

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20578
Docket Number CL-20434

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees

PARTIES TO DISPUTE: (

(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7396) that:

1. Carrier violated the Clerks' Rules Agreement when it dismissed Mrs. Virginia I. Winzen from its service, effective November 2, 1972, on the basis she was guilty of all charges made, without giving reasonable consideration to the testimony given in the transcript of investigation, and the objections made by her representatives.
2. Carrier's action was arbitrary, harsh and an abuse of discretion.
3. Carrier shall now be required to reinstate Mrs. Winzen to service with all seniority rights, vacation rights, etc., and compensated for any and all losses sustained beginning November 3, 1972, until returned to service.
4. Claim to bear a compound interest rate of 1% per month starting with the sixtieth day after date of dismissal and continuing each month thereafter.

OPINION OF BOARD: The Claimant's absence from work on October 13, 1972 led to charges of being absent from duty without permission, failure to protect her assignment, and being insubordinate in connection therewith. Following hearing and findings of guilt, she was disciplined by dismissal from service effective November 2, 1972.

The Employees seek to have the discipline vacated or modified on the grounds that the charge was not sufficiently precise and that the supreme penalty of permanent dismissal was not justified by the infraction and its attendant circumstances. We find no defect in the statement of the charge, so we shall proceed to review the merits of the case.

The hearing record shows that the October 13 absence was preceded by an exchange of four letters, entered in the hearing record as Exhibits

1, 2, 3, and 4. Under date of October 5, 1972, the Claimant requested a day's leave on October 12 "because the Company my husband works for is having a two day meeting and the wives are expected to be there." This request was declined by Mr. C. T. Ramsey, Office Manager, in a letter dated October 6 and handed to the Claimant at about 4:25 p.m. as she was preparing to go home from work. The following Monday, in a letter dated October 9, addressed to Mr. E. C. Kerschen, Manager Revenue Accounting, the Claimant requested to be advised of the reason for declination of her request for a one day leave. Mr. Kerschen replied on October 12, 1972 that the request was declined in view of her prior leaves of absence in 1972 (five days in August and two in September) and in order to keep her work current. The Claimant received this letter at about 12:20 p.m. on October 12. At about 4:25 p.m. on the same day, the Claimant spoke to Mr. Harris, one of her supervisors, telling him that it was impossible for her to work on October 13 as she had to go to her husband's business meeting. Mr. Harris could not authorize the absence, so he phoned Mr. Ramsey, spoke briefly, and then handed the phone to the Claimant. In this talk with Mr. Ramsey, the Claimant acknowledged receipt of the October 12 letter from Mr. Kerschen and also stated that she would not report for work on October 13. The hearing record showed that the Claimant had been granted leave on at least one prior occasion to make a business trip with her husband and that, including vacation, sickness, and all other reasons, she had been off 28 days during 1972. There was no evidence that any of these absences were without permission or otherwise improper. The hearing record also showed that absenteeism among the 24 or so employees in the Claimant's department amounted to about 29% on October 13; however, no overtime work accrued to another employee by reason of the Claimant's absence on that date.

In appraising these facts and the whole record, we conclude that there is no dispute that the Claimant was absent without permission on October 13, 1972 and thus, there is no doubt that discipline was warranted. We note, though, that the Carrier's reasons for declining the requested leave, as evidenced in the correspondence, were more or less narrowly confined to the Claimant's own personal attendance record and to the importance of her own work. The Carrier's correspondence emphasized the Claimant's prior leaves of absence and the need for currency on her own work. In contrast, however, the Carrier's hearing presentation placed emphasis on the high absentee rate of the entire work force of the department and the need to prevent absenteeism from impairing the overall department from functioning properly. Since the absenteeism of the entire department was obviously a sound reason for needing the Claimant's services on the date in question, and since the Claimant's decision about working that date could have been influenced by this reason, we believe the Carrier should have included this reason in its explanation for refusing her request for leave. We also note that the Claimant's absence did not result in overtime pay to another employee or otherwise cause any disruption in the work

except for a one day delay in its being performed. We conclude therefore that, while the Claimant's absence from work warranted discipline, the Carrier has failed to properly assess the foregoing mitigating circumstances in determining the quantum of discipline. When such circumstances are properly taken into account, there is no doubt that the discipline of permanent dismissal is unduly harsh and excessive for the infraction in this case of being absent one day without permission. Accordingly, we shall award that the Claimant be returned to service without back pay, but with all other rights unimpaired.

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 Employee involved in this dispute are respectively Carrier and Employee 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 of permanent dismissal was excessive.

A W A R D

Claim sustained to the extent that the Claimant shall be returned to work with all rights unimpaired but without compensation for back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 20578

DOCKET NO. CL-20434

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship
Clerks, Freight Handlers, Express and
Station Employees

NAME OF CARRIER: Missouri Pacific Railroad Company

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

After carefully reviewing the petition of the Organization for an Interpretation of Award No. 20578, (CL-20434), and after carefully reviewing Carrier's response thereto, it is concluded that the Organization's understanding of the Award is erroneous.

The subject Award, issued under date of January 17, 1975, vacated the Carrier's permanent dismissal of the Claimant, Mrs. V. Winzen, and required the Carrier to return Claimant Winzen "to work with all rights unimpaired but without compensation for back pay." The Award was received by the Carrier's Director of Labor Relations on January 24, 1975, and the Claimant's date of return to service was February 21, 1975; thus Claimant Winzen was returned to service on the 28th calendar day from the Carrier's receipt of the Award and on the 35th calendar day from the date of the Award.

The Employees seek to have the Award interpreted so that its application will require the Carrier (1) to compensate the Claimant from January 20, 1975 to February 20, 1975, or for such period as the Board deems appropriate, and (2) to treat the Claimant's out-of-service period from November 2, 1972 to February 21, 1975 as "in service" time for the purpose of determining her vacation and sick leave benefits under the Agreement. The Employees submit that this first request is justified because the Carrier did not return the Claimant to service within a reasonable period of time, while the second request is justified by the Award's language stating that the Claimant's return to service was to be "with all rights unimpaired but without compensation for back pay."

The Employees' first request requires consideration of what period of time is allowed for a Carrier to comply with an Award. On the Third Division, the Board's adoption procedure automatically appends to each monetary award an order date or compliance date which is fixed on the middle or the last calendar date of the month which falls nearest to 60 days from the date of the Award. An award which does not award money, such as the instant Award, contains no compliance date under the Third Division's procedure.

In the prior handling of this case, the Employees made no request for and the Award did not contain a provision requiring that the Claimant should be returned to service within a stated period of time. The monetary awards adopted on the date of the instant Award carried an order date of March 15, 1975.

With regard to an award which requires an employee to be returned to service, but which does not provide an express compliance provision to govern the date of the return to service, the award by implication requires that the return be within a reasonable period of time from the date of the award. In determining what is a reasonable time in this case the Third Division procedure must be taken into account, particularly since the Employees did not request a compliance date during the prior adjudication of the dispute. Obviously, the Third Division's procedure would allow a longer period of time for compliance than was actually taken by the Carrier in returning the Claimant to service, and it therefore cannot be said that the Carrier's action ran afoul of the criteria for determining a reasonable time.

The Employees' second request is that, for vacation and sick leave purposes, the Claimant be treated as not having had her service interrupted in 1973 and 1974 despite the fact that she performed no compensated service in those years, and despite the fact that she was not awarded back pay for those years by Award No. 20578. The phrase "with all rights unimpaired" in that Award refers to rights which existed on the date of the Award by reason of the previous employment relationship. That relationship covers the entirety of the Claimant's work history with the Carrier, both in-service and out-of-service time, and the Claimant's rights under the Award flow from such history as it actually exists. Award No. 20578 did not intend to rewrite this history, so as to have the Claimant treated for vacation and sick leave purposes as if she had worked uninterruptedly during 1973 and 1974, and indeed such a construction of the Award would be inconsistent with the Award's denial of back pay for those years.

In view of the foregoing, the Request for Interpretation will be dismissed.

- 3 -

Referee Frederick Blackwell, who sat with the Division, as a neutral member, when Award No. 20578 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1976.