

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19871
Docket Number CL-20124

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Western Weighing and Inspection Bureau

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7271)
that:

(a) The Company violated the Rules Agreement effective September 1, 1949, as amended, particularly Rules 20, 21, 22, 23, 24 and 25, when it assessed discipline of dismissal on Inspector Robert E. Donnelly at Des Moines, Iowa, on May 11, 1971.

(b) Claimant Robert E. Donnelly's record be cleared of the charges brought against him May 11, 1971.

(c) Claimant Robert E. Donnelly be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: Claimant, a Fruit and Vegetable Loss and Damage Inspector for the Company, had two years of service at the time of the incident involved in this matter. On April 15, 1971 he was instructed to begin his work day at printing company's office at 8:00 A.M. (his normal work day was from 8:00 A.M. to 4:30 P.M.). He telephoned the office of his supervisor at 9:20 A.M., that morning indicating that he was sick; he had been observed reporting to the assigned place of work at 8:45 A.M. and shortly thereafter leaving. He had been ill for part of the previous day.

On May 11th Claimant was suspended and charged as follows:

- "1. Failure to protect your assignment, April 15, 1971, between 8:00 A.M. and 9:20 A.M.
2. You were absent without authorization on the date and time above.
3. You were charged with insubordination for refusing to acknowledge my letters of April 20, 1971 and April 28, 1971."

Subsequent to the investigatory hearing Claimant was dismissed from service.

Petitioner first raises the issue of the fairness of the investigation, and appropriateness of the hearing officer serving in that capacity. It must be noted that these issues were not raised on the property and hence cannot be considered at this stage of the proceeding in accordance with the long standing practice of the Board; it should be noted in passing, however, that the record does not support the position taken by Petitioner in any event. An additional argument is made that the Company improperly introduced evidence at the investigation dealing with Claimant's past record. We have held that such information may not be used to determine guilt or innocence but is appropriate in consideration of the discipline to be imposed.

With respect to the charges themselves, we find that the Company's conclusion concerning the unauthorized absence cannot be challenged. The record indicates that Claimant's defense of illness does not adequately explain the lateness of the call to the office nor are the recollections of the Company's witnesses refuted. We conclude that there was substantial evidence in support of the conclusion reached.

On the issue of insubordination, however, we have a much more ambiguous situation. Claimant never received the letters in question, until May 11, 1971, but the record indicates that he was verbally informed of their contents previously. Whether or not Claimant's failure to pick up the registered letters was deliberate is conjectural; it is not conjectural, however, to view his verbal refusal to acknowledge the instructions as insubordinate. At best, his attitude towards supervision left something to be desired. Therefore we do find that the Company supported its charges to find a degree of insubordination on the part of Claimant.

As we have said on prior occasions, it is within the Board's province to determine "if the degree of discipline imposed was reasonably related to the seriousness of the proved offense" (Award 19797). Without condoning insubordination or unauthorized absences, we do not find that the facts in this case warrant the imposition of dismissal from service; the past record of Claimant does not support this extreme penalty either. (See Awards 11912, 11457 and 14348 among others). Accordingly, we conclude that Claimant should be restored to service with all rights unimpaired but without back pay.

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 discipline imposed was excessive.

A W A R D

Claimant shall be restored to service with all rights unimpaired but without compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July 1973.

CARRIER MEMBERS' DISSENT TO AWARD 19871, DOCKET CL-20124

(Referee Lieberman)

For the reasons fully stated in the memorandum which the Carrier Members submitted to the Referee during the panel discussion of this case, the claim is clearly invalid and should have been denied.

We dissent.

G. L. Raylor

W. M. Braidwood

A. L. Carter

W. B. Jones

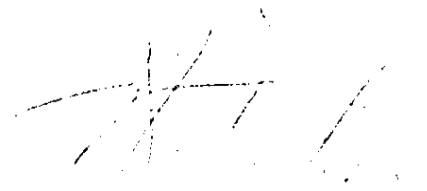
G. M. Youkin

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT TO AWARD 19871 (DOCKET CL-20124)

Disputes submitted to this Board are adjudicated upon consideration of the facts and evidence in the official record as detailed and explained by the parties to the dispute, not upon Carrier Member Memoranda.

Carrier Member Memoranda, regardless of length or sophistry, are not a substitute for, nor do they change, either the record or the facts.

The "Dissent" has no bearing on the validity of the Award.



J. C. Fletcher,
Labor Member

8-28-73