

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19720
Docket Number CL-19788

Frederick R. **Blackwell**, Referee

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

PARTIES TO DISPUTE: (

(George P. Baker, Richard C. Bond, **Jervis Langdon**, Jr., and
(Willard **Wirtz**, Trustees of the Property of
(Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7112)
that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on Robert Nerosa, John Buddendorf and Dennis Shaffer, Clerks at **Pavonia** Yard, Camden, New Jersey.

(b) Claimants Robert Nerosa, John Buddendorf, and Dennis Shaffer's records be cleared of the charges brought against them on August 17, 1971.

(c) Claimants, Robert Nerosa, John Buddendorf and Dennis Shaffer be restored to service with seniority and all other rights unimpaired, and be **compensated** for wage loss sustained during the period out of service, plus interest at 6% per annum, compounded daily.

OPINION OF BOARD: This is a dismissal case which arose from an incident occurring on August 16, 1971 and involving about 65 cartons of chocolate scattered along Carrier's right of way in the vicinity of 48th Street, Camden, New Jersey. At the time of the incident all claimants were working the **11:59 PM to 7:59 AM** shift at Carrier's 27th Street Pavonia Yard Office, Camden, New Jersey. Their ages and length of service were: claimant Nerosa, age 25, six years service; claimant Buddendorf, age 29, six years service; and claimant Shaffer, age 19, six weeks service. Claimant Shaffer was posting under the tutelage of claimant Nerosa.

On September 7, 1971, after separate hearings for each claimant, the Carrier dismissed the claimants for committing the following offenses:

"1. Participation in any unauthorized activity while on duty or while on Company property which may interfere with the **performance** of the work of any **employee** is prohibited, approximately **7:30 a.m., Monday, August 16, 1971, Camden, N.J.**"

"2. Property of the railroad, as well as freight and articles found on cars, right-of-way, **or** elsewhere on Company property must be cared for and properly reported, and must not be removed from Company premises without first securing proper authority, approximately **7:30 a.m., Monday, August 16, 1971, Camden, N.J.**"

Petitioner contends: 1) that the pre-hearing notice of charges contained no statement of the "exact offense involved" and, hence, claimants could not be found guilty when no charges had been made; 2) that any charges which may have been made were not proved by the evidence; and 3) that the discipline imposed was excessive.

It is not disputed that claimant Nerosa went with Yardmaster Hambley from the 27th Street Office to the location of the scattered cartons at about 6:30 AM on August 16, 1971; they moved about five cartons from the track and returned to 27th Street. Subsequently, at about 7 AM, and without having specific authority to do so, all three claimants left the 27th Street Office and went to the location of the cartons. There, they loaded cartons of chocolate into the cars of claimants Nerosa and Buddendorf. City police, upon observing the loading operation at about 7:30 AM, reported the matter to Carrier, whereupon a Carrier policeman, **Sgt. Burns**, went to the location and observed the cartons in both cars. Twelve and six cartons were respectively in the cars of claimants Nerosa and Buddendorf. hereafter, Sgt. Burns questioned all of the claimants in the presence of Trainmaster Bibble.

There is evidenciary conflict on whether claimant Nerosa, after completing the first trip with Yardmaster Hambley, informed the Yardmaster **that** he, Nerosa, intended to return to 48th Street to salvage the cartons. There is also conflict on whether claimants Nerosa and Buddendorf admitted during interrogation by Sgt. Burns that they intended to keep some of the merchandise for their personal use.

Carrier's evidence, through Sgt. Burns, was that claimant Shaffer had said "No, he had no use for it", in response to claimant Nerosa asking if he, Shaffer, wanted some of the chocolate.

Our study of the record shows that claimants Nerosa and Buddendorf were aware of the nature of the charges against them and that the form of the statement of charges in no way impaired their defense. The conflict on whether claimant Nerosa informed his superior of the intended second trip to 48th Street arises from Yardmaster **Hambley's** testimony that he did not recall the claimant saying anything about the second trip and that "if he did it was immaterial at the time". Petitioner argues that this testimony, together with some talk about juveniles getting the cartons, amounted to implied authority for claimant Nerosa to proceed as he did. This argument, at best, raises a credibility issue as does the question of whether claimants admitted their intent to keep some of the cartons for their personal use. Apparently these issues were resolved by Carrier

against the claimants and the record provides no basis for disturbing that action. It is well established that this Board is in no position to resolve questions of credibility of witnesses. Award 11531 (Dolnick). In addition, we note that the establishment of intent of the kind here involved does not necessarily depend upon admissions of the parties; such intent can, and most frequently is, drawn as a reasonable inference from all the circumstances. Also, we see no merit in Petitioner's argument that Carrier's action is based upon the unsupported word of one person, Sgt. Burns, against the claimants. Carrier offered several witnesses including Sgt. Burns and Trainmaster Bibble in whose presence the Burn's interrogation of claimants took place. Thus, though there was opportunity to do so, claimants' representative did not choose to question the Trainmaster on what happened in his presence. Accordingly, we find on the whole record that there is substantial evidence to support Carrier's actions regarding claimants Nerosa and Buddendorf and, further, we conclude that the record affords no basis for viewing the discipline as so unreasonable as to amount to an abuse of discretion by the Carrier.

However, the record before us leads to different conclusions in respect to claimant Shaffer. Carrier asserts that this claimant's dismissal must necessarily stand, because he was subject to Rule 5-B-1 which permits dismissal without a hearing of any employee having less than 60 days service. We do not agree with this contention. Carrier proceeded against claimant Shaffer under Rule 6-A-1, which governs discipline of a person having an employment relationship with Carrier. For whatever reasons, Carrier made the choice to proceed under Rule 6-A-1 and we therefore find that Carrier waived its rights to proceed under Rule 5-B-1. Consequently, Carrier is now bound by the formal record it made against claimant under its chosen procedure and we shall consider his claim accordingly. We further find that, though claimant Shaffer's conduct was such as to warrant discipline, the evidence of record shows several important mitigating facts. Being nineteen years of age and only six weeks on the job at the time of the incident, he obviously **had much** less knowledge of Carrier's rules than the two older and more experienced claimants. Further, since it was natural and logical for him to follow the directions of the employee to whom he had been assigned for tutoring, his leaving the 27th Street Office in the company of such employee must be regarded at least as being under the color of authority. And finally, Carrier's own evidence shows that he consistently disclaimed any intent to retain any of the merchandise for his personal use. In light of these mitigating circumstances we believe the Carrier abused its discretion when it assessed the same discipline against claimant Shaffer as it did against the other claimants. But we also believe claimant Shaffer's conduct amounted to something more than a mere technical violation of Carrier's rules. Upon being asked if he wanted some of the merchandise, he had opportunity to withdraw completely from the affair but did not. Consequently, we shall not award any back wages in sustaining his claim. We shall award that he be restored to service with seniority and all other rights unimpaired.

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 Employes involved in this dispute are respectively Carrier and Employes 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

The Agreement was not violated in respect to two of the claimants as indicated in the Opinion, but was violated in respect to claimant Shaffer.

A W A R D

Claims denied in respect to claimants Nerosa and Buddendorf. Claim sustained in respect to claimant Shaffer to the extent that he shall be **restored** to service with seniority and all other rights unimpaired, but without any **com-** pensation for lost wages.

NATIONAL RAILROAD ~~ADJUSTMENT~~ BOARD
By Order of Third Division

ATTEST: *E. A. Killen*
Executive Secretary

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