

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23311
Docket Number CL-23228

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8915) that:

1. The Carrier violated the effective Clerks' Agreement when following investigation held on March 2, 1978, it arbitrarily and capriciously dismissed Jerry O. Jones from service.

2. The Carrier shall now be required to reinstate Jerry O. Jones to its service with seniority and all other rights unimpaired and his record cleared of any charges.

3. The Carrier shall now be required to compensate Jerry O. Jones for any and all wages suffered as a result of his dismissal from Carrier service.

OPINION OF BOARD: Claimant Jones, who had established seniority as a clerk on August 18, 1969, was dismissed from Carrier's service on March 10, 1978, following a hearing on the charge:

"Improper and unauthorized use of Company telephone during your regularly assigned working hours on various dates commencing December 14, 1976, when you made a series of 193 personal telephone calls to Niles, OH (216-652-3092), as set forth on nine sheets attached hereto. These calls involved a total of 2020 minutes' telephone time, with toll charges of \$372.63, plus 5% tax, for a total of \$391.26."

Following receipt of the notice of dismissal, the Organization's General Chairman, on behalf of Claimant Jones, addressed an appeal to Carrier's Storekeeper Paulovkin in which he outlined the Organization's position in regard to the disciplinary procedures and the extent of the assessed discipline.

Carrier timely responded to the General Chairman's appeal denying the contentions raised and, in addition, pointed out to the General Chairman that "...the claim in this case has not been properly filed, in accordance with Rules 21(a)(1) and 44(b), because J. A. Dixon, Foreman-Materials, Shipping and Receiving, is the officer of the company authorized to receive all claims and grievances being presented by or on behalf of storeroom employees." At each subsequent level of appeal, Carrier repeated this alleged procedural dereliction.

Rule 21--Time Limits on Claims reads in pertinent part as follows:

"Rule 21(a). All claims or grievances shall be handled as follows:

"(1). All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the company authorized to receive same, within 60 days from the date of the occurrence on which claim or grievance is based...

"(b). ...With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

"(c). This rule (21) recognizes the right of representatives of the organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.

"(e). This rule (21) shall not apply to requests for leniency."

Rule 44--Right of Appeal reads in pertinent part as follows:

"(b). The right of appeal, by an employee or his duly accredited representatives in the regular order of succession up to and including the highest official designated by the Company as the one to whom appeals may be made, is hereby recognized. When appeal is taken, further hearing, if requested, shall be granted by the official to whom appeal is made. The appeal must be made in writing to next proper official and a copy furnished official whose decision is appealed. At the hearing on any appeal, the employee shall have the right to be represented by one or more duly accredited representatives. The time limits provided in Rule 21 shall be applicable to appeals under this rule 44(b))."
(emphasis added)

Throughout the handling of this case, both on the property and before our Board, Carrier has vigorously pursued this procedural contention citing prior awards of this Board as authority for their position and urging that the claim should be dismissed by the Board on this basis alone without giving consideration to the merits of the dispute.

From our review of the citations of authority presented, it is indisputable that time limits and grievance procedures are set for a purpose and it is the Board's obligation to respect those purposes. However, they must be given a reasonable application. They are not intended to provide a purely technical defense for either side in a dispute. Nevertheless, we still must face the question in this case whether such procedural error was sufficiently prejudicial to either party so as to undermine the grievance procedures. We do not, in this particular factual situation and limiting our determination to this case alone, believe that it did. It is our belief in this case that "we are concerned with the truth of the matter asserted as opposed to the form in which it is presented" (Third Division Award No. 22269).

The Board has carefully reviewed the entire record and has considered the pleadings of the parties before the Board. We find that none of the Claimant's substantive procedural rights was violated. We do not find any of the Organization's allegations relative to the nature of the charge or the conduct of the hearing of sufficient significance to invalidate the proceedings.

The hearing record contains substantial probative evidence to support the Carrier's charge. It is proper for Carrier to consider Claimant's prior record when determining the degree of discipline to assess after guilt has been established on the instant charge. In this case, the prior record indicates that Claimant had been involved in a similar situation in December, 1977, for which he was given a disciplinary suspension. Based upon the entire record, severe discipline was justified and warranted. On the other hand, permanent dismissal from services is the most severe form of discipline possible. While recognizing our limited appellate review authority, we are convinced that permanent dismissal is too severe in this particular case.

Therefore, it is our determination and we so order that Claimant be restored to service with seniority and other rights unimpaired, without pay for the time he has been out of service and with the condition that Claimant reimburse the Carrier for the personal telephone calls made which were the basis for this action. Claimant must be aware, however, that this action does not exculpate him. He is cautioned that this is his last opportunity to continue in Carrier's employment and that any further major infraction must result in his final separation from service subject to the due process requirement of the Agreement.

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;

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

That the discipline assessed was excessive.

A W A R D

Claim sustained to the extent indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls.
Executive Secretary

Dated at Chicago, Illinois, this 29th day of May 1981.

