

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21355
Docket Number CL-21364

James C. **McBrearty**, Referee

PARTIES TO DISPUTE: (**Brotherhood of Railway, Airline and**
(**Steamship Clerks, Freight Handlers,**
(**Express and Station Employees**
(**Kentucky & Indiana Terminal Railroad Company**

STAT- OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7964, that:

(1) Carrier violated the **Agreement** when, without just cause, it **dismissed** from service Yard Clerk **Wilbert Hayes** effective Thursday, June 27, 1974.

(2) As a consequence **carrier shall:**

(a) Promptly **restore** Mr. **Hayes** to duty with seniority, **vacation, and other** rights unimpaired.

(b) Pay Mr. **Hayes** the **amount** of wages he would have earned absent the violative action less outside **earnings**.

(c) Pay Mr. **Hayes** any **amount** he incurred for medical or surgical expenses for himself or dependents to the extent **that such payments would have been paid by** Travelers Insurance Company under Group Policy No. GA-23000 and, in the **event** of death of Mr. **Hayes**, pay his estate the **amount** of life insurance provided for **under** said policy. In addition; reimburse him for **premium payments** he may have made 'in the **purchase of** substitute health, welfare and life **insurance**.

(d) Pay Mr. **Hayes** interest at the statutory rate for the State of Kentucky for any **amounts** due under (b) hereof.

OPINION OF BOARD: Claimant entered Carrier's **service on April 17, 1968**, and was **employed** as Yard Clerk Relief Vacation Bo. 2. It **is the responsibility** of this position to relieve various other **employees** for vacation, and in this capacity Claimant **was** scheduled to work on Wednesday, June 19, 1974, on the third "TRICK", from **11:00 P.M. to 7:00 A.M.** at L. S. Junction.

On the **night** of June 19, 1974, Claimant telephoned Carrier at **approximately 10:45 P.M.** to say that he would be "a little **late**" because he was **having** trouble with his old **car**. Claimant then reported for work between **11:10 P.M. and 11:15 P.M.** When **Claimant** reported for work, the **employee** he was **supposed to relieve was in a phone booth across the tracks** **calling** a train heading north bound into the yard on the Code-a-phone.

Claimant thereupon told the **Yardmaster** that he had to **return to** his **car** to get a **pen**. While in his **car**, **Claimant** fell into a **sound** sleep, **and** was **mtfully** awakened until **sometime** between **1:15** A.M. and **1:30** A.M. **Claimant then went** into the office, and was told by the Supervisor of Yard Clerks that **Mr. Smith**, the Yard Clerk whom Claimant was **scheduled to** relieve, **would** work through the third "trick" **instead of** Claimant. Claimant then stayed around **until 1:50** A.M., at which **time** he went out to his car **and** drove **home**.

On June 20, 1974, Carrier notified **Claimant** that there would be **an investigation** on **Monday, June 24, 1974**. The purpose of this investigation was to look into the **charge** that Claimant "failed to protect his assignment as **11:00** P.M. to **7:00** A.M. L. S. Junction Yard Clerk on **Wednesday, June 19, 1974**."

The hearing was conducted as scheduled on June 24, **and** on June 26 Claimant was notified by **Carrier** that he **was being** dismissed from service for failing to protect his assignment on June **19**, and in **light** of Claimant's past record of similar infractions.

In urging that the claim be sustained, Claimant has cited the following provision⁸ of the Agreement: :

"RULE 24

Advice of Charge

An employee, charged with an **offense**, shall be furnished with a letter stating the precise charge at the time the charge is made **and this shall** be within 15 days after knowledge of the offense."

"RULE 25

Investigation

An employee who has been in the service **more** than sixty (60) days or whose application has **been** formally **approved** shall not **be** disciplined **ordismissed without** investigation. **He may, however, be held out of** service pending such investigation only if his retention in service would be **injurious** to himself or another person. **The** investigation shall be held within ten (10) days of the date **when** charged with the offense or held from service. A decision **will** be rendered within ten (10) day⁸ after completion of **investigation**, and copies thereof furnished the **Local** and General Chairmen."

"RULE 26

Appeal8

The right of appeal by employees or their duly accredited representatives in the **regular order** of succession up to and **including** the highest **official designated** by the **carrier** to whom **appeals** may be **made** is **hereby** established. When appeal is taken, further **hearing shall** be granted, if requested of the official to whom **appeal** is made. Time limits for appeals shall **be** as prescribed in Rule 28."

"RULE 27

Representation

At **investigations** and **hearings** an **employee**, if he desires to be represented, **may** be accompanied **and** represented by one (1) **or more** duly accredited representatives **as** that term is defined in this agreement. Disputes **growing** out of personal grievances and/or out of the interpretation or application of agreements **or practices** concerning wages, rules, **or working** conditions between the **parties** hereto, may be handled by the employee affected or one (1) **or more** duly accredited representatives, first with the **immediate** supervisory officer and, if not satisfactorily settled, may be appealed by **the** employee or his representative in the order of succession up to **and** including the highest official designated by the **management** to whom appeal8 **may** be made."

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"RULE 29

Investigation **and** Hearing- When Held

Investigations and hearings shall be **held** when possible at home terminal of the employee involved **and** at such time as **not**, so far as **practicable**, to cause the employees to **lose** rest or time. **Employees** shall have reasonable opportunity to secure the presence of representatives **and/or** necessary witnesses."

"RULE 30

Record of Investigation8 **and** Hearings

A **copy** of statements made a matter of record at the **investigation** **and** hearing or on appeals will be **furnished** the employee and the Local and General Chairmen. "

"RULE 31

Date of Suspension

If an employee is suspended, the suspension shall date from the time he was taken out of service."

"RULE 32

Exoneration

If the final decision decrees that the charges against the employee were sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be reinstated and paid for all time lost, if any, less amount earned elsewhere during suspension or dismissal."

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter according to what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

First, however, this Board must examine the allegations by Petitioner that Claimant's guilt was prejudged by Carrier, and that he was deprived of a fair and impartial investigation by virtue of his prior service record being introduced and appended as an exhibit at the close of the investigation. This action is also termed "double jeopardy" by Petitioner.

However, the Board finds that the introduction of an employee's prior record at the investigation does not, per se, impair the fairness and impartiality of the investigation, nor does such introduction constitute "double jeopardy". So long as the issue of guilt is established independently, and the prior record is used only to assist in the determination of the quantum of discipline, the employee's rights are not impaired.

Petitioner next argues that Claimant did show up for his scheduled shift between 11:10 P.M. and 11:15 P.M., after notifying Carrier that he would be late because of car trouble. Moreover, while it is true that Claimant fell sound asleep for two hours, nevertheless, when he was awakened between 1:15 A.M. and 1:30 A.M., he was willing and able to carry out his

duties for the remainder of the third "TRICK". It was Carrier who prevented him from doing so.

After a careful review of the entire record, the **Board** finds that Claimant did not fail to protect his assignment for the entire third "TRICK", **but only** for the two hours between **11:15 P.M.** and **1:15 A.M.**

Petitioner therefore argues that **in** light of the above argument, the "discipline assessed was extremely excessive, severe, and unjustified."

It is **essential** that the gravity of the offense, misconduct or dereliction of duty in the setting under the circumstances should determine the severity of the penalty. A review of the entire record and surrounding circumstances (e.g. Claimant had been **in** Tax Court and **Bankruptcy** Court for five weeks while **working** the third "trick" almost every other night) convinces us that Claimant's permanent dismissal from service was **not** commensurate with the gravity of the dereliction of duty charged against Claimant. We do not in any **way** condone Claimant's falling asleep between **11:15 P.M.** and **1:15 A.M.**, when he should have been attending to his duties, and we agree that some discipline was warranted. **However**, we find the discipline administered by Carrier was excessive, arbitrary, and an abuse of managerial discretion. Therefore, we hold that **Claimant** shall be reinstated to his former position with seniority rights unimpaired. **However, Claimant** will not be compensated for the time lost since his dismissal, nor shall he be **reimbursed** for medical or surgical expenses, **nor** for premium payments he may have made in the purchase of substitute health, welfare and life insurance.

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.

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Claim sustained to the **extent** set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.

