

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22284
Docket Number MS-22240

Rolf Valtin, Referee

PARTIES TO DISPUTE: (**Federated Employees Council**
(**Florida East Coast Railway Company**)

STATEMENT OF CLAIM: "Claim of Federated **Employees Council** that 'Carrier acted arbitrarily, **capriciously** and in a harsh and **discriminatory** manner when it dismissed from service Clerk **E. C. Paulson, May 27, 1977**. As a consequence, Carrier shall:

Reinstate **E. C. Paulson** with seniority and all rights unimpaired and **reimbursed** at the rate of the position or positions his seniority entitled him to while out of service."

OPINION OF BOARD: The claimant entered the Carrier's service in August, 1972. By virtue of the Carrier's policy calling for dismissal where an employee accumulates 90 or more demerits, he was dismissed in early 1975. He had been assessed the demerits (about as many on the one score as on the other) for unsatisfactory job performance and for tardiness. His dismissal was appealed and ultimately determined by Third Division Award 20987. The Award, issued in late February, 1976, called for the claimant's reinstatement without back pay. Claimant resumed his employment with the Carrier, as an office porter at the Bowden Yard, in early April, 1976. He resumed the employment without carry-over of the demerits which had been the basis of his discharge.

The claimant worked in the porter position in the ensuing approximately one-half year. In that period, at various stages, he incurred charge8 which were substantially similar to those which had led to his prior discharge. In mid-May, 1976, the essence of the charge was that his work was repeatedly of unsatisfactory quality and quantity. The charge resulted in a warning of a series of terms. About three months later, charge6 involving three separate incidents were entered against the claimant: 1) reporting late; 2) failing properly to clean a floor; and 3) leaving a desk littered with crumbs upon eating at it. These charges, upon investigation, respectively resulted in 5 demerits, 10 demerits, and 5 demerits.

In September, 1976, the claimant, pursuant to successful bidding, became a Clerk-Operator at Daytona Beach. As of mid-October, 1976, via a lengthy letter providing detailed illustrative material, the claimant was charged with a series of inadequacies over an approximately 3-week period -- once more adding up to the repeated lack of proper quality and quantity in the performance of his work. The charges, on investigation, resulted in 30 demerits.

In January, 1977, the claimant incurred charges for two separate incidents: 1) delaying a train while working as a Yard Clerk; 2) failing properly to prepare an interchange list, also while working as a Yard Clerk. These charges, again on investigation, respectively resulted in 10 demerits and 30 demerits.

Having thus received 90 demerits since the time of his reinstatement, the claimant was dismissed (in February, 1977). It is the propriety of this dismissal which is here presented for determination.

We preliminarily note that we are treating the claimant's entire disciplinary record (since the time of his reinstatement) as before us on its merits. The Carrier makes time-limit arguments with respect to the Organization's appeal of the charges which resulted in the first 20 demerits; the Organization contends that the succeeding 30 demerits should be seen as removed -- on the grounds that they were grieved and that the grievance was left unanswered; and the Carrier, in regard to this, asserts that no such grievance was ever received by it and that the Organization, accordingly, is no longer in a position to protest the 30 demerits. Despite the affidavits which the Organization introduced to show that the 30 demerits were in fact grieved, we cannot believe that the Carrier received the grievance and thereupon remained silent on it, and we thus decline to treat the 30 demerits as fallen. As to the remaining procedural contentions (which are Carrier contentions), it suffices to say that our conclusions on the merits are such that they can legitimately be sidestepped.

By our review of the voluminous record which attends the case, the evidence compellingly supports the claimant's dismissal.

We think there is no escaping the conclusion that the claimant was an employee who time and again failed to measure up to job-performance expectations which are reasonable and which are commonly fulfilled by the claimant's fellow employees. Equally important, the evidence gives every indication that the claimant chose to pursue his subpar ways. He is neither young nor inexperienced, and he is a

clearly intelligent person. There is **no way** to attribute his repeated inadequacies to lack of **inherent** capacities. **Rather**, the **claimant** **simply** declined to heed the ample **warnings** which he was either actually or in effect (via the demerit system) **given** -- **somehow** believing that he was free to set himself apart from his **fellow employes in** the observance of **acceptable** standards of diligence and self-application.

The record, of course, includes various contentions to the contrary. There are **denials**, asserted excuses, and countercharges. But **we** have found nothing of solid and convincing character. **The** thread **which runs through** the **claimant's** stance **in** the various **investigations** of the charges against him is one of **lameness** and evasion. To conclude that the case essentially presents discriminatory or **unduly** harsh **treatment** against the **claimant**, **rather than evenhandedness** and patience by the Carrier, would in **our judgment** constitute a misreading of the evidence.

Where a dismissal is based **on** the presence of a particular **number of** demerits and where the fatal **number** of demerits **has** come into **being** via an **accumulation of** demerits for a series of successive incidents, one cannot help but ask **oneself** whether the number of assessed demerits per incident was fair and proper. **There** is little in the record by which to test the question. In the present case, however, we do not view this as disturbing. **For** we believe that there was **here** such a persistent pattern of **substandard conduct as to** justify dismissal quite without the demerit system.

We enter a **final** note. It has not escaped us that the leaving of luncheon crumbs on another person's desk would in many a case have to be viewed as trivial and as lacking in proper cause for disciplinary action. We are not prepared, however, so to view the incident in the present case. **The** difficulty is **that** it was reflective of the **claimant's** indifferent attitude. We think we would err were we to overturn the dismissal by taking an **isolated** view of the incident.

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;

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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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January 1979.

