

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29779
Docket No. SG-29957
93-3-91-3-360

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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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Terminal Railroad of St. Louis:

Claim on behalf of H.S. Kirkpatrick, for reinstatement to service, with all lost wages and benefits lost, and on behalf of E.K. Hubbard, for payment of all lost wages and benefits lost, between August 31, 1990 and December 26, 1990, including holidays, account of Carrier violated the current Signalmen's Agreement, as amended, particularly the Discipline Rule, when it did not find them guilty as charged and assessed them with excessive discipline." Carrier File S. BRS Case No. 8384.TRRSTL.

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 employe 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 waived right of appearance at hearing thereon.

The Claimants in this case were employed as Signal Maintainers by Carrier. On several dates in July, 1990, one of Carrier's Supervisors observed Claimants' assigned vehicle parked alongside a building which is normally used by the Claimants for their lunch periods. On each date, the truck was observed parked at this building for periods of time in excess of the allotted 20-minute meal periods. On July 19, 1990, the time period in question was 1

hour 55 minutes; on July 23, 1990, the time period in question was 55 minutes; on July 24, 1990, the time period in question was 1 hour 12 minutes; on July 27, 1990, the time period in question was 1 hour 28 minutes.

By notice dated July 30, 1990, the Claimants were instructed to appear on August 3, 1990, for a formal investigatory hearing on the charge of alleged violation of several specifically stated General Notice provisions along with several specifically stated General Rules plus "Article II, Section 1 of the current agreement in conjunction with exceeding the time allowed for meal period---". By agreement of the parties, the hearing was postponed to and held on August 28, 1990, at which time both Claimants were present, represented and testified on their own behalf.

Following completion of the hearing, each Claimant was informed by letter dated August 13, 1990, that they were dismissed from service. Appeals were initiated on behalf of the Claimants and were progressed through the normal on-property appeals procedures. The Carrier, by letter dated November 19, 1990, reinstated Claimant Hubbard to service. Claimant Hubbard returned to actual service on December 26, 1990. Carrier refused to return Claimant Kirkpatrick to service because, in their opinion, the seriousness of the proven offense when considered along with Claimant Kirkpatrick's poor prior discipline record such a reinstatement to service was not justified. Inasmuch as a satisfactory resolution of this dispute could not be achieved during the on-property handling, it has come to this Board for final and binding adjudication.

The Organization has argued that inasmuch as Carrier had made two (2) offers of settlement to the individual Claimants prior to the holding of the investigatory hearing, these offers of settlement were an indication of a weakness in Carrier's primary position. The Organization has also argued that Carrier has failed in its burden of proof requirement in that no-one from the Carrier made any on-site observations of the Claimants to determine exactly why they were in the lunch building during the time periods in question. During the investigatory hearing, the Claimants testified that they were eating their lunch during these periods and "that any excessive time that might have been used in the building was due to them using the toilet facilities". The Organization additionally argued that because there had been no request for leniency by the Claimant or the Brotherhood, Carrier's reinstatement of Claimant Hubbard to service on a leniency basis was somehow incorrect. In any event, the Organization contended that dismissal from service was discriminatory and excessive discipline and an abuse by the Carrier.

The Carrier, on the other hand, has argued that the Claimants themselves corroborated the asserted time periods in question. Carrier contended that the "toilet facilities" argument was specious at best in light of the extensive time periods involved; that the Claimants who had almost total memory recall on certain other items involved in the investigation, had trouble remembering what they actually did during the time periods in question in the lunch facility because "my memory is very laxed on these dates"(sic). Carrier further contended that the granting of leniency to Claimant Hubbard was not discriminatory against Claimant Kirkpatrick because Carrier had the right to consider Claimant Kirkpatrick's prior discipline record when determining the degree of discipline to be assessed for the proven offense.

This Board will first address the Organization's assertion relative to the offers of settlement as advanced by Carrier prior to the hearing in this case. In these offers, Claimant Kirkpatrick was asked if he would accept a 120-day suspension in lieu of a hearing. Claimant Hubbard was asked if he would accept a 60-day suspension in lieu of a hearing. Both Claimants rejected the offers. It is well settled that offers of settlement made and not accepted during the normal progression of a dispute cannot be used as admissions against interest on the part of the offering party. It is a fundamental labor relations principle that such offers are not an admission of wrongdoing or weakness and such offers - when refused - may not properly be introduced in any subsequent handling of the dispute. The Organization's argument in this regard is rejected.

We also reject the Organization's argument relative to the leniency issue involved in Claimant Hubbard's portion of this dispute. There is no requirement in either the rules agreement or arbitral law which requires that lenience must first be requested before it can be granted. Leniency is for the Carrier to grant or withhold. If it is not wanted by the proposed recipient, it can be rejected. In this case, Claimant Hubbard accepted the offer of reinstatement as extended by the Carrier and returned to service. This granting of leniency by the Carrier did not impact in any way on Claimant's right to continue progression of his dispute. Neither was such action an admission of wrongdoing by Carrier.

From our review of the hearing transcript, there is more than substantial evidence, that is, more than a mere scintilla, rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, in support of the determination that both Claimants exceeded the allotted 20-minute meal period on the dates in question and offered no reasonable justification for such excessive overruns of allowable time. Such acts are a form of dishonesty for which discipline is justified. On the basis of this

case record, the discipline as modified for Claimant Hubbard was neither excessive nor discriminatory.

There is indeed justification in this case for two levels of discipline. Claimant Hubbard with some twenty-two (22) years of service and little, if any prior discipline was a proper candidate for Carrier's leniency. Claimant Kirkpatrick, however, had only recently returned to service after having been granted leniency by Carrier following a prior dismissal for a proven rule violation. In addition to the prior discipline by dismissal, there were on Claimant Kirkpatrick's record several other instances of discipline for admitted and/or proven rules infractions. This Claimant, on the basis of the total record, was properly disciplined to a greater degree than the other employee who was equally guilty of the instant infraction. Such an assessment of differing discipline for the same offense is not a violation of either Carrier's or this Board's discretion or jurisdiction.

We do not believe, however, that permanent dismissal from service for Claimant Kirkpatrick is justified by the circumstances which exist in this case. It is our belief that Claimant Kirkpatrick should be accorded the opportunity to demonstrate to himself and to the Carrier that he wishes to make the railroad industry his career. He is, therefore, to be reinstated to service with seniority unimpaired but without pay for any of the time he has been out of service and with the reminder that this will be his last opportunity to demonstrate that he can and will be a productive employee. This reinstatement to service is, of course, subject to Claimant Kirkpatrick's ability to successfully pass those medical and job related examinations which are normally required of employees of this craft.

The discipline as assessed Claimant Hubbard was neither excessive nor arbitrary. His claim for payment for the period of time during which he was out of service is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.