NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23180
THIRD DIVISION Docket Number MW-23203

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The discipline assessed Trackman A. L. Traylor for alleged violation of Rule 176 was without just and sufficient cause /System File B-1800/.

(2) Trackman A. L. Traylor shall be afforded the remedy prescribed in Rule 91(b)(6)."

OPINION OF BOARD: Claimant, a Trackman, was dismissed from service on August 31, 1978, for violation of Rule 176 as it relates to indifference to duty arising out of excessive absenteeism. Said rule, in pertinent part, provides as follows:

> "Employees who are negligent or indifferent to duty, insubordinate, dishonest, immoral, quarrelsome, insolent or otherwise vicious, or who conduct themselves and handle their personal obligations in such a way that the railway will be subject to criticism and loss of good will, will not be retained in the service."

The specific incident which led to Claimant's discharge occurred at approximately 7:20 A.M. shortly before shift start on August 31, 1978. At that time, Claimant telephoned his supervisor and reported that he would be absent from work that day because "he had some business to take care of." When pressed by the supervisor for more information, Claimant refused to give any reason other than "personal business."

As a result of this incident, and Claimant's previous attendance record as well, Claimant was discharged and a hearing on the matter was held on September 11, 1978. Pursuant to said hearing, however, Carrier, on November 13, 1978, agreed to reinstate Claimant but "... without pay for time lost with all rights intact." Thereupon, both Organization and Claimant accepted Carrier's settlement offer but

on the condition that such acceptance would "not jeopardize the organization's claim for payment for lost time." Carrier consented to Organization's conditional acceptance and the back pay claim is the basis of this instant dispute.

Organization contends that Carrier was arbitrary and unjust in removing Claimant from service since he had a good reason for being absent from work on the day of August 31, 1978 (had to take his mother to the doctor). Furthermore, Organization alleges that the amount of discipline which remains (two and one-half months suspension without pay) is inordinately excessive given the severity of Claimant's infraction.

In addition to the preceding arguments, Organization further contends that the hearing which was conducted in this matter was procedurally defective in that Claimant's past attendance record was improperly entered into the hearing record. Accordingly, Organization argues that the issue which was to be considered at the hearing was solely that of the August 31, 1978 incident alone, and any reference to any other incident or to Claimant's prior attendance record, other than in determining the severity of the discipline which was to be assessed, therefore, was improper.

Lastly, Organization maintains that Claimant's attendance record has improved significantly since his last infraction; and also, since Claimant was disciplined for his previous attendance infractions, any inclusion of those instances with the August 31 incident in determining the degree of penalty to be assessed, constitutes a "double penalty" for the same infraction.

Carrier argues that Claimant's actions on the morning of August 31, 1978, are "indicative of his indifference to the requirements of the service," and that such actions warranted the discipline which was assessed. In support of its position Carrier maintains: (1) Claimant's contention that he had to take his mother to the doctor is a "flimsy" excuse; (2) Claimant knew, or should have known, in advance of his mother's doctor appointment, but he waited until five or ten minutes before shift start to notify Carrier of his intended absence; (3) Claimant refused to divulge the specific reason for his absence when requested to do so by his supervisor. Additionally, Carrier contends that Claimant's attendance record is deplorable and was properly considered in determining the amount of discipline to be assessed, and also because it is a part of Carrier's progressive discipline system.

In summary of its position, Carrier maintains: (1) the hearing which was conducted in this matter was fair and impartial; (2) charges which were proffered against Claimant were clearly proven by substantial evidence and, for the most part, were admitted to by Claimant himself; (3) Carrier has the right to impose discipline upon an employe for excessive absenteeism; and (4) all of the previously stated items, plus Claimant's deplorable past attendance record, justifies the penalty which has been imposed.

The Board has carefully read and studied the complete record in this instant dispute and finds that Organization's position must be rejected. Simply stated, the facts of this case clearly do not support either the procedural objections or the merits arguments which have been proffered by Organization on Claimant's behalf.

Regarding the Organization's procedural objections, it has been argued that the investigatory hearing was unfair, and, therefore, improper, because testimony concerning Claimant's prior attendance violations was permitted to be entered into the hearing record. According to Organization, "the introduction of an employe's past record into the transcript would preclude a fair and impartial investigation."

While it is indeed true that an employe's prior disciplinary record (which itself has not been made a part of the original statement of charges) may only be considered in arriving at the measure of discipline and never as a factor in determining guilt in a particular case (**see Awards 10076, 11130 and 17156; and Second Division Award 8057**), **the record in this instant dispute sufficiently demon**strates that Carrier never intended to limit its presentation only to the August 31, 1978 incident; but instead viewed that one particular incident as the culminating action in an otherwise totally unacceptable employe attendance record. The fact that Carrier stated in its dismissal letter to Claimant that he "... was dismissed from service for violation of Rule 176 of the Book of Rules ...", sufficiently supports the conclusion that Carrier was basing its action upon the August 31 incident and Claimant's entire prior attendance record. Furthermore, Claimant's own testimony clearly shows that he too was aware of the comprehensive nature of the charge which had been brought against him. Evidence of this awareness can be found in the following exchanges:

"Q. (by Mr. Spears) Mr. Traylor did Mr. Collier or Roadmaster Strong give you any kind of paper advising you why you were dismissed?

A. (by Mr. Traylor - Claimant) Yes, Foreman Collier gave me a dismissal slip.

Q. Do you have that paper now?

A. It's in my car.

Q. Mr. Traylor would you tell us what rules you violated on this?

A. Rule 176.

Q. Mr. Traylor have you read Rule 176?

A. Yes.

"Q. Do you see anything in Rule 176 that you violated?

A. No.

Q. Mr. Traylor is this the only rule you were charged with?

A. Yes, it was. (Emphasis added by Board.)

* * *

Q. (by Mr. Planchon) Mr. Traylor did Mr. Strong tell you that you were being dismissed for not being at work on this particular day of August 31, 1978, or did he say that you were dismissed for violation of Rule 176?

A. (by Mr. Traylor - Claimant) The slip said that I was dismissed for Rule 176, but on the phone he just said I didn't have a job.

Q. This slip that says you are dismissed for violation of Rule 176, would it necessarily cover one or several days?

A. I don't know.

Q. Would it cover the fact that Rule 176 states, negligent or indifferent to duty? Do you feel that you have been negligent or indifferent to duty?

A. Yes, in the past.

Q. Then would you feel that (sic) is dismissal on Rule 176, would cover indifference or negligent of work?

A. Yes it covers it. (Emphasis added by Board)."

Insofar as Organization's "double penalty" argument is concerned, suffice it to say that to accept this argument would be to negate the entire concept of "progressive discipline," as it exists in the labor-management relations program of this country's railroading industry. This Board has no particular penchant to engage in such folly since the record clearly shows that Claimant was not disciplined twice for the same infraction, as Organization contends, but rather his penalties progressed in severity as his attendance infractions continued unabated. Furthermore, related to this same point, Organization's contention that "Claimant's attendance record had improved significantly between the August 31 incident and the last previous attendance infraction for which he was disciplined," cannot be supported since this Board hardly believes that a mere three (3) week respite between attendance incidents is sufficient to mitigate in favor of the recision or modification of the type of penalty which is involved herein.

Turning next to Organization's contention that the evidence "does not justify the discipline which has been assessed against Claimant" and that the discipline was "excessive, capricious, improper and unwarranted," this Board cannot agree with either of these contentions. Claimant admitted to his actions; he knew of his responsibility and obligation to Carrier regarding Rule 176; and he also knew that his attendance record was reaching a danger point. Moreover, Claimant, who was already in such a vulnerable state, should have attempted to protect his position as best as possible rather than placing himself in further jeopardy. Instead, however, Claimant continued to exhibit the indifferent attitude toward his job as charged by Carrier, and Carrier was left with no alternative but to take disciplinary action. Regardless of Claimant's reason for his absence on the date in question, his continued refusal to divulge the basis of his request to be absent on that day, except that it was for personal business, was unreasonable and improper (Second Division Award 7754). Carrier's disciplinary action, under these circumstances, was warranted and was neither excessive nor capricious, and was, therefore, proper and shall remain undisturbed.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.