

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21612
Docket Number CL-21356

Dana E. Eischen, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7916, that:

(a) The Carrier violated the Rules Agreement, effective September 1, 1946, particularly **Rule 20**, when it assessed discipline of 15 days suspension on R. P. Cook, Third Trick Crew Dispatcher Centralized Crew Dispatching Office, Pittsburgh, Pennsylvania.

(b) Claimant R. P. Cook's record be cleared of the charges brought against him on July 16, 1974.

(c) Claimant R. P. Cook be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: Claimant was employed in July 1974 as Crew Dispatcher on the 3rd Trick in Carrier's Centralized Crew Dispatching Office in Pittsburgh, Pennsylvania. On night of July 11, 1974 the other regularly assigned Crew Dispatcher was relieved by a novice Relief Crew Dispatcher, the senior clerk on the extra list, R. P. Rushofsky. At the start of the 3rd shift at approximately 11:30 p.m. on July 11, 1974 Claimant telephoned his superior, D. E. Hewitt, Supervisor, Centralized Crew Dispatching, at the latter's home. The record is clear that Claimant called Supervisor **Hewitt** to question him about having to work with Rushofsky but there is material conflict concerning the precise conversation which took place. There is no dispute that Hewitt raised question concerning the amount of work, Rushofsky's inexperience and how to apportion the work. There is no dispute concerning Hewitt's direct order to Claimant to complete the work assigned to the shift. Claimant testified that that was the sum and substance of the conversation and denied telling Hewitt he would do no more work than Rushofsky and that Hewitt should not count on having the work done. Hewitt testified on the basis of a written report prepared by him on July 12, 1974 and addressed to the Transportation Superintendent. That report and Claimant's testimony assert inter alia the following as facts:

- "1. Claimant Cook called him at home at 11:30 P.M., the starting time of Cook's assignment, and asked who would be working with him that night.
- "2. When informed that it was R. P. Rushofsky, an inexperienced man, Cook advised Hewitt not to expect any work to be done.
- "3. When asked why, Cook replied that he would do no more than the inexperienced man.
- "4. When instructed by Mr. Hewitt that he was to do 8 hours of crew dispatching work during his tour of duty and the work would be done, Cook replied, 'Don't count on it.'

Additional evidence adduced on the record consists of statements by Rushofsky and the regular 2nd Trick Crew Dispatcher. Under close scrutiny however these statements are of little evidentiary value since neither man heard all of the Hewitt-Cook conversation but only isolated parts. Moreover, one of the purported "affidavits" is neither sworn nor signed by the witness.

Upon reporting to work on the morning of July 12, 1974 Supervisor Hewitt found that some two hours of crew dispatching work had not been performed on the 3rd Trick and had to be done by the 1st Trick operator. The record shows clearly that this is a rare occurrence. At approximately 9:30 A.M., July 12, 1974 Hewitt contacted Claimant Cook by telephone and advised him he was pulled out of service effective that date with letter of charges to follow. Thereafter, by letter dated July 16, 1974, Claimant was notified to attend, investigation into charges of insubordination and failure to complete his work assignment. Following an investigation held July 19, 1974, Claimant was found culpable and assessed discipline of actual suspension for 15 working days,

The Organization raises several procedural objections relative to impartiality of the hearing officer and propriety of the review of the transcript by other than the hearing officer. These allegations of bias and unfairness were raised de novo at Board level and may not be considered by us.

See Awards 17424, 19746, 19977 et al. The case turns on a determination whether substantial record evidence supports Carrier's conclusion of Claimant's guilt of insubordination **and, if so**, whether the penalty assessed is arbitrary, unreasonable or capricious in the circumstances. In **our judgement** the central issue herein is one of credibility of witnesses. If Hewitt's account of the conversation can be **believed, then** we think it not unreasonable to conclude that the **uncontroverted** failure to perform the work was, indeed, a self-fulfilled prophecy by Claimant and, taken as a **whole, his** action would constitute insubordination. If none of the conversation occurred as Hewitt described **it, then** the mere fact of incompleteness is not enough to establish insubordination. But by long-established precedent we cannot set ourselves up as triers of fact and particularly not to resolve patently conflicting testimony. See Awards 9230, 9322, 10113, 10791, 16281, 21238. So long as the **testimony of Carrier's** witness is not so clearly devoid of probity that its acceptance would be per se arbitrary and **unreasonable, we** may not substitute our **judgement** in cases of this type. Nor can we conclude that 15 days' suspension for proven insubordination is so disproportionate to the offense as to warrant reversal. In the facts of record before us we must deny the claim.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1977.