohio Railway **Company**

STATEMENT OF CLAIM: Claim of the **System Committee** of the Brotherhood (GL-7287)
that:

(a) The Carrier violated the terms of the Clerks' Agreement when it dismissed Phil L. Scaggs from service.

(b) Claimant **Phillip** L. Scaggs shall now be restored to service with seniority and all other rights unimpaired and paid for all losses sustained by reasons of this wrongful **dismissal**.

OPINION OF BOARD: Claimant was charged with "responsibility in your unauthorized absence **from** your regular assignment during your tour of duty resulting in conduct unbecoming an employee at about **10:40** P.M. Sunday, February 20, 1972." Following an investigation held on February 29, 1972 Claimant was dismissed from service by letter dated March 2, 1972. That letter stated:

"It has been found that you **were** at fault for absenting yourself from duty without proper **authority** in that you left your regular assignment at **about 9:45** P.M. and returned to this regular assignment after being called by Assistant to **Train-**master Midkiff at about **11:05** P.M., while your regular assigned hours were 4:00 P.M. until **12:00** midnight, and had heated conversation with Assistant to Trainmaster Midkiff at about **11:30** P.M., which conversation was unbecoming an employee, in that words of an 'off color' and abusive nature were used in conversation with a supervising officer. The discipline administered is dismissal from service of the Railway **Company.**"

Petitioner first asserts that Claimant was not afforded a fair and impartial hearing and further that his claim was not given unbiased consideration in its handling on the property. This argument is based on the fact that Superintendent Talbert signed the charge against Claimant, conducted the investigation, rendered the dismissal decision, and also was the designated officer to **whom** the first step of the appeal was directed. The record of the investigation, the Rule cited and the Awards of this Board do not support this position. The Superintendent was not a witness in this case and a long line of decisions by

all the divisions of this Board have held that a Claimant's rights are not necessarily jeopardized by the same Carrier official filing the charge, presiding at the hearing and latter imposing the discipline. In this case the further function of the ~~same~~ official as the initial recipient of the appeal is similarly not prejudicial.

The facts outlined in the letter quoted above are not substantially in dispute. However the Organization argues that the discipline imposed was arbitrary and an abuse of discretion, We must examine the two acts complained of and illuminated at the ~~investigatory~~ hearing.

It is admitted ~~that~~ the Claimant left work early on the day in question, without proper authority. However, Petitioner asserts that there was a long established practice on the ~~property~~ that employees are permitted to leave early provided that their work has been completed. Carrier emphatically denied such practice ~~in~~ its submission, but the record indicates no such denial on the property. Furthermore, the transcript of the investigation contains ~~uncon-~~troverted testimony by ~~Claimant~~ that it was not unusual for clerks or certain other craft employees to leave early if their work was completed. This is supported by the direct statement of the Assistant to the ~~Trainmaster~~ who said to Claimant that "from now on ~~before~~ leaving the job he should check with the ~~Yard-~~master". Carrier submitted a document with its submission, on this issue, which cannot be considered since ~~it~~ was not presented on the property. The apparent practice, discussed above, at very least casts some doubt on Carrier's conclusion that Claimant was guilty of a serious infraction in his Leaving work. At most, we conclude that Claimant should have notified supervision, not merely a fellow employee, that he was leaving. We note that in Award 19412, involving the same parties, the Claimant was charged with taking excessive time off and Carrier's discipline of dismissal was upheld; however, the record in the case shows four prior incidents within an immediately prior eight month period all culminating in either warnings or suspensions for absence from duty without permission. In this case, with respect to this aspect of the charge, the discipline of dismissal for Leaving work would appear to be quite arbitrary and unwarranted in view of Claimant's ~~9½~~ year service with no blemishes on his record.

On the matter of the altercation with the supervisor, the record is quite clear that Claimant, notwithstanding his personal problems and pressures, engaged in a loud and moderately abusive colloquy which was wholly unwarranted and improper. The language used can be considered "shop talk" and as such not offensive per se, but the entire outburst cannot be tolerated or condoned by this Board. Our conclusion, then is that the Carrier was correct in its finding of guilt, but that under ~~all~~ the circumstances and facts of this particular case, the penalty imposed was improper and constituted an abuse of managerial discretion. We shall reduce the discipline to a 30 day suspension.

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

That the discipline imposed was excessive.

A W A R D

Penalty reduced to a 30 day suspension; Claimant shall be reinstated in accordance with Rule 27 (d).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 14th **day of** December 1973.