

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22843  
Docket Number CL-22761

George E. Larney, Referee

PARTIES TO DISPUTE: (Southern Railway Company  
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(Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees

STATEMENT OF CLAIM: Carrier did not violate the agreement with the Brotherhood of Railway, Airline and Steamship Clerks as alleged, when it declined to permit Mr. C. E. Philo, who had been dismissed from all service of Southern Railway, to displace on General Clerk position 3 (No. 16506) in Carrier's Central Matching Bureau in Atlanta, Georgia, effective May 9, 1978.

Since the agreement was not violated, Mr. Philo is not entitled to eight (8) hours' pay at the rate of \$64.42 per day for each work day beginning May 9, 1978, and continuing, as claimed for and in behalf of Mr. Philo by the Clerks' Organization.

OPINION OF BOARD: On May 5, 1978, Claimant, Charles E. Philo, then the incumbent Supervisor Service Control, an excepted position in the Intermodal Transportation Services Department located at Carrier's General Offices in Atlanta, Georgia was dismissed from all service of the Company. Claimant was notified of this action by letter dated May 5, 1978 and signed by Carrier official B. R. Osborne, General Manager of the Intermodal Transportation Service Department. This letter reads as follows:

"Atlanta, Georgia - May 5, 1978 \*

Mr. C. E. PHILO:

We have had cause to discuss with you your job performance and personal behavior recently and several times within the last twelve months. I have concluded that your attentiveness to service and conduct on the job and with others has not improved as you promised and I had hoped. I believe we have exercised more than due diligence and tolerance with you and you have continued to demonstrate counter-productive results.

To describe but a few instances and examples:

May 3, 1977, you acted in an irresponsible manner by throwing a can of water out of a building window;

"October 18, 1977, you threw coffee out of a window that almost struck another employee. Your excuse for this act was 'things just build up';

November 2, 1977, you were involved in an altercation with Mr. J. B. Howell in which you refused to stop your diatribe;

March 3, 1978, -- your cantankerous behavior and uncooperativeness with our Miami Sales office;

April 22, 1978, -- another refusal to assist our Sales Department (Atlanta).

We cannot tolerate such disruptive and apparently uncontrollable behavior. You have been counseled with, warned, reprimanded and nothing has persuaded you to conduct yourself in a courteous, cooperative and orderly manner. Therefore, I hereby advise you that you are dismissed from all service of the Company as of May 5, 1978.

B. R. Osborne"

By letter dated May 8, 1978, Claimant notified Carrier official T. E. Curley that since he had been dismissed from his excepted position in the Intermodal Transportation Services Department it was his intention to displace, effective May 9, 1978, an employee, one Mr. K. W. Baker, then occupying a position in the Central Matching Bureau under the provisions of Rule B-5(b) of the Controlling Agreement bearing effective date of May 1, 1973. Rule B-5(b) reads as follows:

"(b) Employees holding seniority rights under section (a) of this Rule shall, in the event they are demoted, laid off or have occasion to leave their position account of circumstances beyond their election, be privileged to exercise a displacement right under schedule rules, provided they avail themselves of this opportunity within thirty (30) days. If they desire to return to a schedule position because of their own election, they may assert their seniority only by bidding on vacancies, provided that they must exercise such right by bidding upon the first vacancy open, to which their seniority and qualifications entitle them, after so demoting themselves."

By letter dated May 10, 1978, Carrier informed the Claimant that in view of his dismissal from all service of the Company, his employment relationship with Southern had been terminated and therefore he had no right to displace anyone.

On May 11, 1978, the Organization in behalf of the Claimant, requested an investigatory hearing as provided for under Rule C-1 which reads in relevant part as follows:

"RULE C-1 -- DISCIPLINE, INVESTIGATIONS, HEARING AND APPEALS

(a) An employee who has completed sixty (60) days of compensated service will not be disciplined (including discharge) except for cause. In the event an employee is disciplined he will be notified, in writing, of the specific reasons therefor. The Carrier recognizes the right of such employee to be accompanied by his duly accredited representative, should he so desire same, during any discussion with the employee of events leading to such disciplinary action. If such employee, or his duly accredited representative, disagrees with the disciplinary action taken by the Carrier, he may request, within ten (10) days following such notification, a hearing before proper Carrier officer to determine the propriety thereof. At such hearing, the employee involved shall be entitled to the assistance of the duly accredited representative. The hearing shall be held within ten (10) days of request, if practicable, and the designated Carrier official shall render a decision affirming, modifying or revoking the prior disciplinary action within ten (10) days following the date on which such hearing is completed.

(b) If the Carrier determines the need for investigating an incident that may result in disciplinary action, any employee involved shall be furnished with a letter setting out the subject matter and the charges against the employee(s) involved. Such letter shall set a time, date and place for hearing thereof, which hearing shall be conducted in the same manner as provided for hearings conducted under Paragraph (a) above.

(c) No employee will be disciplined for any matter of which the Carrier has had knowledge for more than thirty (30) days.

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As per the Organization's request a hearing was held on May 20, 1978, and in a letter dated May 26, 1978, Mr. L. E. Wetsel, the hearing officer informed the Claimant that he had been adjudged guilty as charged and that therefore his dismissal was affirmed.

On May 31, 1978, the Organization filed another claim in behalf of the Claimant alleging Carrier had violated Rule B-5(b) of the Controlling Agreement cited above and therefore Claimant ought to be allowed to exercise his seniority by displacing K. W. Baker in the Central Matching Bureau. Carrier throughout its handling of this matter on the property declined this latter claim.

In an extensive review of the record before us we have reached the following determinations:

1. The Organization's allegation that Carrier violated Rule C-1(c) cited above is one which constitutes new argument. This argument was not invoked by the Organization at any time during the hearing held on May 20, 1978, nor is there proof of a preponderant nature to show that the parties discussed such alleged violation of the contract in its handling of this claim on the property. What the Organization did raise at the hearing was an objection with respect to the introduction of incidents involving the Claimant other than those cited in the May 5, 1978 letter of dismissal reproduced above. This objection is of a wholly different nature than the allegation that Carrier violated Rule C-1(c) of the Agreement. It is well established that this Board which is an appellate tribunal is barred from considering new argument. Therefore, we find the hearing afforded Claimant was properly conducted.
2. The Organization alleges further that Claimant was denied his contractual rights under Rule B-5(b) when Carrier prevented him from displacing K. W. Baker in the Central Matching Bureau following his dismissal. We find there was no denial of Claimant's rights as so alleged. The Organization requested an investigatory hearing for Claimant under Rule C-1 and Carrier correctly granted this request. Had Claimant been exonerated of the charges following the hearing he would certainly have then been entitled to exercise his seniority right of displacement under Rule B-5(b). However, Claimant was adjudged guilty as charged, his dismissal affirmed and as a result any rights of his under the Controlling Agreement were thereby terminated.
3. Notwithstanding the aforestated two findings, it is our determination that, even though the Claimant's conduct is, on the whole, rather reprehensible and his attitude about work and his responsibilities which flow therefrom certainly repugnant, the discipline of dismissal imposed on him as a result of the incidents set forth in his dismissal letter of May 5, 1978, is excessive. However, we find further that

said actions of Claimant are too serious to go unpunished and that such penalty levied should be commensurately severe. Therefore, the period of time Claimant has been withheld from service of the Carrier shall serve as a disciplinary suspension and shall be duly notated on Claimant's personnel record.

Without prejudice to the general applicability of Rule B-5(b), we direct Carrier to reinstate the Claimant with no back pay or other monetary benefits and to allow him to exercise his seniority to a clerical position covered by the May 1, 1973 Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 was excessive.

A W A R D

Claim of the Organization sustained to the extent and in the manner set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A.W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1980.