

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number **20860**
Docket, Number CL-20767

Dana E. Eischen, Referee

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

PARTIES TO DISPUTE: (

(Southern Railway **Company**

STATEMENT OF CLAIM: Claim of the System Committee of the **Brotherhood**
(GL-7539) that:

(a) Carrier violated the Agreement at Charlotte, North Carolina, when it suspended Mr. Harry **Yandle**, Clerk, from the service of the Carrier February 17, 1972 through February 27, 1972; and

(b) Carrier shall be required to compensate Mr. Harry **Yandle**, Clerk, for nine **(9)** days' pay at his daily rate for each work day lost beginning February 17 and ending February 27, **1972**.

OPINION OF BOARD: Claimant entered service with Carrier in December **1969** and in February **1972** he occupied the position of **Yard** Clerk at Charlotte, North Carolina with regularly assigned hours of **3:00** to **11:00** p.m. Tuesday through Saturday. On Thursday February 17, 1972 an incident occurred which resulted in Claimant's suspension from service at about **4:30** p.m. By letter dated February 17, 1972 Carrier informed Claimant as follows:

"**This** is to advise that effective today, you are **sus-pended** from the service of Southern Railway for a period of ten **(10)** days, time ending 3 p.m., Thursday, February **27**, 1972. Anytime that **you** are off after this will be of your own accord.

The **reason** for this suspension **is** that you were observed on **more** than one occasion loitering in washer/locker room not protecting your assignment."

Claimant requested an investigation **and** on his return to service on Tuesday February **29**, 1972 a hearing **was** held at which Claimant **was** represented by Petitioner herein. On April 12, 1972 Claimant notified Carrier that he was **claiming nine** "(9) **days pay** account **the** company **un-justly** holding **me** out of service from February 17, 1972 until February 27, 1972." **The** matter was handled through **all** appeals procedures on the property, time limits were extended as necessary by mutual **agreement** of the parties and the claim ultimately was declined on December 15, 1973.

The record shows that Claimant on **February 17, 1972** at **approximately 4:20 p.m.** was confronted by his supervisor, **G. F. Helms**, Assistant Agent-Terminal Control, while seated at a table in the switchmen's locker room talking with another clerk, **one W. A. Meade**. Meade **was** just completing a tour of duty and Claimant had come on at **3:00 p.m.** The switchmen's locker room contains a lavatory and is open to all employees **in** the yard. The incident between Claimant and Helms is **best** reconstructed by **reference to their respective testimony** in the transcript of the investigation held **February 29, 1972, to wit:**

Helms : "At approximately **4:20 p.m., February 17th**, I went in **the** switchmen's locker room to pick up some yard placing **tickets**. I observed **Mr. Yandle** and **Mr. Meade** sitting across the table from each other. Mr. Meade **had** his radio on the floor and Mr. **Yandle** had his radio on top. I asked them then if there wasn't any work on **the** yard for them to be doing. **Mr. Yandle** stated that he had four yard clerks at that time. That there wasn't any work to be done. I told him if I observed him in the switchman's locker room any **more** when he **was** on duty, supposing to **be** performing his duties, that I would take him out of service. Mr. Yandle said then, **'Well, you can** take me out of service now if you want to'. I told him he **was** out of service."

Xandle: "I went to work at **3 o'clock** and worked continuously until I got all **my** duties performed. I had some gravel in **my** shot and I had to go to the rest room. Being near the new building there, I stepped inside, washed my **hands**, **used** the **restroom**, sat down on the **bench** and I took the **gravel** out of my shoe and had just got **my** shot back on and tied when Mr. Helms walked in and confronted me about work to be doing and me loitering in the locker room. I **didn't** have a chance to explain to him. He told me to get outside **and** do **something** or I would be taken out of service."

The unrefuted record shows that Helms **transported** Claimant, at the latter's request, to the yard office where they met with Helms' superior **G. K. McKinna**, Agent-Terminal Control. At this meeting, Helms indicated to **McKinna** in Claimant's presence that he had just suspended **Claimant** but would defer to **McKinna's judgement** on the matter of restoration to service. Claimant interjected "I am already out of service and I **will** leave it up to **my** local chairman," whereupon Claimant left the property.

Petitioner on behalf of Claimant contends that Carrier has failed to prove by substantial **record** evidence the charges of "on **more** than one occasion loitering in washer/locker room not **protecting** your assignment." There are no allegations herein that Claimant did not receive a fair and impartial investigation but Petitioner does maintain **arguendo** that the discipline imposed was excessive and consequently arbitrary, unreasonable and capricious.

Rule **40**, the Discipline Rule of the parties' agreement, has since been amended but at the time of this incident **read** in pertinent part as follows:

"(a) **Employees will** not be discharged or disciplined except for cause. . . . **Pending** investigation employees may be relieved from service. If found blameless, they **will** be paid for lost time. If employee receives remuneration for services from Company or others during suspension or dismissal, only actual **amount** lost **will** be paid."

Our review of the record herein leads **to a conclusion** that Claimant was not without blame regarding the incident of February 17, **1972**. **He** was in an apparent state of rest when **confronted** by his supervisor and rather than provide his explanation when questioned he arrogantly challenged the supervisor. On the other hand, in the peculiar facts of this **case supervisor Helms** likewise was not without blame. Upon encountering Claimant he ordered him to return to work which is within his prerogative but also in the same breath he threatened **suspension** without waiting for Claimant to obey or to explain his **presence** in the locker room. In our considered **judgement**, the precipitous threat by Helms and the petulant challenge by **Yandle** equally contributed to the incident. **Each** engaged in **brinksmanship** and escalated a relatively minor incident into a confrontation and a disciplinary matter. Claimant further aggravated his situation by rejecting out of hand the **overture** to return him to **service**.

The record does not indicate that Carrier considered the **precipitating role** of supervisor Helms **when** it assessed the ten (10) days suspension on the day of the incident. To this extent we deem **the** penalty arbitrary and hereby reduce the assessed discipline to a suspension of five **(5)** days. Since Claimant actually lost nine **(9)** days pay, he shall be recompensed for four **(4)** days pay at **his** daily rate in February 1972, less any offset **consistent** with Rule **40** (a) of the **then-existing** Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

The claim is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division ..

ATTEST: A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 14th day Of November 1975.