

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21355  
Docket Number CL-21364

James C. McBrearty, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, Airline and  
Steamship Clerks, Freight Handlers,  
Express and Station Employees  
{ Kentucky & Indiana Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,  
GL-7964, that:

(1) Carrier violated the Agreement when, without just cause, it dismissed from service Yard Clerk Wilbert Hayes effective Thursday, June 27, 1974.

(2) As a consequence carrier shall:

(a) Promptly restore Mr. Hayes to duty with seniority, vacation, and other rights unimpaired.

(b) Pay Mr. Hayes the amount of wages he would have earned absent the violative action less outside earnings.

(c) Pay Mr. Hayes any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and, in the event of death of Mr. Hayes, pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare and life insurance.

(d) Pay Mr. Hayes interest at the statutory rate for the State of Kentucky for any amounts due under (b) hereof.

OPINION OF BOARD: Claimant entered Carrier's service on April 17, 1968, and was employed as Yard Clerk Relief Vacation No. 2. It is the responsibility of this position to relieve various other employees for vacation, and in this capacity Claimant was scheduled to work on Wednesday, June 19, 1974, on the third "TRICK", from 11:00 P.M. to 7:00 A.M. at L. S. Junction.

On the night of June 19, 1974, Claimant telephoned Carrier at approximately 10:45 P.M. to say that he would be "a little late" because he was having trouble with his old car. Claimant then reported for work between 11:10 P.M. and 11:15 P.M. When Claimant reported for work, the employee he was supposed to relieve was in a phone booth across the tracks calling a train heading north bound into the yard on the Code-a-phone.

Claimant thereupon told the Yardmaster that he had to return to his car to get a pen. While in his car, Claimant fell into a sound sleep, and was not fully awakened until sometime between 1:15 A.M. and 1:30 A.M. Claimant then went into the office, and was told by the Supervisor of Yard Clerks that Mr. Smith, the Yard Clerk whom Claimant was scheduled to relieve, would work through the third "trick" instead of Claimant. Claimant then stayed around until 1:50 A.M., at which time he went out to his car and drove home.

On June 20, 1974, Carrier notified Claimant that there would be an investigation on Monday, June 24, 1974. The purpose of this investigation was to look into the charge that Claimant "failed to protect his assignment as 11:00 P.M. to 7:00 A.M. L. S. Junction Yard Clerk on Wednesday, June 19, 1974."

The hearing was conducted as scheduled on June 24, and on June 26 Claimant was notified by Carrier that he was being dismissed from service for failing to protect his assignment on June 19, and in light of Claimant's past record of similar infractions.

In urging that the claim be sustained, Claimant has cited the following provisions of the Agreement:

"RULE 24

Advice of Charge

An employee, charged with an offense, shall be furnished with a letter stating the precise charge at the time the charge is made and this shall be within 15 days after knowledge of the offense."

"RULE 25

Investigation

An employee who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation only if his retention in service would be injurious to himself or another person. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within ten (10) days after completion of investigation, and copies thereof furnished the Local and General Chairmen."

"RULE 26

Appeals

The right of appeal by employees or their duly accredited representatives in the regular order of succession up to and including the highest official designated by the carrier to whom appeals may be made is hereby established. When appeal is taken, further hearing shall be granted, if requested of the official to whom appeal is made. Time limits for appeals shall be as prescribed in Rule 28."

"RULE 27

Representation

At investigations and hearings an employee, if he desires to be represented, may be accompanied and represented by one (1) or more duly accredited representatives as that term is defined in this agreement. Disputes growing out of personal grievances and/or out of the interpretation or application of agreements or practices concerning wages, rules, or working conditions between the parties hereto, may be handled by the employee affected or one (1) or more duly accredited representatives, first with the immediate supervisory officer and, if not satisfactorily settled, may be appealed by the employee or his representative in the order of succession up to and including the highest official designated by the management to whom appeals may be made."

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"RULE 29

Investigation and Hearing - When Held

Investigations and hearings shall be held when possible at home terminal of the employee involved and at such time as not, so far as practicable, to cause the employees to lose rest or time. Employees shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses."

"RULE 30

Record of Investigations and Hearings

A copy of statements made a matter of record at the investigation and hearing or on appeals will be furnished the employee and the Local and General Chairmen."

"RULE 31

Date of Suspension

If an employee is suspended, the suspension shall date from the time he was taken out of service."

"RULE 32

Exoneration

If the final decision decrees that the charges against the employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be reinstated and paid for all time lost, if any, less amount earned elsewhere during suspension or dismissal."

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

First, however, this Board must examine the allegations by Petitioner that Claimant's guilt was prejudged by Carrier, and that he was deprived of a fair and impartial investigation by virtue of his prior service record being introduced and appended as an exhibit at the close of the investigation. This action is also termed "double jeopardy" by Petitioner.

However, the Board finds that the introduction of an employee's prior record at the investigation does not, per se, impair the fairness and impartiality of the investigation, nor does such introduction constitute "double jeopardy". So long as the issue of guilt is established independently, and the prior record is used only to assist in the determination of the quantum of discipline, the employee's rights are not impaired.

Petitioner next argues that Claimant did show up for his scheduled shift between 11:10 P.M. and 11:15 P.M., after notifying Carrier that he would be late because of car trouble. Moreover, while it is true that Claimant fell sound asleep for two hours, nevertheless, when he was awakened between 1:15 A.M. and 1:30 A.M., he was willing and able to carry out his

duties for the remainder of the third "TRICK". It was Carrier who prevented him from doing so.

After a careful review of the entire record, the Board finds that Claimant did not fail to protect his assignment for the entire third "TRICK", but only for the two hours between 11:15 P.M. and 1:15 A.M.

Petitioner therefore argues that in light of the above argument, the "discipline assessed was extremely excessive, severe, and unjustified."

It is essential that the gravity of the offense, misconduct or dereliction of duty in the setting under the circumstances should determine the severity of the penalty. A review of the entire record and surrounding circumstances (e.g. Claimant had been in Tax Court and Bankruptcy Court for five weeks while working the third "trick" almost every other night) convinces us that Claimant's permanent dismissal from service was not commensurate with the gravity of the dereliction of duty charged against Claimant. We do not in any way condone Claimant's falling asleep between 11:15 P.M. and 1:15 A.M., when he should have been attending to his duties, and we agree that some discipline was warranted. However, we find the discipline administered by Carrier was excessive, arbitrary, and an abuse of managerial discretion. Therefore, we hold that Claimant shall be reinstated to his former position with seniority rights unimpaired. However, Claimant will not be compensated for the time lost since his dismissal, nor shall he be reimbursed for medical or surgical expenses, nor for premium payments he may have made in the purchase of substitute health, welfare and life insurance.

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 imposed was excessive.

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Claim sustained to the extent set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. W. Paulos  
Executive Secretary

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

