

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19573
Docket Number CL-19447

William M. Edgett, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(Penn Central Transportation Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-6963) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 6-A-1 to 7-A-1, inclusive, when George Schwindinger, Ticket Clerk, Pennsylvania Station, Newark, New Jersey, was required to reimburse the Carrier \$902.50, which amount of money was stolen from his cash drawer on October 14, 1966.

(b) The Carrier be required to return this money, \$902.50, plus interest at 6X from date paid to Carrier to date of its return to the Claimant.
(Docket 2420)

OPINION OF BOARD: Claimant, a Ticket Clerk at Newark, New Jersey, was relieved of \$902.50 from his cash drawer, by a person or persons unknown, on October 14, 1966. His claim asks that he be relieved of the burden on repaying that amount to Carrier. The basic facts are not in dispute.

On the date in question claimant left his position for a coffee break. He left his drawer closed with the key in the drawer, unlocked. The work area is restricted, and only other clerks, and persons on proper business are **admitted**. On his return, claimant, after immediately observing his loss, called his supervisor.

An investigation was held on October 27, 1966. Carrier issued a notice of discipline on December 29, 1966, advising claimant that he would receive sex-en days suspension for his culpability in the loss of the money. That decision was appealed, by a letter received by Carrier on January 9, 1967. Following a discussion, **held** on January 16, 1967, claimant was advised that the seven day suspension was reduced to a reprimand because of claimant's past record and length of service. On January 23, 1967, the Division Chairman listed a claim for discussion at the regular monthly discussion with the Superintendent of Personnel, the most salient **section**(for our purposes here) of which is as follows:

- "2. That claimant George Schwindinger, Ticket Clerk at the Newark, New Jersey Passenger Station, be relieved of monies stolen, or misplaced from his working draw, at the window of this said Passenger Station, Newark, New Jersey on October 14, 1966."

The request to be relieved of the obligation to repay **Carrier** for the loss **was** based on an agreement. which Carrier says was "voluntary", which Claimant made and began discharging on December **5**, 1966. Claimant's agreement to repay Carrier was made during the time that he was waiting for Carrier's disciplinary decision following the investigation. It can hardly be considered voluntary. It is noteworthy that the record clearly shows that it was not referred to in Carrier's notice of discipline. Yet the agreement to reimburse Carrier was an integral part of the entire problem.

Carrier took the position that the Claim filed as New **Yorks** Clerks case **10/67** had not been handled in accordance with Rule 7-A-2, which reads:

"7-A-2 (Effective **November 1**, 1955) When it is considered that an injustice has been done with respect to any matter other than discipline, the **employee** affected or the 'duly accredited representative' as that term is defined in this Agreement, on his behalf, may within ninety days present the case, in writing, to the **employee's** immediate Supervisor. If the decision of such Supervisor, which shall be in writing, is unsatisfactory, such decision may then be appealed by the employee affected or by the said 'fully accredited representative' as that term is defined in this Agreement, on his behalf, to the Superintendent Personnel (in System General Office Departments, the officer in charge of the Department).

In the case of claims for compensation alleged to be due, the time periods specified in Rule 7-B-1 will be observed."

Apparently claim numbered New York Clerks Case **33/67** was filed on February 13, 1967. That claim was handled on the property and is the claim which has been submitted to this Board. It seeks relief from Carrier's **assessment** of \$902.50 from claimant's wages.

Carrier begins its defense by asserting that claimant did **not** file **claim No. 33/67** in a timely manner because the shortage occurred on October **14**, 1966 and the **claim** was not filed until February **13**, 1967. The claim was filed well within the ninety day time limit. **December 5**, 1966 is the date Carrier required claimant to begin repaying and limitations did not begin to run until that date.

Carrier next argues that the claim, as presented to the **Board, has** been materially changed from the claim as handled on the property. Of course, if this were the case it would result in dismissal of the claim. However the Board has held that where Carrier has not been misled, **and the** issue is "substantially the same issue as originally raised", the claim should not be **dismissed**. This view was expressed in Award No. 13229 as follows:

"... Though the first paragraph of the Statement of Claim presented to this Board is not couched in the identical language used in the claim originally presented to the Carrier on the property it raises substantially the same issue as originally raised. It **cannot**, therefore, be seriously urged that the Carrier has been misled as to **the issue** or claim confronting it. Unless there is a real and substantial variance between the claim presented to this Board and the one presented to the Carrier on the property, this Board would not be justified **in** dismissing this claim; therefore, the request for a dismissal of this claim is denied. See Award **3256--Carter**; Award **6656--Wyckoff**."

The issue presented to the Board here is more than substantially the same. It is exactly the **same**. Claimant asks the Board to relieve him from **re-**paying the stolen money. That issue has been consistently raised throughout the handling on the property and the submission to the Board.

The reason Carrier raises the question of change is not that claimant has changed the nature of his claim. It stems from the citation of Rules claimant alleges were violated in his submission to this Board and the lack of citation on the property. This, under some factual circumstances might be a material variance.. Under the facts of this case it is not. Claimant was given notice of trial, a trial was held and he was disciplined. All in connection with the monetary loss at issue. However, as noted, that process did not result in the requirement that he repay the loss to Carrier. That requirement was established by Carrier outside of the disciplinary process. When claimant made his protest Carrier replied that he was making a claim under Rule 7-A-2, dealing with non disciplinary matters. The Organization **argues** here, and the record supports its assertion, that Carrier, not the Organization, injected Rule 7-A-2 into the controversy.

What has occurred is that Carrier disciplined claimant by suspension, later reduced to reprimand, acting under Rule 6 of the Agreement. Acting outside the Agreement it required claimant to re-pay the stolen funds. Claimant **amended** and supplemented his claim to include the matter of re-payment. He accepted **the** reprimand. However he has **continued** to protest the requirement of **repayment**, and correctly points out that this was a disciplinary **measure taken** without **observing** the **requirements** of Rule No. 6.

Carrier objects to this view of the case, citing an **Award** from another property to the effect that recoupment of stolen funds is not a **disciplinary** measure and therefore not subject to the requirement of notice, hearing, and notice of discipline. However that **may** be on the property in question, there are several Awards on this property which reach a contrary conclusion. In rendering the Award on this property the Board **was** joined by the Referee who sat with the Board in rendering the Award **relied** upon by Carrier.

There can be no doubt that the Awards on the property hold that a requirement that a shortage **must** be repaid is a matter of discipline. Awards so holding **follow**: No. 4295, No. 4296, No. 4325, No. 4665, where it **was** said:

"... It is the opinion of this Board that the failure of the Carrier to reimburse the **Claimants** for the shortages charged them can only be a matter of discipline for their alleged laxity or negligence, and the conduct of the Carrier violated Rules 6-A-I and 6-B-1 of the Agreement. If we were to agree with the **Carrier** that it should have the choice of deciding when shortages in Ticket Clerks' accounts **were** discipline **matters**, and when they were not, it would in effect vitiate the discipline rules in the Agreement."

also No. 13575, as follows:

"Under the exceptional and **unusal** circumstances in this case, the action of the Carrier in rewiring **the employee** to make reimbursement **was** tantamount to discipline. We therefore find that he should have been given a trial in accordance with the discipline rule of the Agreement. Parts **(a)** and **(b)** of the **claim will** be sustained. We are without authority, however, to grant the remedy requested in Part **(c)** of the claim."

And, in No. 18239 the Board said:

"An investigation was held on October 16, 1968. After the hearing, he **was** found to have failed to follow explicit instructions to place all monies in the station safe and lock it whenever he is required to leave the station. As a discipline, Claimant **was** required to make restitution in the **amount** of \$335.73."

Thus we cannot accept Carrier's argument that **Claimant was not disciplined** when he **was** required to **make** re-payment. In order to **assess** discipline under the Rules Carrier was required to do so by written notice following the trial. It did not do so. Instead it required claimant to agree to re-payment during the time he **was** waiting for the result of his trial. Claimant filed a timely protest against that action and has continued his protest to this Board. By failing to adhere to the rules for assessing discipline Carrier violated the Agreement. We will grant that part of the claim which asks that Carrier reimburse claimant in the amount of \$902.50.

Part **(b)** of the claim asks that Carrier **pay** interest on the **amount** due at the rate of 6%. Since that issue **was** not raised on the property the Board, under established principles, must reject it.

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** violated.

A W A R D

Claim is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *E. G. Killian*
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1973.