

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **24361**
Docket Number **CL-24588**

Paul C. Carter, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
{ **Freight Handlers**, Express and Station **Employees**
{ Union Pacific Railroad **Company** (Western Districts)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (**GL-9628**) that:

1. Claimant C. E. Shines was **improperly** dismissed **from** the service of the **Union Pacific Railroad Company** on July 1, 1981 for accumulation of demerits without hearing or notice of hearing advising **claimant** of precise charge.

2. Carrier shall now be required to compensate **claimant** for all **time** lost **commencing** July 1, 1981 until April **7, 1982** when reinstated to **service** without prejudice to claimant's claim for all lost time; also, Carrier shall be required to permit claimant to **return** to position of crew dispatcher.

OPINION OF BOARD: The record shows that Claimant had been **in** the service of **the** Carrier since July 20, **1953**, with no assessment of d-its until **September, 1980**.

Effective **September 1, 1969**, the Carrier's Discipline System was revised, providing, **among** other procedures, for a demerit system, and on **January 1, 1970**, the Division **Superintendent** of the Idaho **Division** issued Circular No. **47** setting **forth** the **new** Discipline System. The last paragraph of Circular No. 47 reads:

"When a balance of **90** or **more** uncleared **demerits** stand against the record of an **employee**, he shall be subject to dismissal, provided, **if** such **action** is to be taken, it will follow a hearing **when** required in accordance **with** the respective labor agreements."

On July 1, **1981**, the Superintendent advised Claimant that his record was being assessed 45 demerits for an occurrence **on** May 31, **1981**, which occurrence was described:

"While working as Crew Dispatcher, you failed to call Fireman G. L. Willis **for his turn**, for SF-31 **on** duty **9:35** PM **on** May 31, **1981**, resulting **in** claim for mishandling being made by **Mr. Willis**; in violation of General Rules B and L; General Regulation **702** of Form **7908**."

In the **same** letter of July **1, 1981**, the Superintendent **advised the Claimant:**

"In connection with this assessment of discipline, your personal record shows an accumulation in excess of 90 **demerits**, which is excessive; **therefore**, you are dismissed from service."

There appears to be no dispute **between** the parties that there was an **accumulation** of **90** or more demerits against Claimant's record on July 1, **1981**.

The basic contention of the **Organization** is that Carrier violated the discipline rule of the applicable Agreement when **it** dismissed Claimant for an accumulation of **demerits** without a fair and **impartial** hearing, nor advising the Claimant of the precise charge. **The Organization** relies **primarily** on those portions of the discipline rule reading:

"(a) No **employee** shall be disciplined or dismissed without a **fair** and impartial hearing. . . . At a **reasonable time** prior to the hearing the **employee** shall be apprised **of** the precise charge. **In** case of unsatisfactory service or **incompetency** all charges to be investigated shall be stated..."

"(g) An **employee** charged with **offense** involving **memoranda** against record shall be advised **in** writing **nature** of offense with which charged."

The Carrier contends that the **discipline** procedure of the applicable Agreement have no **application** to a situation where an **employee accumulates** the **maximum number** of demerit marks against his personal record and **becomes** subject to dismissal **in** accordance **with** the Carrier's published System of **Discipline**. **The Carrier** goes on to point out **that** the **accumulation** of in excess of **90** demerit marks on Claimant's record was a **matter** of recorded fact, **and** each separate and distinct assessment of **demerit** marks was preceded by an **investigation under** the discipline rule of the applicable agreement. The Carrier **also states**:

". . . The **investigation and hearing conducted under** the provisions of Rule **45** on June 11 (**22?**), **1981**, for an occurrence on **May 31**, resulted in an **accumulation** in excess of **90** d-its and thus **Shines was properly dismissed from the service of the Company under its established Discipline Procedure.**"

The **Organization** contends **that** the hearing conducted on **June 22, 1981**, involved a charge **against** Claimant for alleged violation of **"General Rules B and L, General Regulations 702 and 702B of Form 7908 in connection with failure to call a fir- for his turn, as stated in Notice of Rearing dated June 1, 1981. This Notice made no charge of 'accumulation of demerits...'. "**

The question before the **Board** is **whether Claimant** was entitled to a hearing on the charge of **accumulated** demerits **in** excess of **90**, as referred to in Notice issued by the Superintendent in **Circular No. 47**, dated January 1, **1970**.

We do not have the benefit of any evidence as to practice on the property. **Upon** careful consideration of the record before us, **including** the Discipline Rule of the applicable **Agreement**, we are **of** the considered opinion that the Carrier violated the Agreement in dismissing the Claimant for accumulation of **90** or more d-its **without** affording **Claimant** a fair and **impartial** hearing on **that charge** as provided for in Rule **45** of the Agreement. We consider the accumulation of **demerits** as separate and apart from the offense for which **Claimant** was assessed 45 demerits as a result of the investigation conducted on June 22, **1981**. This

conclusion is supported by Third Division Awards Nos. 10877 and 22835; also Second Division Award No. 6382, which **award** cites early Award No. 1820 of that Division. See also **Award** No. 4 of Public Law Board No. 1582. We do not consider Award No. 40 of public **Law** Board No. 496 of significance, as *that* award dealt with a question of leniency. Our **conclusion** appears to be contemplated by **that** part of Carrier's Discipline Rule reading:

'khan a balance of 90 or more uncleared **demerits** stand against the record of **an employe**, he shall b-e subject to **dismissal**, provided, if such action is to be taken, it **will** follow a hearing **when** required **in** accordance **with** the respective labor agreements."

The record shows that **on** December 16, 1981, the Carrier offered **rein-**stat-t of Claimant **on** the basis:

"In order to avoid **Shines** sustaining excessive discipline, I **indicated to you in conference that I would be willing to permit** the **reinstatement** of **C. E. Shines** subject to **the condition that** he would not return to position of Crew Dispatcher and that the question of pay for **time** lost will be decided by action to be instituted before the **Adjustment Board**." (General **Manager Merrett** to the General Chairman.)

The letter **agreement** was signed and returned to the Carrier by the General Chairman on March 23, 1982, and Claimant returned to Carrier's service on April 7, 1982. In consideration of the letter **agreement** of December 16, 1981, we will not order Claimant restored to service as a crew dispatcher. Furthermore, we will not allow any **compensation** beyond December 16, 1981. Any **time** lost by the Claimant beyond that date was not caused by the Carrier. Compensation for the period from July 1, 1981 to and including December 16, 1981, should be computed in accordance with Section (c), Rule 45, of the Agreement.

If in the future the Claimant should attempt to occupy a position for which the Carrier does not **consider him qualified**, the matter may then be handled under the applicable provision5 of the Agreement.

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 **Employes** involved in this dispute are respectively Carrier and **Employes** 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.

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Claim sustained in accordance with the **Opinion.**

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

Attest: Acting Executive Secretary
National Railroad Adjustment **Board**

By *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May 1983.

