

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22862
Docket Number CL-22825

Paul C. Carter, Referee

(Brotherhood of Railway, Airline **and**
(Steamship Clerks, Freight Handlers,
(Express and Station **Employees**

PARTIES TO DISPUTE: (

(St. Louis-San Francisco **Railway** Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood **(GL-8753)**
that:

1. The Carrier acted in an arbitrary, capricious and **unjust manner** and violated the agreement between the parties when on June 26, 1978, it dismissed Clerk O. R. Whitehead from the service of the company.

2. In view of the foregoing arbitrary, **capricious** and unjust action of the Carrier, it shall now be required to:

(a) Restore Clerk Whitehead to service with the carrier with all seniority, vacation and other rights unimpaired.

(b) Pay Clerk Whitehead for all time lost **commencing** with June 16, 1978, **and** continuing until Clerk Whitehead is restored to service.

(c) Pay Clerk Whitehead any amount he incurred for medical or surgical expenses for himself or his dependents to the extent that such payments could have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and in the event of the death of Clerk Whitehead 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 suitable health, welfare **and** life insurance.

(d) Pay Clerk Whitehead any amount he incurred for dental-expenses for himself or his dependent⁹ to the extent that such payments could have been **paid** by Aetna Insurance Company under the National Dental Plan. In addition, reimburse him for premium payments he may have made in the purchase of suitable dental insurance.

(e) Pay Clerk Whitehead interest at the rate of **10%** compounded annually on the anniversary of this claim for amounts due under (b) above.

OPINION OF BOARD: The claimant, who had been in Carrier's service about twelve years, was assigned to Services Clerk-General, Position No. 1, in the **Print-Mail** Room, located in Carrier's General Office **Building**, Springfield, Missouri, hours of assignment **7:30 A.M. to 11:45 A.M.**, and **12:15 P.M. to 4:00 P.M.**, **Monday** through Friday. He was to divide his time, as needed, between the mail room and the reproduction room.

On June 16, 1978, claimant was issued two citations to appear for formal investigations, one to c-nce at **10:00 A.M.**, June 20, 1978, and one to **commence** at **2:30 P.M.**, June 20, 1978. The first investigation involved:

"xxxx your reported refusal to work in the reproduction section as instructed by Foremen of the reproduction section, at or about **2:30 PM**, June 15, 1978; and, for your reported absenting yourself from your duties without proper authority, at or about **2:30 PM** on June 15, **1978.**"

The second investigation involved:

"xxxx your alleged refusal to report to my office, as instructed by the Head Services Clerk, at or about **2:03 PM**, June 16, 1978."

A copy of the transcript of each of the investigations has been made a part of the record.

The Board has carefully reviewed the transcript of each investigation and finds that none of **claimant's** substantive procedural rights was violated. There was substantial evidence in each investigation in support of the charge. However, the charges and the evidence in support thereof, were not sufficiently serious as to warrant permanent dismissal.

While the **Board** is reluctant to substitute its judgment for that of the Carrier as to the amount of discipline imposed, the penalty of dismissal is so out of proportion to the seriousness of the **offenses** involved herein, that the Board feels justified in reducing the discipline. It is the conclusion of the Board that a disciplinary suspension of no more than six months would have been appropriate.

We will award that the penalty assessed be reduced to a **six-months** disciplinary suspension, following which claimant **shall** be reinstated and compensated in accordance with Agreement rule No. 31.

The Organization has presented no agreement support for Parts (c), (d) and (e) of the claim, and they are denied.

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

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third **Division**

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 30th day of May 1980.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 22862

Docket No. CL-22825

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station **Employees**

NAME OF CARRIER: St. Louis-San Francisco Railway Company

Upon application of the representative of the Carrier involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The claimant was discharged by the Carrier on June 16, 1978. A claim was **made** on his behalf **and** progressed to this Division by the Organization. In Award 22862 the Division held:

"We will award that the penalty assessed be reduced to a six-months disciplinary suspension, following which claimant shall be reinstated and compensated in accordance with **Agreement** rule No. 31."

Agreement **Rule** No. 31 reads:

"If the final decision decrees that charges against the **employe** were not sustained, the records shall be cleared of the charge; if suspended or dismissed the employe shall be reinstated and paid for all time lost (if any), less any amounts earned in other employment."

The request for interpretation involves the issue of the amount of pay claimant is due. In the handling on the property the **Carrier, requested** the claimant to furnish a copy of his 1978 and 1979 Federal **Income** Tax returns, a copy of his 1978 and 1979 Missouri State Income Tax returns, and also a sworn statement of his earnings January 1, 1980 through June 9, 1980, for use in determining the amount to which **claimant** was entitled under Award 22862.

The claimant declined to furnish copies of his Federal and State Income Tax returns as requested, as he considered such requests an invasion of privacy. The Carrier contended in the on-property handling that claimant owned and operated a print shop, known as Fast Copy, at **1807-H.S., Glenstone** Plaza, Springfield, before and during the time he was out of service.

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In our view the Carrier was within its rights in requesting the submission of the **income** tax returns in order to determine from the best available information what credit, if any, should be applied to the back pay. (See Interpretation No. 1 to Award No. 19744, Docket No. CL-19696, Serial No. 276.)

With the Organization's response to the request for interpretation, it has furnished copies of joint Federal Tax **Returns** of claimant and his wife for the years 1978 and 1979, and a statement prepared by a Certified Public Accountant **covering** the business carried out at the Fast Copy establishment from January 1, 1980 through **June** 9, 1980. The Organization advised the Board that copy of its response was being furnished the Carrier. We assume that copies of the Federal **Income** Tax returns and copy of the statement prepared by the Certified Public Accountant were also furnished the Carrier. If, for some reason copies were not furnished to the Carrier, they should be furnished promptly.

The Federal Return for 1978 shows no earnings other than from the railroad prior to dismissal. The 1979 **Return** shows a loss from the operation of the business, as does the statement prepared by the Certified Public Accountant for the period January 1, 1980 through June 9, 1980.

We do **not** consider that the Carrier needs **any** additional figures to arrive at the amount due claimant under Award 22862. As the statements furnished show no earnings from the business during 1978, and that it operated at a loss during the year 1979, as well as for the period January 1, 1980 through June 9, 1980, we do not consider that deductions can properly be made under that part of Rule 31 reading:

"... if suspended or dismissed the **employe** shall be reinstated and paid for all time lost (if any), less any amounts earned in other employment."

Referee Paul C. Carter, who sat with the Division when Award No. 22862 was adopted, also participated with the Division in **making** this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of **May** 1981.