

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22843  
Docket Number CL-22761

George E. Larney, Referee

PARTIES TO DISPUTE: (Southern Railway Company  
(  
(Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees

STATEMENT OF CLAM: Carrier did not violate the agreement with the Brotherhood of **Railway**, Airline and Steamship Clerks as alleged, when it declined to **permit** Mr. **C. E. Philo**, who had been dismissed from all service of Southern Railway, to displace on General Clerk position 3 (No. 16506) **in** Carrier's Central Matching Bureau in Atlanta, Georgia, effective May 9, 1978.

Since **the agreement** was not violated, Mr. Philo is not entitled to eight (8) hours' pay at the rate of \$64.42 per day for each work day beginning May 9, 1978, **and** continuing, as **claimed** for and in behalf of **Mr. Philo** by the Clerks' Organization.

OPINION OF BOARD: On May 5, 1978, Claimant, Charles E. **Philo**, then **the incumbent** Supervisor Service Control, an excepted position in the Inter-modal Transportation Services **Department** located at Carrier's General Offices in Atlanta, Georgia was dismissed from all **service** of the **Company**. Claimant was notified of this action by letter dated **May 5, 1978** and signed by Carrier official B. **R. Osborne**, General **Manager** of the **Intermodal** Transportation Service Department. This letter reads as follows:

"Atlanta, Georgia - May 5, 1978 \*

Mr. C. E. **PHILO**:

We have had cause to discuss with you your job performance and personal, behavior recently and several **times** within the last **twelve months**. I have concluded that your attentiveness to **service and** conduct-on the job and with others has **not improved** as you promised **and** I had hoped. I believe we have exercised more than due diligence **and** tolerance with you and you have continued to demonstrate **counter-productive** results.

To **describe** but a few instances **and** examples:

May 3, 1977, you acted in an irresponsible manner by throwing a can of water out of a building window;

"October 18, 1977, you threw coffee out of a window that almost struck **another employee**. Your excuse for this act was '**things** just build up' ;

November 2, 1977, you were involved in an altercation with Mr. J. B. Howell in which you refused to stop your diatribe;

March 3, 1978, -- your cantankerous behavior **and un-cooperativeness** with our **Miami** Sales office;

April 22, 1978, -- another refusal to assist **our** Sales Department (Atlanta).

We cannot tolerate such disruptive and apparently uncontrollable behavior. You have been **counseled** with, warned, **reprimanded** **and** nothing has persuaded you **to conduct** yourself in a courteous, cooperative and orderly manner. Therefore, I hereby advise you that you are dismissed from all service of **the** Company as of May 5, 1978.

B. R. Osborne"

By letter dated May 8, 1978, Claimant notified Carrier official T. E. Curley that since he had been dismissed from his excepted position in the Intermodal Transportation Services Department it was his intention to displace, effective **May** 9, 1978, an **employee**, one Mr. K. W. Baker, then occupying a position in the Central Matching Bureau under the provisions of **Rule B-5(b)** of the Controlling Agreement bearing effective date of **May** 1, 1973. **Rule B-5(b)** reads as follows:

"**(b)** Employees holding seniority rights **under** section (a) of this **Rule** shall, in the event they are demoted, laid off or have occasion to leave their position account of circumstances beyond their election, be privileged to exercise a displacement right under schedule rules, **provided** they avail themselves of this opportunity within thirty (30) days. If they desire to return to a schedule position because of their **own election**, they may assert their seniority only by bidding on vacancies, provided that they must exercise such right by bidding upon the **first vacancy** open, to which their seniority and qualifications entitle them, **after** so **demoting themselves**."

By letter dated May 10, 1978, Carrier **informed** the Claimant that in view of his dismissal **from** all service of the Company, his employment relationship with Southern had been **terminated** and therefore he had no right to displace anyone.

On May 11, 1978, the Organization in behalf of the Claimant, requested an investigatory hearing as provided for under Rule C-1 which reads in relevant part as follows:

**"RULE C-1 -- DISCIPLINE, INVESTIGATIONS, HEARING AND APPEALS**

(a) An employee who has completed **sixty (60)** days of **compensated** service will not be disciplined (including discharge) except for cause. In the event an employee is disciplined he will be notified, in writing, of the specific reasons therefor. The Carrier recognizes the right of such employee to be accompanied by his duly accredited representative, should he so desire same, during any discussion with **the** employee of **events** leading to such disciplinary **action**. If such employee, or his duly accredited representative, disagrees with the disciplinary action **taken** by the **Carrier**, he may request, within ten (10) days following such notification, a hearing before proper Carrier officer to determine the propriety thereof. At such hearing, the employee involved shall be entitled to the assistance of **the** duly accredited representative. The hearing shall be held within ten (10) days of request, if practicable, and the designated Carrier official shall render a decision affirming, modifying or revoking the prior disciplinary action within ten (10) days following the date on which such hearing is completed.

(b) If the Carrier determines the **need** for investigating an incident that may result in disciplinary action, any employee involved shall be furnished with a letter setting out the subject matter and **the** charges against the employee(s) involved. Such letter shall set a time, date and place for hearing thereof, which hearing shall be conducted in the same **manner** as provided for hearing conducted under Paragraph (a) above.

(c) No employee will **be** disciplined for any matter of which the Carrier has had **knowledge** for more **than thirty** (30) days.

**\*\*\*\*\* "**

As per the Organization's request a hearing was **held** on May 20, 1978, and in a letter dated May 26, 1978, Mr. L. E. Wetsel, the hearing officer informed the Claimant that he had been adjudged guilty as charged and that therefore his dismissal was affirmed.

On May 31, 1978, the Organization filed another claim in behalf of the Claimant alleging Carrier had violated Rule B-S(b) of the Controlling Agreement cited above and therefore Claimant ought to **be** allowed to exercise his seniority by displacing K. W. Baker in the Central **Matching** Bureau. Carrier throughout its **handling** of this matter **on the property** declined this latter claim.

In an extensive **review** of the record before us we have reached the following determinations:

1. The Organization's **allegation** that Carrier violated Rule C-1(c) cited above is one which constitutes new argument. **This argument** was not invoked by the Organization at any **time** during the hearing held on May 20, 1978, nor is there proof of a preponderant **nature** to show that the parties discussed such alleged violation of the contract in its handling of this claim **on the property**. What the Organization did raise at **the** hearing was an objection with respect to the introduction of incidents involving the Claimant other than those **cited** in the May 5, 1978 letter of dismissal reproduced above. This objection is of a wholly different nature than the allegation that Carrier violated **Rule C-1(c)** of the Agreement. It is well established that this Board which is an appellate tribunal is barred from considering **new** argument. Therefore, we find the hearing afforded **Claimant** was properly conducted.
2. The Organization alleges further that **Claimant** was denied his contractual rights **under Rule B-S(b)** when Carrier **prevented him** from displacing **K. W. Baker** in **the** Central Matching Bureau following his dismissal. We find **there** was no denial of Claimant's rights as so alleged. The Organization requested an investigatory hearing for Claimant under **Rule C-1** and Carrier correctly granted this request. **gad** Claimant been exonerated of the charges following the hearing **he** would certainly **have** then been entitled to exercise his seniority right of displacement under **Rule B-5(b)**. However, Claimant was adjudged guilty as charged, his dismissal **affirmed** and as a result any rights of his under the Controlling Agreement were thereby terminated.
3. Notwithstanding the aforestated two findings, it is our determination that, even though **the Claimant's** conduct **is**, on **the** whole, rather reprehensible and his attitude about work **and** his **responsibilities** which flow therefrom certainly **repugnant**, the discipline of **dismissal** **imposed** on him as a **result** of the incidents set forth in his **dismissal** letter of **May 5, 1978**, is **excessive**. However, we find **further** that

said actions of Claimant are too serious to go unpunished and that such penalty levied should be commensurately severe. Therefore, the period of **time** Claimant has been **withheld** from **service** of the Carrier shall serve as a disciplinary **suspension** and shall be duly notated on Claimant's personnel record.

Without prejudice to the general applicability of Rule **B-5(b)**, we direct Carrier to reinstate the **Claimant** with no back pay or other **monetary** benefits and to allow him to exercise his seniority to a clerical position covered by the May 1, 1973 Agreement.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing **thereon**, and upon the whole record and all the evidence, finds and holds:

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 was excessive.

A W A R D

**Claim** of the Organization sustained to the **extent and in** the manner 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 May 1980.