

118

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21335
Docket Number CL-21082

Frederick R. Blackwell, Referee

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

PARTIES TO DISPUTE:

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7781,
that:

1. Carrier's action in suspending employee J. W. Witte from actual service for ninety (90) days was arbitrary, unreasonable and unjust. The penalty assessed was harsh, excessive and out of all proportion for an employee who was tardy for 20 minutes and made an honest mistake.

2. Carrier shall be required to clear the record of employee J. W. Witte, and compensate him for all time lost.

OPINION OF BOARD:

(Following an April 3, 1974 hearing, the Claimant was found guilty of charges (1) that he had improperly performed his clerical duties on March 2, 1974, and (2) that he had failed to protect his assignment on March 5, 1974. Based on such findings of guilt, and a review of the Claimant's past record, the Carrier disciplined the Claimant by actual suspension of ninety (90) days.)

The Organization appeals the discipline on the grounds: (1) that the pre hearing charge was defective; (2) that the facts established in the hearing record do not prove the charges alleged; and that the discipline imposed was of unreasonable severity in relation to all the facts of record.

The charge was stated in a form which is usual in this industry and thus the Organization's first objection is not supported by the record. With regard to the merit question in the Organization's second point, the hearing record contains sufficient facts and evidence to support the findings of guilt. (On March 2, 1974, the Claimant made sixteen (16) mistakes in checking sixty-six (66) cars, which is an error rate approaching 24%. This fact demonstrates improper performance of his clerical duties and affords substantial evidence to support the first count of the charges. The record also reflects that the Claimant asked his wife to phone management to say that he would be late on March 5, 1974 for his 7:00 A.M. assignment, but that she did not call until 7:31 A.M. When the Claimant reported for duty at 7:20 A.M., management had ordered his job to be filled by another employee. Accordingly, the record contains substantial evidence to support the second count of the charges.

(However, there is merit in the Organization's third point and the cited Award No. 13758 is precedential authority for the necessity of a Carrier to keep its review of a past record within proper bounds. In this case, since the past record which the Carrier reviewed was more broad than the Claimant's past disciplinary record, the Carrier's review of the Claimant's record was arbitrary in part and for this reason the claim will be sustained in part.) More specifically, the Carrier's May 31, 1974 letter to the General Chairman reflects that, after determining the Claimant's guilt on the charges, the Carrier reviewed the Claimant's past record before determining the quantum of discipline to be assessed. Such a review is permissible under a host of prior authorities. Also, it was proper for the Carrier to consider the suspensions cited in the May 31 letter (the December 8, 1972 deferred five (5) day suspension and the August 1, 1973 thirty (30) day suspension which also invoked the prior five (5) day deferred suspension), because the Claimant had rights and opportunity to challenge and contest these suspensions under the Rule 22 provisions relating to Discipline and Grievances. However, the May 31, 1974 letter cited five (5) letters of warning or admonition, which are not of a nature which renders them subject to the Rule 22 provisions. (The warning or admonition letters are dated: April 18, 1972, October 13, 1972, November 24, 1972, January 15, 1973, and June 8, 1973.) Consequently, the Claimant had no right or opportunity to challenge and contest the contents of these letters under Rule 22 and the letters' contents in the instant record must therefore be regarded as the unproved, unilateral assertions of the Carrier. Such unproved assertions cannot properly be taken into account in determining the quantum of discipline, and the fact that the Carrier did take such assertions into account was arbitrary and unreasonable. (When the five aforementioned letters are blanked out of the instant record, it is concluded that a ninety (90) day suspension is excessive discipline in light of the offenses proved by the instant record and the prior discipline of thirty-five (35) days actual suspension. Accordingly, the claim will be sustained to the extent that the ninety (90) day suspension is reduced to a sixty (60) day suspension and the Carrier shall be required to compensate the Claimant for time lost as a result of the vacated part of the suspension.)

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;

Award Number 21335
Docket Number CL-21082

Page 3

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated in accordance with the Opinion.

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Claim sustained to the extent that the ninety (90) day suspension is hereby reduced to sixty (60) days and the Claimant shall be compensated for all time lost (30 days) from the vacated part of the ninety (90) day suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

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