

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

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

1. Carrier violated the purpose and intent of the Clerks' Rules Agreement when it dismissed Employee John Dieringer.

2. The Carrier shall now be required to compensate Employee John Dieringer, Milwaukee, Wisconsin, for all loss suffered from January 25, 1956 to February 15, 1956.

OPINION OF BOARD: Claimant John Dieringer was dismissed from service on January 25, 1956 and reinstated on February 15, 1956. The undisputed facts are that he was filling Caller Position #82 from 11:59 P.M. to 7:59 A.M. Wednesday through Sunday. He also had been assigned Caller Position #80 from 3:59 P.M. to 11:59 P.M. on Thursday. On January 12, 1956 he ended his tour of duties at 7:59 A.M. and was to report back to work at 3:59 P.M., that he telephoned the yard caller immediately prior to his scheduled starting time and informed him that he had overslept and would be a few minutes late and that the yard caller took care of his duty until he arrived.

Carrier Member argues strenuously that claimant is charged with other acts of violation of rules and is before this Board in Award 9480. The superintendent in his examination of claimant also indicated that there were other violations on the part of claimant, but he did not put them in the record. None of these incidents of violation, except the one which was the immediate cause of his discharge herein, are in this record and therefore cannot be considered in this hearing. There is no evidence, either oral or documentary, of any other violation.

It seems to be established that this Board should not substitute its judgment for that of the carrier in matters of discipline, unless its action has been arbitrary, capricious, in bad faith, or based on bias or prejudice or on an

abuse of discretion. It is apparent from this record that the decision of the carrier to discharge claimant was based on matters outside this record and that its action was capricious, arbitrary and unreasonable, and the claim must be sustained.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 1st day of December, 1960.

DISSENT TO AWARD NO. 9659, DOCKET NO. CL-9502

Award 9659 sustains the instant claim alleging that Carrier's "action was capricious, arbitrary and unreasonable" because its decision "to discharge claimant was based on matters outside this record". The "matters outside this record" refer to Claimant's previous service record, which Carrier took into consideration in determining the amount of discipline to assess after the record of investigation had proven Claimant's guilt of the immediate charge.

The Carrier Member cited and argued that it was proper to consider Claimant's previous service record, not for the purpose of determining guilt of the immediate charge, which Claimant had admitted, but to determine the amount of discipline to be assessed. In support thereof, he cited Award 1599 among others. No awards were or could be cited to the Referee contrariwise. In failing to follow these precedent awards without showing palpable error therein or any reason whatsoever therefor, Award 9659 itself is in palpable error and we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

**LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT
TO AWARD NO. 9659, DOCKET NO. CL-9502**

There is not the slightest scintilla of evidence in the record that Carrier considered claimants previous service record in determining the amount of discipline to be assessed after the investigation had been held, as contended by the Dissenters. This defense was raised for the first time before the Board by Carrier Member in Panel Argument, based apparently on a statement by the conducting officer that "we do not make a habit of holding an investigation with an employe the first time he is late." There was no evidence introduced at the investigation that claimant had ever been late for work previously, nor that he had been so charged and investigation held thereon, which would have been necessary before such could have become a part of his personal record. If this was not true, Carrier could find an employe guilty on a minor charge and dismiss him for something else upon which he had never been charged, and thereby deny him the right of due process. This would clearly allow the Carrier to evade the provision of Rule 22 (a), providing:

"An employe * * * shall not be disciplined or dismissed without investigation and prior thereto the employe will be notified in writing the precise charge, * * *."

Therefore, the only record that can be considered by the Carrier in the assessment of discipline or dismissal is that upon which a proper investigation has been previously held.

The dissenters attempt to confuse the issue by making the broad statement that "no awards were or could be cited to the Referee contrariwise" to awards cited by them in support of their contention that a carrier may consider an employe's past record in such cases. This issue not having been raised by the Carrier on the property and made a part of the dispute, it could not be raised for the first time here by a Carrier Member in Panel Argument. See Awards cited in my Dissent to Award 9189 and "Answer" attached thereto on this subject.

This issue not having been raised by Carrier, there was no necessity for me to present any awards to the Referee on the subject. It was not pertinent to a determination of the dispute prior to the adoption of the award and neither is it pertinent here. The record clearly showed that Claimant's discharge was based on matters outside the record, which constituted arbitrary and capricious action on Carrier's part. The Dissenters desperate attempt to change the record to fit their convenience, will not change the facts. Their feeble attempts to do so, however, shows that they are fully aware that Carrier's actions were capricious, arbitrary and unreasonable.

The following awards bring into proper perspective the governing factors involved here. Award 2895: "There were other derelictions of duty mentioned in the statements. They were not included in the charge nor proved but were abandoned." (Emphasis ours). Award 2991: "We are bound by the evidence given at the hearing". Award 6062: "* * * we are limited to a consideration of

the evidence adduced at the investigation or hearing." Award 6783: "No disciplinary action was taken, although hearings were held, in connection with any of the incidents related, * * *. The addition of several zeros does not give a number. Only if a finding of negligence had been made in these cases could the accumulative effect be contended to result in a conclusion that Claimant was an unsafe employe." (Emphasis ours). Award 5788: "If evidence is to be used and relied upon by the Carrier it should and must be produced at the hearing."

/s/ J. B. Haines
J. B. Haines
Labor Member

The Dissent is based upon false factual assumptions and is untenable.