

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number 24672
Locket Number MW-24492

Edward M. Hogan, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Louisiana & Arkansas Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Laborer George Williams for alleged failure to comply with instructions of Acting Assistant Foreman F. Tucker was without just and sufficient cause and on the basis of unproven charges (Carrier's File 013.31-242).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered, including holiday pay, beginning September 30, 1980.

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier following a formal investigation held on July 16, 1980, on the charges that Claimant refused to follow instructions of his supervisor. The Organization claims that the investigation was not fair and impartial in that insufficient evidence was presented by the Carrier to substantiate the charge. The Organization further contends that the discipline was excessive, capricious, improper and unwarranted.

The Carrier argues that there was no showing on the record of any arbitrary or capricious act by the Carrier and that the discipline assessed c-t **be** considered as excessive due to the importance of the violation and because of the Claimant's past employment record with the Carrier.

As background, the Claimant had begun his service with the Carrier in April of 1973. In August, 1973, Claimant was subjected to a force reduction and subsequently written out of service for his failure to protect his position and seniority within seven days as required by the then controlling agreement. Claimant **was subsequently re-employed** by the Carrier in April of 1974 as a laborer. In 1976, the Claimant received a thirty day suspension for a incident similar to the claim before us, and he also received a warning letter for the use of profanity against a supervisor. In 1977, Claimant was **dismissed** from the service of the Carrier for reporting to **work** in an intoxicated condition. Although this dismissal was found to be warranted by this Board (see Award #22619), the Claimant was restored to service without pay for lost time in November of 1979.

The claim before this Board arose out of an incident that occurred on June 10, 1980. Claimant was charged for violations of Rules B, **E** and N. The Carrier had been unsuccessful in securing notice of the investigation upon the Claimant until mid-July, 1980. Although the investigation was held on July 16, 1980, the Claimant and the Organization were assured by the Carrier's hearing officer that the record would **be re-opened** if either the Claimant or the Organization had additional materials to be submitted. No such submissions being received, the Carrier on September 30, 1980, notified the Claimant that he was being dismissed from its service, the charges having been found substantiated from the record.

This Board is not a "trier of **fact**". We will not overturn determinations of a hearing officer in like cases where the issue before us is that of conflicting evidence on the record or whether there **was sufficient** evidence on the record to support the Carrier's finding. As in the Claimant's previous case before this Board (Award #22619), we uphold the findings as adduced by the Carrier.

However, this Board, while not unmindful of its obligation in reviewing the level and assessment of discipline, finds itself troubled by the level of discipline assessed in this matter after a thorough review of the transcript. This Board has traditionally, and we support, that if an employee has a disagreement with a legitimate instruction from a supervisor as to work and/or duties, the employee must first perform or implement such instructions and then grieve the matter. (See Third Division Awards 8512, 8712, 11238, 12687, 14067, 16286, 17153, 20030, 20066, 21778 and 21788). Further, while upholding the general principle that this Board will not substitute its judgment over that of the Carrier, and that the employee's past performance record can **be** utilized in the determination of discipline, our examination of the record does not find the usual and typical **"intent to ignore"** a legitimate instruction from a supervisor which is commonly **and** usually present in these types of cases. While upholding the principles previously enunciated, we are of the belief and opinion that the Claimant should be granted **"one last chance."** We must, **however**, admonish the Claimant that we take this action only because of the fact presented to us in this particular cause, and that **we** firmly uphold the long standing precedents of this **Board** cited beforehand.

We will award that Claimant be restored to service with seniority and other rights unimpaired, without any compensation for time lost while out of service.

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 was excessive.

A W A R D

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

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

Attest:


Nancy J. Davis - Executive Secretary

Dated at Chicago, Illinois this 24th day of February, 1984

