

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20554

Docket Number SG-20221

Irwin M. Lieberman, Referee

(Brotherhood of Railroad Signalman

PARTIES TO DISPUTE: (

(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Western Pacific Railroad Company that:

Mr. C. A. **Rhines** be reinstated to his position of Signal Maintenance Foreman at Elko, Nevada, with all pension, seniority, insurance, hospital and all other rights unimpaired, together with full pay for all time lost including overtime, until he is returned to this position.
(Carrier's File: D-Case No. **9036-1972-BRS**)

OPINION OF BOARD: Claimant, who had been employed by Carrier on December 12, 1946, was a Signal Maintenance Foreman at Elko, Nevada at the time of the incident involved in this dispute. He was charged with failing to follow instructions and consequent violation of a series of operating rules in relation to investigating damage caused by a derailment on January 14, 1972. Following a formal investigation Claimant was discharged by letter dated January 31, 1972. After handling on the property, by Agreement, Claimant was offered reinstatement as of April 3, 1972, on a leniency basis only (without prejudicing Petitioner's right to process the Claim to this Board). Thus the effective penalty was reduced to two months and two days.

Petitioner raises a number of procedural arguments which we find do not have merit. One is deserving of **comment:** that Carrier improperly raised in its letter of discipline the fact of past indifference in the performance of his duties. We have held on numerous prior occasions that consideration of past record may not be used to establish guilt for the particular offense in question, but is properly considered in determining the measure of discipline to be imposed, as was done in this case.

Petitioner's primary position is that Carrier did not establish a prima facie case for the finding of guilt and that since Carrier has not met its burden of proof, no discipline is warranted. This of course is denied by Carrier.

The record of the investigation indicates that Claimant did not follow his supervisor's instructions and inspect the hot box in the vicinity of the derailment. He offered to go back and make the inspection several hours later, when questioned by his supervisor, but was instructed not to

do so. Claimant, in defense of his position, testified credibly that it would have been quite difficult to secure access to the area in question because the track was blocked (possibly a five or six mile walk) and that in his judgment the inspection was not necessary. Subsequently it became evident that his judgment was sound in that the equipment was functioning properly and had only minor damage to the case. The record, however, is unequivocal in that he failed to follow instructions, even though such failure had no negative consequences. It is evident that this Carrier does not expect or desire its Signal Foremen to exercise independent judgment contrary to the instructions of their supervisors; this attitude is certainly credible in view of the continuing emphasis on safety. In this case the record of the investigation, therefore, contains substantial evidence to support Carrier's conclusion of guilt.

Over the years in discipline cases we have held consistently that this Board is not warranted in disturbing discipline imposed by Carrier, after findings of guilt, unless it appears from the record that the penalty imposed was so unjust, unreasonable or arbitrary as to constitute an abuse of discretion. (Awards 5032 and 16074, for example). In this dispute, we find that the penalty imposed was arbitrary and unreasonable and cannot be permitted to stand. The penalty of discharge (much less the commutation to two months-plus on a leniency basis) is not commensurate with the offense committed, and is an improper exercise of discretion. This employee, with over twenty five years of service, and holding a position of responsibility, did not precisely follow the instructions of his supervisor; his dereliction was at most marginal. If Claimant possessed an absolutely clean record, it is reasonable to presume that he would have received a reprimand at most for this infraction. His past record, evaluated by Carrier in its determination of penalty, included letters admonishing Claimant's performance dated November 1970, May 1969, November 1968 and a waiver and admission of responsibility for a performance failure in 1962. This record, though not exemplary, contains no prior actual discipline in twenty five years. Under **all** the circumstances, based on the entire record, we find that a fifteen day suspension is an appropriate penalty in this case.

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;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the penalty imposed was improper.

A W A R D

The discipline imposed will be reduced to a fifteen day suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1974.