

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24361  
Docket Number CL-24588

Paul C. Carter, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, Airline and Steamship Clerks,  
Freight Handlers, Express and Station Employees  
{ Union Pacific Railroad Company (Western Districts)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9628 that:

1. Claimant C. E. Shines was improperly dismissed from the service of the Union Pacific Railroad Company on July 1, 1981 for accumulation of demerits without hearing or notice of hearing advising claimant of precise charge.

2. Carrier shall now be required to compensate claimant for all time lost commencing July 1, 1981 until April 7, 1982 when reinstated to service without prejudice to claimant's claim for all lost time; also, Carrier shall be required to permit claimant to return to position of crew dispatcher.

OPINION OF BOARD: The record shows that Claimant had been in the service of the Carrier since July 20, 1953, with no assessment of demerits until September, 1980.

Effective September 1, 1969, the Carrier's Discipline System was revised, providing, among other procedures, for a demerit system, and on January 1, 1970, the Division Superintendent of the Idaho Division issued Circular No. 47 setting forth the new Discipline System. The last paragraph of Circular No. 47 reads:

"When a balance of 90 or more uncleared demerits stand against the record of an employee, he shall be subject to dismissal, provided, if such action is to be taken, it will follow a hearing when required in accordance with the respective labor agreements."

On July 1, 1981, the Superintendent advised Claimant that his record was being assessed 45 demerits for an occurrence on May 31, 1981, which occurrence was described:

"While working as Crew Dispatcher, you failed to call Fireman G. L. Willis for his turn, for HF-31 on duty 9:35 PM on May 31, 1981, resulting in claim for mishandling being made by Mr. Willis; in violation of General Rules B and L; General Regulation 702 of Form 7908."

In the same letter of July 1, 1981, the Superintendent advised the Claimant:

"In connection with this assessment of discipline, your personal record shows an accumulation in excess of 90 demerits, which is excessive; therefore, you are dismissed from service."

There appears to be no dispute between the parties that there was an accumulation of 90 or more demerits against Claimant's record on July 1, 1981.

The basic contention of the Organization is that Carrier violated the discipline rule of the applicable Agreement when it dismissed Claimant for an accumulation of demerits without a fair and impartial hearing, nor advising the Claimant of the precise charge. The Organization relies primarily on those portions of the discipline rule reading:

"(a) No employee shall be disciplined or dismissed without a fair and impartial hearing. ... At a reasonable time prior to the hearing the employee shall be apprised of the precise charge. In case of unsatisfactory service or incompetency all charges to be investigated shall be stated..."

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"(g) An employee charged with offense involving memoranda against record shall be advised in writing nature of offense with which charged."

The Carrier contends that the discipline procedure of the applicable Agreement have no application to a situation where an employee accumulates the maximum number of demerit marks against his personal record and becomes subject to dismissal in accordance with the Carrier's published System of Discipline. The Carrier goes on to point out that the accumulation of in excess of 90 demerit marks on Claimant's record was a matter of recorded fact, and each separate and distinct assessment of demerit marks was preceded by an investigation under the discipline rule of the applicable agreement. The Carrier also states:

"... The investigation and hearing conducted under the provisions of Rule 45 on June 11 (22?), 1981, for an occurrence on May 31, resulted in an accumulation in excess of 90 demerits and thus Shines was properly dismissed from the service of the Company under its established Discipline Procedure."

The Organization contends that the hearing conducted on June 22, 1981, involved a charge against Claimant for alleged violation of "General Rules B and L, General Regulations 702 and 702B of Form 7908 in connection with failure to call a fireman for his turn, as stated in Notice of Hearing dated June 1, 1981. This Notice made no charge of 'accumulation of demerits...'. "

The question before the Board is whether Claimant was entitled to a hearing on the charge of accumulated demerits in excess of 90, as referred to in Notice issued by the Superintendent in Circular No. 47, dated January 1, 1970.

We do not have the benefit of any evidence as to practice on the property. Upon careful consideration of the record before us, including the Discipline Rule of the applicable Agreement, we are of the considered opinion that the Carrier violated the Agreement in dismissing the Claimant for accumulation of 90 or more demerits without affording Claimant a fair and impartial hearing on that charge as provided for in Rule 45 of the Agreement. We consider the accumulation of demerits as separate and apart from the offense for which Claimant was assessed 45 demerits as a result of the investigation conducted on June 22, 1981. This

conclusion is supported by Third Division Awards Nos. 10877 and 22835; also Second Division Award No. 6382, which award cites early Award No. 1820 of that Division. See also Award No. 4 of Public Law Board No. 1582. We do not consider Award No. 40 of Public Law Board No. 496 of significance, as that award dealt with a question of leniency. Our conclusion appears to be contemplated by that part of Carrier's Discipline Rule reading:

"When a balance of 90 or more uncleared demerits stand against the record of an employe, he shall be subject to dismissal, provided, if such action is to be taken, it will follow a hearing when required in accordance with the respective labor agreements."

The record shows that on December 16, 1981, the Carrier offered reinstatement of Claimant on the basis:

"In order to avoid Shines sustaining excessive discipline, I indicated to you in conference that I would be willing to permit the reinstatement of C. E. Shines subject to the condition that he would not return to position of Crew Dispatcher and that the question of pay for time lost will be decided by action to be instituted before the Adjustment Board." (General Manager Merrett to the General Chairman.)

The letter agreement was signed and returned to the Carrier by the General Chairman on March 23, 1982, and Claimant returned to Carrier's service on April 7, 1982. In consideration of the letter agreement of December 16, 1981, we will not order Claimant restored to service as a crew dispatcher. Furthermore, we will not allow any compensation beyond December 16, 1981. Any time lost by the Claimant beyond that date was not caused by the Carrier. Compensation for the period from July 1, 1981 to and including December 16, 1981, should be computed in accordance with Section (c), Rule 45, of the Agreement.

If in the future the Claimant should attempt to occupy a position for which the Carrier does not consider him qualified, the matter may then be handled under the applicable provisions 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 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 Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May 1983.

