



Award No. 16005

Docket No. TE-15025

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)**

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Toledo, Peoria & Western Railroad, that:

1. Carrier's discharge of G. L. Hessing, Agent, Sheldon, Illinois, from its services effective August 29, 1963 was improper and an unwarranted assessment of discipline.

2. Carrier shall reinstate G. L. Hessing to the position from which discharged with all rights unimpaired and pay him for all time lost.

OPINION OF BOARD: Claimant is the Agent at Sheldon, Illinois, which is monthly rated with a regular work week from Monday through Saturday. Following an investigation held on August 24, 1963, Claimant was discharged from the service of Carrier for being absent without proper authority on Saturday, August 10, 1963 in violation of TP&W Transportation Rules P, 713, and 1017. The initial decision of Carrier was appealed on the property, and Claimant was reinstated to service with seniority rights unimpaired but without pay for time lost, which amounts to one hundred and thirty (130) days' pay. Petitioner here contends that the reduced penalty invoked by Carrier was too severe under the circumstances involved in this dispute, and that Claimant should be reimbursed for all time lost.

Carrier contends that the final discipline invoked was proper, as Claimant admitted violating the applicable rules as charged during the investigation, and that it is not the function of this Board to substitute its judgment for that of Carrier as to the appropriate measures of damages. Furthermore, Carrier urges that the claim must be denied because the dispute was handled on the property on a leniency basis without any objection to the manner in which said claim was processed.

Petitioner suggests that Claimant had worked less than a full eight hours on the sixth day of his work week without prior objection or complaint from Carrier for at least six years, relying upon language found in Rule 11, Section 3, paragraph (b) of the Agreement between the parties, which is as follows:

"... If not worked on the sixth day or if worked less than a full day on such sixth day there shall be no reduction in compensation. . . ."

Therefore, Petitioner avers that although Claimant admittedly violated Carrier's rules, compliance had been effectively waived through Carrier's failure to require compliance over the years. In support of this position, numerous prior awards were submitted by Petitioner in which penalties either were reduced or revoked by this Board, where mitigating circumstances were found to exist.

Careful review of the entire record discloses that Claimant was familiar with Carrier's rules, and that he failed to seek release from the Dispatcher even though there was ample work for an eight hour shift on the date of claim. Moreover, Carrier already has considered mitigating factors, such as Claimant's twenty-two (22) years of service with Carrier, and reinstated Claimant to his former position. Throughout consideration of this dispute on the property, Petitioner was essentially concerned with the measure of discipline, and did not challenge Carrier's right to penalize Claimant in some manner. This Board consistently has held in similar circumstances where, as here, a claim is handled on the property ultimately as a request for leniency that we have no authority to entertain the claim unless the penalty invoked is clearly excessive. Awards 11914, 14601, 14800, and others.

The record reveals that Claimant violated applicable rules of Carrier and was admittedly absent from duty without proper authorization. The original penalty invoked by Carrier already has been reduced because of mitigating circumstances. No question of procedural defects nor a denial of Claimant's guilt are involved, and we will not upset the punishment finally decided upon by the Carrier even though the revised sanction may be greater than that which the Board might choose. Award 14601, 14581, 14391, 12985 and others.

Accordingly, the Claim will be denied.

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 Agreement was not violated.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1967.

DISSENT TO AWARD 16005, DOCKET TE-15025

I must disagree with the majority members in this award because they failed to give proper consideration to the basic issue—a question of simple American justice which the Agreement intends to preserve.

Claimant worked a position which, under that Agreement, is not necessarily filled a full day on Saturdays. For six years he worked it less than a full day on Saturdays without objection or complaint from the Carrier. Then, without warning, Carrier spied upon him and charged him with violating a rule which prohibits absence from duty without permission.

Carrier's failure to act for six years was bound to be interpreted as an understanding that claimant was not required to be on duty a full day on Saturdays. Thus, he was lulled into a sense of security, believing he was doing no wrong. For his trust in the basic right to be warned he lost one hundred and thirty days' pay, a tragedy for the employe.

Failure of this Board to give effect to the well-known principle involved constitutes error, and I dissent.

J. W. Whitehouse
Labor Member