Award No. 13095
Docket No. TE-12047

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Clinchfield Railroad that:

1. The action of the Clinchfield Railroad Company was discriminatory, unreasonable and in abuse of the Carrier's discretion when it suspended A. O. Heffner, employed as agent-operator at Chesnee, South Carolina, from service for a period of thirty days, beginning November 2 through December 1, 1959; and

2. A. O. Heffner shall be compensated for the time held out of service and his record cleared of the charges.

OPINION OF BOARD: On October 7th a Carrier Officer reported that Claimant, A. O. Heffner, had absented himself from his duties as agent of the Chesnee, South Carolina Station for a period of about 40 minutes without permission. It was also reported that the station door had been left open during his absence. As a result, Claimant was suspended from service for a period of thirty (30) days. Claimant requested a hearing which was held. The discipline imposed was not changed after such hearing. Claimant now asks this Board to review Carrier's action and asks to be compensated for the time held out of service.

Our scope of review in discipline cases is somewhat limited. We can only revoke a discipline imposed if we are unable to find any reasonable or substantial evidence in the record to support Carrier's contention that one or more of its rules or regulations, reasonably prescribed, and in effect, have been violated by the disciplined employe. If such evidence is found, our scope of review becomes perhaps even more limited in regard to the amount or type of discipline imposed. The test is not whether we, acting in the capacity of an officer of the Carrier, would have imposed a less stringent discipline as adequate under the circumstances. We can only remedy a discipline which is, in our considered opinion, based upon a careful examination of the entire record, unreasonable and unjustified.

With this scope in mind, we turn to a review of the record before us. In doing so, we are of the opinion that the evidence developed is not substantial

enough to reasonably support Carrier's finding that Claimant was guilty of an infraction of rules and regulations then in effect.

Carrier's discipline is apparently based upon a finding that Claimant violated one or more of the following rules:

"RULE 920

(b) Absenting themselves from duty, . . . without permission, is forbidden."

"RULE G-1

Disloyalty, dishonesty, desertion, intemperance, immorality, vicious or uncivil conduct, insubordination, incompetency, **wilful neglect**, inexcusable violation of rules resulting in endangering, damaging or destroying life or property, making false statements, or concealing facts concerning matters under investigation, will subject the offender to summary dismissal."

However, when the evidence in the record is carefully examined, they do not support a finding that either of these rules were violated. The unrebutted evidence discloses that Claimant was not "absent from duty" when he went to the post office. Such trips are a part of his duties. Even his assistance to the Railway Express Agent, which was not the primary purpose for his absence, was presumably beneficial to the Carrier (owner). In addition, the unrebutted evidence indicates that the common practice throughout the system since the installation of CTC was to almost completely ignore the former practice of obtaining permission from the dispatcher before short absences from the Agency. There was also evidence that Mr. Britt, a Carrier officer, was, or should have been, familiar with this practice. Mr. Timberman's testimony established the admitted absence, but did not establish that Claimant was absent from duty. Neither did it negate the common practice of short absences without the dispatcher's permission. The only other evidence, correspondence and testimony of Heffner and testimony of Letterman, certainly didn't establish a violation of Rule 920 (b).

We are also unable to find any evidence to reasonably support a finding that Rule G-1 has been violated. Carrier's ruling appears to be based upon a finding that Claimant was guilty of "incompetency or wilful neglect . . . resulting in endangering, damaging or destroying life or property", in leaving the door unlocked during his absence. However, the uncontroverted evidence is that there were other Carrier employes present during his absence; that he had previously acted in a similar manner when Mr. Britt was present; that there was nothing of any unusual value which could be taken from the station; and, that he had never suffered any loss in more than 22 years' service. Timberman's testimony certainly did not rebut any of this testimony, but actually confirmed the presence of another Carrier employe during Claimant's absence. Even from a very broad viewpoint, we are unable to say that this constitutes incompetency or wilful neglect which endangered or damaged property or life.

We are of the opinion that Carrier cannot suddenly, after permitting or condoning a practice for several years, punish an employe for such practice. The record reveals that there are several rules and regulations which are slightly or largely ignored throughout the system, with Carrier's knowledge and apparent consent. To allow Carrier to suddenly punish employes for such

commonly accepted deviations, without warning that henceforth such rules were to be strictly enforced, would be to allow Carrier to act arbitrarily and capriciously. Hesitant as we are to interfere with discipline, we cannot allow it to be arbitrarily imposed.

Inasmuch as the evidence does not reasonably support a finding that Carrier's rules have been violated by the Claimant, we need not pass on the reasonableness of the penalty imposed for such alleged violation. Since such penalty was improper, the claim must be sustained in accordance with Rule 10 (e).

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 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

The Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1964.