

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23188  
Docket Number CL-22808

Joseph A. Sickles, Referee

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

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood  
(GL-8721) that:

**Carrier** violated the Agreement at Memphis, Tennessee, when on August 24, 1977, it suspended Mr. S. K. Powell from **service** without pay, beginning August 25, 1977, and extending through September 23, 1977.

**Carrier** shall now be required to compensate Mr. S. K. Powell for all time lost during the unjust suspension **period** and remove all reference to the unwarranted suspension from his service record.

OPINION OF BOARD: On the 24th of August, 1977, the Claimant **was** scheduled to work as a **Utility Clerk from 11:30 a.m. to 8:30 p.m.** However, he telephoned at 11:30 a.m. to report that he **would be** late, but that he would report to work as **soon** as possible. He arrived 20 minutes later - at 11:50 a.m.

Because of his failure to report on time, the **Claimant** was **suspen&d** from **service** without **pay** for thirty (30) days. Pursuant to the agreement, the **Employee** requested an investigation concerning the propriety of the assessed **discipline**, which investigation was conducted.

The Organization **has** urged that the **Employee's** failure to report for duty at the appointed hour was necessitated by an **incident** with his automobile, and that the **Carrier was** the first **to** be notified of his **difficulty**.

While **the** Organization concedes that the **Carrier** may weigh an **employee's** past record after all of the **evidence** and testimony has been completed to ascertain the amount of **discipline** that may be meted out, **in** this **instance** the **Employees** **insist** that the **Claimant's** past record was introduced at the hearing **prior** to **any** evidence or testimony being taken.

In its Submission to the Board, the Carrier points out that the **Employee** has had a **dismal record concerning his ability to arrive at work in a timely manner; and it points Out that he was warned that he must make arrangements to protect his assignment on time and he was told to insure that his car would not cause him to be late.**

This record presents **some** rather significant questions to the Board which do not **admit of easy resolution.**

Initially, there is **no** question, at this **stage** of the **development** of arbitration law, that an **Employee's** past record may not be **used** to prove a present offense against him, however it maybe considered **in assessing the amount of punishment to be imposed, once the offense is established independently.** We do not agree with the Organization **that the timing of the presentation of the past record is crucial, and the fact that it may be presented at an early stage in the proceedings das not automatically taint its consideration; although we will agree that the timing of its receipt can be indicative of the Carrier's motivation.**

**Certainly, a 20 minute tardiness when an employee has admittedly called his employer to advise that he would be late does not normally warrant a 30 day suspension. At the same time, our review of the Employee's rather atrocious record leads us to understand the severity of the disciplinary action. However, once again we return to the basic question of whether Or not the Employee's past record was used as a basis for finding the Employee guilty of an offense; because obviously, a past record is not pertinent to the amount of discipline to be imposed unless a present offense has been established.**

The Organization has made **numerous references** to the statement made by the Hearing Officer at Page 7 of the **Transcript of Investigation.** The **Employee explained that another vehicle pulled in front of him and caused him to brake suddenly. When his engine died, he was unable to restart it. As confirmation Of this, he presented a document to show the events, at which time it was Stated:**

**"The Company is not questioning the facts as presented by Mr. Powell. Exhibit 2 is not contested by the Company."**

Thus, we are confronted with the question of **whether any** tardiness, under **any circumstance, is an automatic offense, Or if extenuating circumstances** can excuse an absence. We do **not question, for one moment, that if an employee has received a number of warnings for tardiness related to automobile trouble, an employer will be (and should be) quite suspicious of an absence dealing with automobile difficulties. Nonetheless, we cannot agree that there can never be a valid excuse.**

Here, the **Employee** presented testimony which the **Company** conceded to be the case, and which, to **this** Hoard, **was an** acceptable reason for being 20 minutes tardy - if, in fact, it was the case.

The **Company's** concession at Page 7 of the transcript is therefore quite **significant** to us. In addition, we have considered the **Superintendent's** November 21, 1977 letter, which implies to us that the **Carrier had determined** that no excuse for being late would be acceptable.

Although we **will sustain** the **claim**, we feel compelled to **advise** the Claimant that nothing herein should, **in any manner**, be considered by us to be a **condonation** of his tardiness record, and we are confident that his future **employment** relationship is within his power to control, because certainly, no Carrier or employer is required to tolerate **the type** of tardiness and attendance record demonstrated here.

**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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.