

Award No. 13989
Docket No. CL-14974

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE UNION TERMINAL COMPANY
DALLAS, TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5626) that:

(a) The Carrier violated the current Clerks' Agreement when on January 5, 1964 it arbitrarily and capriciously withheld Porter Osborn Levert Caldwell from service prior to affording him an investigation.

(b) That Porter Osborn Levert Caldwell be paid a day's pay for each of the nine (9) work days that he was withheld from service pending result of investigation.

OPINION OF BOARD: On January 5, 1964, Claimant was removed from service and directed to report the next day to the Mail, Baggage and Ticket Agent. He reported the following morning, as directed, accompanied by his Local Chairman, and he was handed the following letter dated January 6, 1964, addressed to said Claimant:

"Dear Sir:

You are directed to appear for Formal Investigation in the Board Room, Third Floor, Union Station, at 10:30 A.M., Monday, January 13, 1964.

The charges against you are that you failed and refused to comply with request and instructions from General Platform Foreman Burns to sign an acknowledgment of understanding of instructions dated December 31, 1963, concerning procedure to be followed in securing medical attention.

This will confirm verbal advice previously given you that you are suspended from service pending result of investigation.

You may bring to the investigation any witnesses you desire and representation as provided in the working agreement.

Yours truly,

/s/ E. F. Ahrens
Mail Baggage and
Ticket Agent"

(Emphasis ours.)

"Mr. E. F. Ahrens:

This will acknowledge receipt.

/s/ Osborn L. Caldwell
Date 1-6-64"

At the same time, on January 6, 1964, Claimant executed an acknowledgment of the December 31, 1963 instructions. Notwithstanding this acknowledgment, Carrier proceeded with the Formal Investigation and, at the conclusion thereof Claimant was reinstated, found guilty of the charges, disciplined and assessed a penalty of nine working days.

The last paragraph of Rule 27 of the applicable Agreement reads:

"It is understood that nothing in this article will prevent the supervising officer from holding employees out of service where **flagrant violations** of the Company rules or instructions are apparent, pending result of investigation which shall be held within ten (10) days." (Emphasis ours.)

Webster's International Dictionary defines "flagrant" as "extreme, flauntingly or purposefully conspicuous . . . glaring offenses or errors so conspicuous or bad that it would be impossible not to notice them." It cannot be said that the Claimant flagrantly violated the "Company rules or instructions." It is not an extreme or glaring offense to refuse to acknowledge receipt of a Company notice which is ambiguous. And this is particularly true in view of the fact that Claimant did acknowledge receipt of that notice the very next day.

The notice in question reads as follows:

"December 31, 1963

BULLETIN TO PORTERS:

It will be necessary in the future for employees who need medical attention to secure a form to be presented to the Clinic or Hospital except in cases of emergencies. The Clinic has been instructed not to furnish treatment without receipt of this form.

Form will be issued by the General Platform Foreman, Mr. Johnson, or the undersigned.

/s/ E. F. Ahrens
Mail, Baggage and
Ticket Agent"

Claimant and other covered employees were entitled to medical and hospital care under the rules and regulations of the Santa Fe Hospital Association. The notice is not clear whether Claimant and other employees were obliged to secure forms before they could get medical treatment for any kind of ailment, discomfort or injury. If this was so, Carrier may have exceeded its prerogative. It only later became clear that Carrier meant that the forms were necessary only in the event an employee was injured on the Carrier's premises. At the Investigation, Mr. Ahrens said:

"I would like to state that it is not the company's position or intention to restrict an employee from securing medical attention and that this bulletin was issued solely for the purpose of apprising The Union Terminal Company concerning injuries on this property."

It should be noted that Mr. Ahrens signed the December 31, 1963 Bulletin, signed and handed Claimant the letter dated January 6, 1964 setting out the charges and confirming the suspension, and conducted the formal investigation. He also wrote the letter dated January 17, 1964, reinstating Claimant "without pay for time lost."

On the basis of the entire record, we conclude that Claimant did not flagrantly violate any of the Carrier's rules and instructions, and he was, therefore, improperly held out of service. The discipline penalty of nine days' pay is unjustified, arbitrary and capricious.

Carrier argues "that part of the time lost being claimed by the Organization was a result of the request of the Organization that the investigation be postponed." If this claim was sustained because the penalty was excessive, such a defense for the intervening four days would have been valid. But, Carrier violated Rule 27 by wrongfully holding Claimant out of service. Under such circumstance the investigation was unnecessary. There is no justification for a reduction of Carrier's liability.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1965.