NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20805
Docket Number CL-20693

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Long Island Rail Road Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7549, that

1. The Carrier violated the Clerks' Agreement, particularly, Rules 6, 7, 7-A-2, 9-A-1 and 9-A-2, among others when it removed Clerk Marilyn Shea from service on September 12, 1972.

2. The Carrier further violated the Clerks' Agreement by conducting trial on October 5, 1972, at 10 a.m., without the accused Clerk (Marilyn Shea) or her representative present.

3. The Carrier further violated the Clerks' Agreement by conducting trial on October 5, 1972, at 2 p.m.; October 12, 1972; October 18, 1972; and October 24, 1972, without the accused Clerk (Marilyn Shea) or her representative present.

4. The Carrier further violated the Clerks' Agreement by dismissing claimant from its employ effective November 13, 1972, as a result of trial for alleged offense of September 18, 1972.

5. That Clerk Marilyn Shea be paid for all loss of pay for each day from September 11, 1972 to June 25, 1973, when she was returned to service as a result of appeal to the Superintendent Personnel Management, Long Island Railroad.

OPINION OF BOARD: Claimant had been employed as a key punch operator with hours of 9:00 A.M. to 5:00 P.M. Monday through Friday. She had eight years of service. Claimant had been on maternity leave from May 3, 1972 until her return to duty on September 11, 1972, having given birth to a child. It is noted that her husband was an officer of the Organization herein. On September 11, 1972 she was informed that she would be required to work four hours of overtime that evening; she informed her supervisor that she was unable to work the overtime and left at about 5:00 P.M. She was then held out of service pending charges and investigation for her failure to work the overtime, effective September 12th. On September 16th Claimant received a letter telling her to report for duty on September 18th and informing her that she could continue to work pending the investigation of the incident of September 11th. On September 18th Claimant again was required to work overtime and refused. She continued to work and received written charges, dated September 28, 1972, on each of the incidents which also scheduled separate

trials for the two incidents for 10:00 A.M. October 5th and 2:00 P.M. the same day. The trial for the earlier incident took place as scheduled, without the presence of Claimant or any representatives, and subsequently she was assessed a forty-five day suspension ("time held out of service to apply"). The trial on the second charge was started the afternoon of October 5th and continued over several following days; the result was that Claimant was terminated effective November 13, 1972. Following the appellate process, Claimant was restored to duty on June 25, 1973, but was neither compensated for time lost nor exonerated.

Dealing with the first incident, the circumstances surrounding the investigatory trial were unusual and clearly there were no justifiable reasons for the original one week suspension (paragraph 1 of the Claim). Initially it is noted that all of the representatives of Claimant's Organization were at a meeting of a Presidential Fact Finding Board on October 5th together with certain senior Carrier representatives: a fact obviously known to Carrier. Petitioner asserts, and presented a written statement during the appellate process, in corroboration, that on October 2, 1972 an attorney representing Claimant telephoned Claimant's supervisor and requested a postponement of the trial. He alleges that he sent a telegram confirming the request on October 4th but received no response until October 6th. Carrier acknowledges the request for postponement but indicated that it had been received on October 4th. In spite of this later admission (by the highest officer of Carrier), at the trial on October 5th, the supervisor in question testified that neither Claimant nor the Organization had requested a delay or postponement of the proceedings. Carrier bases its position, that it acted properly, on the discipline rule which in 6-C-1 (b) provides:

> "If he desires to be represented at such trial, he may be accompanied by the 'duly accredited representative' as that term is defined in this Agreement".

The Agreement defines duly accredited representative quite precisely as either members of the committee or officers of BRAC. Carrier concludes that the attorney had no standing under the Agreement and his request for postponement could not be honored. We do not agree. Carrier perhaps had the right to preclude the outside attorney from representing Claimant at the hearing, pursuant to the Agreement, but this right does not extend to ignoring a request for postponement of the proceeding. At very least, Carrier had the obligation of determining the nature of the problem from Claimant before proceeding in the absence of Claimant entirely. It must be concluded, that under the circumstances herein, Claimant's rights to a fair and impartial trial were irreparably damaged and the discipline resulting from that trial must be set aside. We are not, by this Award, making a determination with respect to the question of whether an employe under this Agreement may be represented by an outside attorney in a disciplinary trial.

With respect to the trial on the second charge of insubordination, the Claimant, contrary to the contention of Petitioner, was effectively represented and was present. We do not find it pertinent to elaborate on the circumstances, but Claimant was able to find out about the hearing not being postponed and managed to secure representation. Paragraph three of the Claim does not have merit.

The record of the trial on the September 18th incident reveals that Claimant refused to work overtime on the night in question and offered no reason for this action, although she had a plausible basis for the refusal. There is some conflict on a number of points of fact including whether she indicated she "would not" or "could not" work the overtime; we cannot resolve credibility questions and must allow the Carrier's hearing officer that perogative. The conduct of the hearing, however, raises some serious questions. Claimant's representative repeatedly attempted, by questioning adverse as well as friendly witnesses to develop information in such questions as how many clerks worked overtime and how many did not work the night of September 18th; how much overtime was actually needed; how many man-hours were indeed worked that night and several other questions. In each case, the hearing officer refused to permit the questions to be answered as not being relevant to the incident which took place at 5:10 P.M. that night: the time of the alleged insubordinate act. At the same time the hearing officer did permit testimony, over the Petitioner's representative's strong objections by a Carrier witness, with respect to an incident which took place on September 8th. There was a marked lack of impartiality on the hearing officer's part shown by these rulings and serious question as to the validity of the entire trial.

This dispute is marked by a distinctly hostile and counter-productive attitude on both sides: Carrier apparently was quite punitive and showed little regard for Claimant's personal problems; Claimant was at best uncommunicative and showed no concern for Carrier's problems. However, the evidence in the transcript is quite clear in that Claimant was required to work overtime on the evening of September 18th and refused to do so; it must be concluded therefore, that there was substantial evidence to support Carrier's conclusion that she was guilty as charged. After careful evaluation, we also must conclude that the hearing officer's conduct, although prejudicial in his refusal to permit certain questioning, was not of sufficient significance to warrant overturning the entire matter. We reach this conclusion since the line of questioning would not have changed any of the material facts upon which the conclusion of guilt was based (we make this determination based on Petitioner's arguments going to those alleged

additional facts). The record demonstrates that Carrier's request for overtime work was not limited solely to Claimant, but was directed to all the employees in her classification. We have previously held that refusal to work overtime under such circumstances warrants discipline (see for example Award 20265 involving the same parties). Since Carrier employed progressive discipline in the two incidents in this dispute, we shall follow and not modify Carrier's disciplinary principle. Therefore, we shall deny the Claim for the September 18th infraction, but, in view of our conclusion with respect to the earlier incident, the discipline imposed will be reduced to a forty-five day suspension, and she will be made whole in accordance with the provisions of Rule 7-A-1 (d).

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

That the Agreement was violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1975.

ment to its conclusion, the compensation should have been for the remaining strike period until January 19, 1973 and thereafter, which would be considerably in excess of an additional 21 days.

We cannot accept the Organization's logic in this case which would require the payment for time not worked during a strike and would include strike time as part of the forty five day suspension. It is a proper assumption in this case that Claimant would not have been available for work during the strike period. To permit the concurrent running of the suspension during the strike hiatus would dissipate all real impact of the penalty imposed. Therefore we shall sustain the Carrier's computations with respect to the suspension.

Referee Irwin M. Lieberman, who sat with the Division as a neutral member when Award No. 20805 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.