

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20294
Docket Number CL-20528

Joseph A. Sickles, Referee

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

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company

STATEMENT OF CLAIM: **Claim** of the System **Committee** of the Brotherhood
(GL-7425) that:

1. The Carrier violated the Master Clerical Agreement effective January 1, 1965, when on September 19, 1972, it dismissed Clerk **U. K. Franken, Jr.**, Suffolk, Virginia from **service** of the Carrier following investigation on September 8, 1972, at which he was not present.

2. Carrier shall now be required to:

- (a) Clear the record of Clerk **U. K. Franken, Jr.**, of any and all references to the instant case.
- (b) Reinstate Clerk **U. K. Franken, Jr.**, **with** full seniority and rights unimpaired.
- (c) Honor the **Employees'** request for an indefinite leave of absence.

OPINION OF BOARD: On May 23, 1971, Claimant was involved in an altercation which led to his arrest. Subsequently, he was found guilty of two counts of murder and three counts of attempted murder and was sentenced to a total of ninety (90) years of confinement in the State Penitentiary.

In August of 1972, Claimant was advised by Carrier to report for a formal investigation as a result of unauthorized absence from duty on and after May 24, 1971. After a number of postponements, the investigation was conducted on **September** 8, 1972. Obviously, Claimant was not present. **On** September 19, 1972, Claimant was dismissed from service.

The Organization does not contest the basic facts stated above, but states that the Carrier should have granted Claimant an indefinite leave of absence, and requests a reinstatement because **Claimant** was not present at the investigation.

The Board has reviewed the applicable Agreement at length, **and** we are **unable** to discwer any language which would authorize us to require Carrier to grant an unlimited leave of absence to an employee who is incarcerated in a State Penitentiary after conviction of a **num-**ber of crimes of violence.

The Organization's request for reinstatement because Claimant was not present at the investigation stems from the wording of Rule 27 (a):

"An employee . . . **will** not be disciplined or dismissed without investigation and hearing and will have the right to be present." (**underscoring** supplied)

In its very vigorous defense of Claimant's rights, the Organization raised timely objection to a "trial in absentia" before the investigation was held, requested an indefinite postponement (both of which objections were renewed at the investigation) and wade objection to hearsay testimony at the investigation.

We are persuaded by the Organization's contentious that, clearly, a Claimant has a due process right to confront and cross examine witnesses - and to present his **own** evidence **and** testimony - at a hearing concerning his employment status **and** Livelihood. At the same time we recognize that a Claimant may not defeat Carrier's right to take appropriate disciplinary action, by deliberate action, or by circumstances which are created by his own conduct or misconduct.

Rule 27(a) contains language which mandates that **Claimant** has a right to be present at an investigation and hearing. But, under this record, we are unable to conclude that Carrier's action in any wanner precluded Claimant's presence (See First Division Award 18244). In fact, Carrier withheld **formal** investigation until Claimant's guilt was established under the State's criminal procedures and it **became** apparent that he would be subjected to a Lengthy period of prison incarceration.

We have no difficulty in issuing a denial award under this record because Claimant himself, by his own misconduct in perpetrating a **number** of severe crimes of violence, affected his contractual right to be present at the investigation. There is absolutely no evidence of record to suggest that Carrier was a motivating factor in precluding **Claimant's** attendance.

At the same time, we note that which appears to be an underlying concern by the Organization that, in some manner, Rule 27(a) **may** be diluted by this Award. Such is not the case. We feel that the mandates of Rule 27(a) are quite significant, and this Board would not condone any deliberate Carrier action which would deprive a Claimant of his right to be present at his investigation, unless he waives that right, or his deliberate action affirmatively precludes such attendance. We do not mean to suggest that Carrier has urged that the impact of Rule 27(a) be relaxed, but merely point out that each individual case must be viewed upon its own merits.

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: *A. W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.