

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the St. Louis Southwestern Railway Company (St-L/SW):

Claim on behalf of Brother D. R. Trenthem, for reinstatement to service with all time and benefits paid, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 700, when it arbitrarily dismissed him from service." ,Carrier file 484-68-A.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given notice of hearing thereon.

This case had as its genesis an event which occurred on April 17, 1989. At that time, Claimant was withheld from service pending a Hearing in connection with the episode. A Hearing was held and Carrier subsequently informed Claimant, by letter dated June 1, 1989, that he had been found to be at fault, but he would be returned to service effective June 12, 1989, "on a leniency basis, with no penalty to St. Louis Southwestern Railway Company, with time lost to serve as discipline." The discipline and loss of pay which emanated from the April 17, 1989, episode is not a part of our consideration in this case. Rather, this case stems from the events which occurred on June 12, 1989, and thereafter.

On June 12, 1989, Claimant reported for duty as instructed. However, because he would not sign an acceptance of Carrier's "no pay for time lost" offer, he was not permitted to resume his duties. Subsequently, by notice dated July 10, 1989, Claimant was charged with alleged violations of Rules 604 and 607 "when you refused to return to duty on June 12, 1989" After an agreed-upon postponement, the Hearing was held on August 3, 1989, at which time Claimant was present, ably represented and testified on his own behalf. Following the Hearing, Claimant was informed by letter dated August 8, 1989,

that he was dismissed from service. The dismissal of August 8, 1989, was appealed and handled in the usual manner on the property and, failing to reach a satisfactory resolution thereon, has come to this Board for final adjudication.

At the outset of our deliberations, there is a procedural argument raised by the Organization which must be addressed. Carrier, for the first time in its handling of this dispute, has included in its ex parte submission to this Board an argument relative to its consideration of Claimant's prior discipline record for the purpose of establishing the proper measure of discipline. Carrier listed the incidents of prior discipline which had been assessed against the Claimant. This argument would have been valid, but for the fact that nowhere during any of the on-property handling of this case did Carrier even allude to the existence of or consideration of any prior discipline record. The Carrier knows, or should know, that as an appellate tribunal, this Board cannot accept or consider any argument or evidence which has not been made a part of the on-property handling. While it is correct that a prior discipline record (or absence thereof) may properly be considered when determining the amount of discipline to assess after guilt has been established on a particular charge, such prior record, and the consideration of it, must be brought into the record during the on-property handling of the dispute. This Board in this case rejects Carrier's belated reference to Claimant's prior discipline record.

The Board has reviewed and studied all of the on-property communications in connection with this case. We have read the Hearing transcript. We have heard the parties' arguments and contentions. We have heard the Claimant's own retelling of the events and circumstances. We are convinced, based upon the record of this case and without going into all of the specifics, that there is sufficient reason to place some blame on all of the parties involved for that which occurred. Claimant did report for work as instructed on June 12, 1989. Carrier did not permit him to perform his duties on that date. Claimant avoided notification by Carrier after it realized that it had erred when insisting that Claimant sign an acceptance of the leniency offer. Claimant obfuscated the situation by his less than precise language in his letter of June 29, 1989. Based upon the entire record in this case, it is our conclusion that Claimant should be restored to service with seniority unimpaired, but without any payment for the time he has been out of service. Claimant's return to service is predicated upon his ability to successfully pass any return-to-service examinations which are normally required of employees of his class.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever, Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1991.