Award Number 17595

Docket Number CL-18209

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Gladden, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6554) that:

1) Carrier's action in dismissing G. K. Rutkowski from service was arbitary and unjust. The penalty assessed was harsh, excessive and out of all proportion for an employe who was late for work on September 2, 1967 and September 9, 1967.

2) Carrier shall now be required to reinstate employe G. K. Rutkowski on his Train Clerk Relief Position No. 16 in Seniority District No. 22 with all rights unimpaired and compensate him for all losses sustained until he is returned to service.

OPINION OF BOARD: This is a discipline case. Claimant was dismissed from service for failure to properly protect his assignment on two occasions.

The Carrier contends that the claim is barred in that it was not timely filed in accordance with Rule 36 1(a). This Rule is taken from Article V of the August 21, 1954 National Agreement. The first sentence of Rule 36 1(a) reads as follows:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

Claimant, after investigation as requieed in Rule 22 of the controlling agreement, was dismissed on September 25, 1967. He timely followed all procedures for appeal as provided in Rule 22 until the highest officer of the Carrier on November 30, 1967 made a "final decision" sustaining Claimant's dismissal.

On December 5, 1967 a claim for reinstatement and compensation was filed with the proper Carrier official as is provided in Rule 36 of the existing agreement but more than 60 days after the initial notice of dismissal dated September 25, 1967.

Rule 22 was a part of the controlling agreement when Rule 36 was adopted by the parties following the National Agreement of August 21, 1954. No

change or deletion of Rule 22 was made at that time and it remains a part of the existing agreement.

We must therefore construe each of the Rules in light of the existance of the other. Rule 36 is a general rule and deals with "all claims or grievances" while Rule 22 applies only to procedures to be followed where the carrier has exercised its right to discipline or dismiss an employe.

In the instant case the "final decision" provided in Rule 22 was not made until more than 60 days after the initial decision of September 25, 1967.

Rule 22(f) of the Agreement reads as follows:

> "(f) If the final decision decrees that charges against the employe were not sustained the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost less any amount earned in other employment."

We do not believe it a proper construction of the two rules to require Claimant to abandon his remedy under Rule 22 and require him to initiate a new claim under Rule 36 when he has not obtained a final decision from the Carrier with 60 days of the initial action taken by the Carrier under Rule 22. Nor do we believe it is the intent of the parties that an employe maintain concurrent claims or grievances under Rules 22 and 36 arising from the same act of the Carrier; seeking the same relief and from the same officer of the Carrier.

We accordingly find that the "occurrence" referred to in 36 1(a) was the "final decision" made November 30, 1967 dismissing Claimant, and that Carrier's contention the claim is barred is without merit.

The Carrier next contends that a letter dated September 26, 1967 purporting to substantiate testimony of Claimant is inadmissible.

We agree that the letter which was submitted after the conclusion of the investigation, is inadmissible. Award No. 15574 (Ives).

We now turn to the merits of the case. Claimant was late to work on September 2, 1967 and September 9, 1967. On the ocassion of September 2, 1967 Claimant called the chief clerk to advise of his expected lateness.

We concur with the Carrier that the admission of the Claimant of his guilt makes it proper to consider his past record in fixing the penalty to be imposed. Award No. 4479 (Carter) also Award No. 6171 (Wenke).

We do not however believe that an employe's past record may be used to exclude from consideration the degree and seriousness of the violations made the subject of the pending action, in the instant case, being late for work on two occasions (30 minutes and 20 minutes respectively).

While it is well established that this Board will not substitute its judgment for that of the Carrier in matters of discipline unless its action has been arbitrary, harsh, or excessive, so as to render such action unreasonable, we believe this is the case where the Carrier has summarily dismissed Claimant for being less than thirty minutes late on two ocassions, even while taking into consideration his two prior investigations in less than one year.

We find that a proper penalty for the violations made the primary basis for dismissal, after considering Claimant's prior record is suspension from service without pay for a period of 90 days.

Claimant is therefore suspended from service, without pay for a period of 90 days from September 25, 1967. Carrier is required to reinstate Claimant with all rights unimpaired, and, subject to the terms of the above suspension, compensate him for his losses sustained until he is returned to service in accordance with the provisions of Rule 22 (f) of the existing 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 the discipline imposed was excessive.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.

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