

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 19933

Docket Number CL-19874

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
(Pacific Fruit Express Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7199)
that:

(a) The Pacific Fruit Express Company violated the current Clerks' Agreement between the parties when on August 26, 1971 it dismissed Mr. J. E. Zapata from service following investigation at which the charges brought against him were not proved; and,

(b) The Pacific Fruit Express Company shall now be required to reinstate Mr. J. E. Zapata to service with all rights unimpaired; to compensate him for all wages lost until restored to service with all rights unimpaired; to make premium payments to the Hospital Association as well as the Travelers Insurance Company under Policy CA-23000 extant until he is returned to service with all rights unimpaired, and to expunge his personal record respecting the charges.

OPINION OF BOARD: This claim is for reinstatement of claimant with back pay and all rights unimpaired.

Claimant was discharged, after hearings, for violation of Rules H and K of Carrier's rules.

Rule H, reads:

"Engaging in other work or business is not permitted. Exceptions to this rule may in **some** cases be made, but only on prior approval of head of department".

Rule K, provides:

"Those wishing to absent themselves from duty must first obtain approval of their supervisors, In case anyone is not able to report for duty, he must immediately inform his supervisor and report the circumstances; failure to do so without giving a satisfactory explanation cannot be permitted",

We shall deal with Rule K, first.

The testimony, at the hearing, showed that on July 12, 1971, while employed, claimant sustained an injury. He reported it, and was examined by a doctor, who took X-Rays. After the examination, claimant returned to work, but was unable to finish the day and left two hours ahead of time, **after** notifying his foreman.

Although, there was a great deal of testimony at the hearings and numerous objections, the above facts emerged clearly. There was no substantial testimony supporting the charge of violation of Rule K. Under **the** established precedents of the Board, the charge was not proven.

The conclusion reached by G. W. Flynn, in his letter of discharge to **the** claimant, dated August 26, 1971, that the other trips-to doctors "were clearly with the purpose of setting up an umbrella over /the_/ unauthorized absence" is not supported by any evidence, if not actually contrary to it:

As to the charge of **violation** of Rule H, the situation is different. The record contains substantial **uncontroverted** evidence, that claimant worked only on week ends and refused jobs on weekdays, and that he was actually working on other jobs in violation of the Rule. Claimant did not refute the **testimon** but only objected to it on the ground of "hearsay", Disciplinary hearings **ar**, not court proceedings, where strict adherence to rules of evidence is required. Claimant was, in the notice sent to him, advised that he is charged with having outside employment in violation of Rule H. It was his right and **obligation** to deny it, if the charge was not true. This he failed to do. He could easily have brought his wife to deny the testimony of the Carrier's witnesses. This, too, he failed to do. The testimony, thus, was substantial and uncontradicted. Under the numerous precedents of the Board, it can not upset a decision based on substantial evidence.

Nor can the Board substitute its judgment for that of the Carrier in imposing discipline when a finding of violation is based on substantial evidence, where it is not shown that the Carrier acted "in an unreasonable, **ar**-bitrary, or discriminatory manner amounting to abuse of discretion".

Nor is Rule H, itself, unreasonable, in view of the fact that it affected the attendance record of employees. No evidence was introduced to show that the Rule was applicable to permanent employees only.

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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 **Carrier** did not violate the Agreement by discharging the **Claimant** for violation of Rule H.

A W A R D

The claim is dismissed.

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

ATTEST: *A.W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

NATIONAL RAILROAD ADJUSTMENT BOARD

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By Order of Third Division

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A. W. Paulsen
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