Award No. 10877
Docket No. TE-12960

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Florida East Coast Railway Company, that:

1. Carrier improperly dismissed H. A. Bruns from the service without just cause.

2. Carrier shall reinstate H. A. Bruns to his former position with all rights unimpaired and with pay for all wages lost.

OPINION OF BOARD: H. A. Bruns, Claimant herein, entered the service as Telegrapher on July 29, 1955. He was suspended from duty on February 23, 1961, and his services terminated on April 3, 1961. The Claimant contends that the Carrier improperly dismissed him from the service without just cause.

The dispute here rests almost entirely on procedural questions. There is comparatively little controversy over the facts involved.

On the first day of October, 1927 the Carrier prescribed a set of rules, Circular No. 1, for the discipline of the employes which provided among other things, as follows:

"Effective October 15, 1927, discipline by actual suspension with loss of pay to the above-named employees will be abandoned. Thereafter, except in cases necessitating dismissal from the service, discipline will be applied by reprimand or by demerits entered against records of employees, both of which may be cancelled by subsequent good service as hereinafter stated.

Hereafter, efficiency will be maintained by reprimand, demerits, or dismissal from the service."

* * * * *

"An accumulation of ninety (90) demerits will be taken as evidence that the employee is not rendering satisfactory service, and suspension from duty will follow, at which time the entire record will be reviewed and such further action taken as the circumstances warrant."

Under these rules and prior to July 7, 1959, the Claimant had acquired 90 or more demerits and was removed from the service; later on July 21, 1959, he was returned to the service with a balance of 50 demerits against his record; subsequently to that time he had acquired some more demerits and for an incident that occurred on November 30, 1960, on the 30th day of January he was given 10 additional demerits so that on February 2, 1961, there stood against his record in excess of 90 demerits. On January 25, 1961 the Claimant had written, as follows: "I take full responsibility for this error and waive right to formal investigation" and admitted later that all demerits and reprimands he had received were his — by his accepting responsibility and waiving his rights to formal investigation.

Claimant was later notified that he was charged with having accumulated ninety (90) or more demerits and told to report for investigation on February 9, 1961, later rescheduled to February 12, 1961. On February 23, 1961, the Claimant was advised that the investigation had disclosed the demerit entries were correct, that he had not been rendering satisfactory service; that he was out of service subject to his right to appeal with respect to the demerits entries (ten (10) assessed on January 30, 1961) which had not become closed under the Agreement.

This Board has consistently recognized the right of Management to take disciplinary action as necessary to effect operation of the railroad. The freedom of action of the Carrier can be restricted only by the terms of an effective Agreement.

It is the claim of the Petitioner that Rule 22(a) of the Agreement effective August 1, 1948, supersedes the disciplinary rules of the Carrier (Circular No. 1) effective January 1, 1947:

"Rule 22

"Discipline

(a) An employe whose application has been approved in accordance with Rule 32 will not be disciplined or dismissed without first being given a fair and impartial hearing, except in cases in which the Management considers the offense sufficiently serious the employe involved may be suspended pending hearing and decision, or when the employe admits responsibility in writing and waives hearing. Such waiver of hearing will not be used in case of dismissal."

It is the contention of the Claimant that the Carrier imposed what it considered to be the ten fatal demerits without a hearing and that Rule 22 specifically prohibits the use of a waiver of hearing where dismissal is involved; that by so doing Carrier waived any right to dismiss the Claimant.

The Carrier also relies on Rule 22(a) heretofore cited and on Rule 22(c) which is as follows:

> "(c) If an employe considers himself unjustly disciplined, or is dissatisfied with the decision referred to in Paragraph (a) of this Rule, he has the right to appeal in succession up to and including the highest official designated by the Management to handle such cases, provided written notice of appeal is given the official rendering the decision appealed from, within twenty (20) calendar days from the date of the issuance of the decision. This appeal may be made by himself or his duly accredited representative and shall be governed by the provisions of Rule 23. If no such an appeal is made within that time the case will be considered closed and thereafter barred."

It is the contention of the Carrier that after the ten (10) demerits were assessed against him on January 30, 1960, the Claimant had been told he was out of the service subject to his right to appeal with respect to those demerit entries which had not been closed under the Agreement; that no appeal was taken within twenty days and any question in connection with the case became closed and barred under Rule 22(c); that since the time for an appeal had expired no question could be raised as to Claimant's having ninety (90) or more demerits and his services were terminated.

It must be borne in mind that Claimant was charged with having accumulated ninety (90) or more demerits and being subject to removal from service under the provisions of Circular No. 1. At the investigation held on February 12, 1961, the Claimant made the following statement, "I recognize what is in the record, and to my knowledge it is true and correct and I have nothing to say in behalf of myself for such handling of situations that should give me such a record."

The Claimant had the right to appeal from the assessment of the last ten demerits. This he failed to do within the twenty days required in Rule 22(c). Thus, none of the assessed demerits were challenged and they were in excess of ninety (90) demerits.

An analysis of the record clearly demonstrates there was no abuse of discretion by the Carrier in dismissing Claimant and in this instance Carrier's Circular No. 1 was not superseded by nor inconsistent with Rule 22 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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1962.