

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20913  
Docket Number CL-21005

Irwin M. Lieberman, Referee

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

PARTIES TO DISPUTE: (

(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7710) that:

1. The Western Pacific **Railroad** Company violated **Rule** 45 of the Agreement extant when it failed and refused to allow Mr. A. F. Daggett due compensation for time held out of service in contravention of the clear and **unambiguous** terms thereof; and,

2. The Western Pacific Railroad Company shall now be required to compensate Mr. A. F. Daggett for eleven days' at the pro-rata rate of his regular **assignment** of Interchange Clerk 24259.

OPINION OF BOARD: Claimant on February 5, 1973 was working a regular assignment as Yard clerk with hours of **11:59** P.M. to **7:59** A.M. There were no provisions for a fixed lunch period but the applicable Rule 18 provides that not less than twenty minutes shall be allowed to eat for regular operations requiring continuous hours. During the shift which was admittedly light in work load, a power failure occurred from **1:10** A.M. to **2:05** A.M. Claimant admitted that he left the office at about 1 A.M. and sat in his car during the blackout. At approximately **1:50** A.M. a fellow employee Mr. Brown, came out and asked Claimant to go to eat with him. **Brown** drove his car. The two men returned at about **3:15** A.M. The two men were asked by the Trainmaster, upon their return, **where** they had been. When told they had been to lunch (**known** to the Chief Clerk) he immediately took them out of service.

An investigatory hearing was held on February 8, 1973 and on February 15th the two men were found guilty of unauthorized absence and were both dismissed **from** service. By letter dated February **21st**, both men were accorded leniency by Carrier and returned to service, with Brown being **made** whole for lost pay but Claimant not being **reimbursed**.

Without regard to minor issues (such as the citation of a **Rule** in the dismissal letter which was not specified in the charge) the principal issues are whether or not Carrier appropriately withheld **Claimant** frw service prior to the determination of guilt, whether the evidence supported the finding of guilt and whether the penalty assessed was discriminatory in view of the handling of Mr. Brown's case. It is noted that the charge, subject matter of the hearing, and the **dismissal** letter all referred to the absence

without authorization es the central issue in the disciplinary dispute; the citation of a rule for the first time after the hearing **was** inappropriate but in our judgment not a fatal flaw es it **was** completely **gratuitious**.

The Organization argues that Carrier violated **Rule** 45 of the Agreement which sets forth the disciplinary procedure and provides in pertinent part:

"He may, however, be held out of service pending such investigation if the gravity of the offense warrants . . . . It is understood end agreed that the suspense feature of this rule is permissive end not mandatory, end will not be invoked where trivial or minor infractions of the rules **are** involved."

Petitioner avers that it was wholly **unwarranted** to hold Claimant out of service for the infraction involved in this dispute. Petitioner also **alleges** that the **case was** not proven against **defendent** since the Chief Clerk knew that the two men had gone to eat end that the time for a meal period **was** somewhat flexible, based on operating needs. Finally, it is charged that the discipline assessed was discriminatory in view of the virtual complete exoneration (no loss of pay) for the other employee.

First it is noted that Claimant had a reasonably poor work record insofar es attendance end tardiness is concerned (including taking time **away** from work) whereas Mr. **Brown** had a clean record.

There is no question but that the two men took en excessive **amount** of time for "lunch" on the night in question. Even if twenty minutes was the minimum end somewhat flexible, the period of en hour and twenty minutes or more was unwarranted, even with the circumstance of the black out, which **was** over before the two men **returned**. Further there was a need for Claimant during the period of his absence. Therefore we conclude that there was substantial evidence that Claimant was absent in the unauthorized fashion es charged. Given the guilt of Claimant, the difference in the ultimate penalties accorded the two men **was** justifiable when the two records are considered end certainly does not constitute **an** abuse of discretion by Carrier.

The question of the suspension of Claimant prior to the hearing and assessment of penalty is another matter. In examining the alleged infraction at the time of the **Trainmaster's** action, there is no indication that the offense could be construed to be "grave" end it certainly had no possible effect on **the safety** of the public, other employees or himself. For this **reason** we **conclude that** Claimant should not have been held out of **service** Prior to the assessment of discipline.

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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 **Employees** involved in this dispute **art** 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

Claimant shall be made whole (at his regular pro-rata rate) **for** losses sustained from February 5, 1973 through February **14th**, 1973; the remainder of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

G.W. Pauls  
Executive Secretary

Dated at Chicago, **Illinois**, this 16th day of January 1976.