

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Burlington Northern Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Railroad Company (BN):

Claim on behalf of Foyice Clark, Jr. for reinstatement to service with all time lost and all reference to this investigation stricken from his personnel record, account of Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 54, when it assessed him with excessive discipline in letter of October 1, 1986. General Chairman's file F-86-428. Carrier file ESI-87-a-22C."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant appeared before the Board on December 6, 1988, represented by counsel.

Claimant was a Signal Crew Foreman for 5 years, with nine and one-half years total service, on September 15, 1986. On that date he failed to report for duty and did not call in. On that afternoon his wife called his Supervisor to say that the Claimant was in court.

On September 16, 1986, Claimant also did not report for work and again did not call in. On September 17, 1986, he again failed to report and did not call his Supervisor until the evening of the 17th when he left a message on the Supervisor's recorder.

Clearly, Claimant was in violation of Rule 532 pertaining to reporting for duty and the record substantiates this. On October 1, 1986, he was dismissed from service on the basis of the facts above and in consideration of his record of "violations of similar nature." The sole issue before the Board is whether the facts contained in the record justify the severity of the penalty. In its submission, and in Claimant's presentation at the hearing, a strong case has been made for mitigation on the basis of severe emotional problems in the Claimant's personal life during the September 15-17, 1986, period.

Claimant's obligations are well stated in Second Division Award 6710 cited in Carrier's submission:

"Every employee has an obligation and a duty to report on time and work his scheduled hours, unless he has good and sufficient reason to be late, to be absent, or to leave early. Those reasons must be supported by competent and acceptable evidence. No employee may report when he likes or choose when to work. No railroad can be efficiently operated for long if voluntary absences are condoned."

As a Foreman as well as a veteran employee, Claimant was well aware of his obligations. In addition, his record shows a 5 day suspension in 1983 for failure to follow orders and a suspension from August 19 to September 3, 1985, for failure to protect his assignment.

By letter dated May 8, 1987, the Carrier indicated its willingness to reinstate Claimant on a leniency basis, but that he would be restricted to working under the direction of a Foreman. This offer was refused.

It has been pointed out many times that, where there is competent evidence to support charges against an employee, the Board has no authority to substitute its judgement for that of the Carrier as to the appropriate penalty simply because it may disagree or might have assessed a different penalty under the circumstances. In order to modify a penalty the Board must determine that it was arbitrary, capricious or excessive. (Third Division Award 24386)

It is equally well accepted that "employee discipline should be progressive and viewed as corrective in nature, not punitive." (Second Division Award 8157) The sole issue for the Board in the present case is whether discharge is excessive given the record and the previous disciplinary experience of the Claimant. After a further review of these factors, the Board concludes that discharge is excessive in this case.

With only two relatively minor instances of suspension over a 9 1/2 year career, we cannot agree that discharge for a next offense of failing to protect an assignment meets the test of progressive discipline. The record does not indicate an employee who is habitually absent or who has indicated that he is beyond correction. We also believe that there are sufficient mitigating circumstances in the record to justify a modification of the penalty.

As held in Third Division Award 16800:

"Dismissal from service is an extreme and severe penalty and whether or not such penalty is justified depends upon many facts and circumstances in each case...

From a careful examination of the record and the evidence adduced at the hearing we are of the opinion that there is sufficient mitigating circumstances in this dispute which warrants us to interfere with the penalty imposed by the Carrier in this matter, to wit, dismissal from its service. Under all the circumstances in this case we hold that the discipline assessed is excessive, unreasonable and an abuse of discretion on the part of the Carrier."

Despite the Board's intent to mitigate the penalty of discharge, we trust that the Claimant fully understands and accepts his obligation to be available on a full time basis and, particularly, his obligation to follow the rules regarding calling in or seeking appropriate leave in advance should circumstances make it impossible for him to be present for duty. Any similar deviation from either of these obligations may be taken as evidence that he is beyond corrective efforts and subject him to discharge.

Given the fact that neither the record nor previous discipline can support permanent discharge, the discharge will be converted into a suspension without pay for time lost and Claimant will be reinstated as a Foreman with seniority and other rights but without back pay for time lost. Reinstatement will also carry with it the condition that he work under the close supervision of a more senior designated official for one year from date of reinstatement.

A W A R D

Claim sustained in accordance with the Findings.

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Award No. 27706
Docket No. SG-28274
89-3-88-3-39

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of February 1989.