

. NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21181

Docket Number CL-20852

Dana E. Eischen, *Referee*

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station **Employees**  
( Staten Island Rapid Transit Operating Authority

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood  
(GL-7699) that:

(1) Carrier violated the Agreement between the parties when it suspended Mr. James A. Garefalos from service (without compensation) for the period October 25, 1973 through January 24, 1974, end

(2) **Carrier** shall reimburse Mr. Garefalos in the amount of all **compensation lost** by him during the claim period - October 25, 1973 **through** January 24, 1974.

OPINION OF BOARD: Claimant, James A. Garefalos entered the service of the Staten Island Rapid Transit Railway Company (**SIRT**) in 1949 and worked for that Carrier as a Janitor from 1949 to 1970. By tri-partite Agreement signed by SIRT, the City of New York and the **Brotherhood of Railroad Airline and Steamship Clerks** (the Organization herein) on February 5, 1971 the City took over the passenger service operation of **SIRT**. Claimant and some 31 other **employees** represented by the Organization were, pursuant to that Agreement, given the option inter alia to follow the work. **Claimant** elected to follow the work and he transferred all of his seniority to the employ of the City. Thereafter, the City established an agency known as Staten Island Rapid Transit Operating Authority (**SIRTOA**) to operate the passenger **service** operation. Thus, **Claimant** came to the employ of **SIRTOA** (Carrier herein) in 1971 with seniority dating from 1949.

By hand-delivered letter dated October 29, 1973, Claimant received *the* following notification:

"Dear Mr. Garefalos:

You are instructed to **report to** Assistant Superintendent's office 9:30 AM Wednesday, October 31st, 1973, for investigation in **connection** with your alleged act of insubordination at 10:00 AM, Wednesday, October 24, 1973, in refusing to **comply** with instructions of Assistant Superintendent to perform duties as required by janitorial assignments dated November 11, 1971.

Very truly yours,

C. Ii. Bergman /s/  
Superintendent"

Thereafter, an investigative hearing **was** conducted on October **31, 1973**. By certified letter dated November 21, **1973 Claimant** received the following **information**:

"Dear **Mr.** Gerefalos:

On October 31st, 1973, pursuant to Notice, I conducted an **Investigation** and Hearing of allegations of insubordination as set forth in a letter to you dated October **29th**, last. Following a careful review of the transcript of the Investigation and Hearing, it is my finding that the testimony and evidence given before me substantiated the charge, and that in your failure on **October 24th, 1973** to follow the proper and **lawful** orders of Assistant Superintendent Ekin, you were insubordinate.

An evaluation of **your** service record with our Carrier establishes that on two prior occasions **known** to present **management**, you were guilty of insubordinate acts identical to that of October **24th**, last. On a leniency basis, then, **and** only in **final** consideration of your **years** of service with our carrier, do I issue **my** decision which is as **follows**:

Discipline in the matter herein **shall** be in the form of a ninety **(90)** days suspension for the period October **25th, 1973** through January **24th, 1974**, inclusive.

**You are cautioned further that your** attitude and **responsiveness to supervision must** hereafter conform to accepted standards of service.

Very truly yours,

C. H. Bergman /s/  
Superintendent"

Subsequently the instant claim **was** filed on December **12, 1973** as follows:

"Dear Mr. Duszak:

Please consider this as an appeal from the decision of Mr. C. H. Bergman in the claim on behalf of Mr. J. H. Gerefalos for **restoration to service of Carrier and compensation for all wages lost during suspension period - October 25, 1973 through January 24, 1974.**

"The facts in this case are that Mr. Garefalos was charged with insubordination by Superintendent C. H. Bergman per his letter dated October 29, 1973. Investigation and hearing was held on October 31, 1973 by Mr. Bergman and, under date of Nov. 21, 1973, Mr. Bergman assessed discipline of 90 days' suspension from service against Mr. Garefalos,

During the formal investigation held on October 31, 1973, Hearing Officer Bergman encouraged and allowed the introduction of records from another Carrier (E&O-C&O Form X-187) regarding the work-record of Mr. Garefalos and such action was obviously violative of the 'fair and impartial' requirements of Rule 47 of our Agreement.

The service of Mr. Bergman as prosecutor, judge and jury further precluded any opportunity of a fair and impartial investigation, and his action in making the charges, holding the hearing and rendering the decision against Mr. Garefalos in this case caused a violation of the Agreement.

In view of these violations of Rule 47 of the Clerks' Agreement, it is respectfully requested that Mr. Garefalos be restored to the service of Staten Island Rapid Transit Operating Authority with compensation for all time lost during his period of suspension.

very truly yours, . . .

E. J. Reynolds' /s/

The claim was denied on the property and appealed by the Organization to our Board for disposition.

As alluded in the quoted correspondence supra an incident occurred between Claimant and Mr. C. W. Ekin, Carrier Assistant Superintendent, on the morning of October 24, 1973 at St. George Terminal. The unrefuted record shows that part of Claimant's duties as Janitor at St. George Terminal was to clean "Tower B," including the Carmen's locker room. In this connection, a schedule, of janitorial assignments showing duties of Claimant and three other janitors was circulated November 11, 1971 by Assistant Superintendent Ekin. At approximately 9:30 A.M. on October 24, 1973 Ekin issued instructions to Claimant, through a Crew Dispatcher, to clean Tower B. Claimant did not clean the tower. Ekin next issued a direct order to Claimant to clean the tower. Claimant replied in words or substance that he would not do so and walked away. Ekin thereupon suspended Claimant from service. Approximately one-half hour later Claimant returned and handed Ekin a note reading as follows:

"OCTOBER, 24th, 1973

C. W. EKin  
ASST SUPT  
S.I.R.T.OA

"DEAR SIR:

I 'M VERY SORRY I CANNOT DO THE WORK YOU  
ORDERED ME TO DO TODAY ACCT OF STOMACH PAIRS.  
I CANNOT STRAIN MYSELF ANY MORE THAN I HAVE ALLREADY THIS  
MORNING.

JAMES GAREFAOLIS /s/

JANITOR ST.GEORGE & VARIOUS 6am

P.S.

A.TORREGROSSA REQUESTED TO TYPE THIS MEMO ACCT INCUMBENT  
CANNOT WRITE IN ENGLISH."

Assistant Superintendent Ekin instructed Claimant to report, to the Company physician's office at 2:00 p.m. The record is in conflict as to whether Claimant presented himself as directed. In any event he did not see the doctor, At the hearing Claimant testified that he consulted his own family doctor because the Company doctor "didn't show up." Claimant presented a certificate from his own doctor dated October 24, 1973 which carries the statement "...gastroenteritis from 10/25/73." Claimant apparently reported to St. George Terminal on October 25, 1973 but was not permitted to work. Thereafter, the hearing described above was conducted and Claimant was assessed 90 days actual suspension for the period October 25, 1973 through January 24, 1974.

The Organization protests the discipline on several grounds to wit: 1) Failure of Carrier to provide a fair and impartial investigation per Rule 47 of the Agreement because the same Officer conducted the hearing and assessed the discipline. 2) Prejudicial introduction of Claimant's past discipline record at the hearing and investigation, 3) Mitigating circumstances of Claimant's illness on October 24 justify his refusal to perform the work in question and 4) The ninety days of discipline was excessive in the circumstances.

It is well known that our jurisdiction in discipline cases is limited to a review of three factors, 1) Whether Claimant was afforded a fair investigation 2) Whether substantial evidence supports the finding of culpability and 3) Whether the quantum of discipline imposed was excessively harsh, arbitrary or unreasonable. We have reviewed the facts of record herein in light of these standards. In our considered judgement

there is no evidence that **Rule 47** was violated or that **Claimant** was denied a fair and **impartial** investigation. We do not approve of the practice of Carrier whereby one individual prefers the charges, holds the hearing and assesses the discipline. It has been often stated that **employees** discipline should have both the **appearance** and the reality of fairness and **impartiality**. But we cannot find on record any overt evidence of bias or prejudice to **Claimant** and we are therefore not able to hold that the **combination** of roles, solely and without **more**, was per se violative of **Rule 47**. Nor can we concur with the **Organization's** assertion that introduction of **Claimant's** past discipline record at the investigation deprived him of a fair hearing. There was **ample** evidence to support finding of culpability and **Claimant's** arguments in mitigation **simply** are not **credible** or **persuasive**. In such **situations** past discipline records properly **may** be introduced relative to determining the **amount** of discipline to be assessed for a proven instant infraction. It perhaps goes without saying that past discipline may not be used directly or inferentially to establish present guilt. In any event, there is no evidence that **Claimant's** past discipline record was so used in this case. And it is specious to argue that his prior discipline was **immaterial** because from "another Carrier" wherein the record shows 24 years of uninterrupted service for essentially the **same** managerial entity and under one Labor Agreement with change of ownership marked only by a change of title so far as **Claimant** was concerned. That prior record shows that **Claimant** was disciplined with progressive severity twice before for the **same** offense of which he was found culpable in the instant case. Thus, in 1970 **Claimant** was suspended for five (5) days for refusing to **clean** Tower B and in 1971 he was dismissed (but later reinstated) for refusing to clean certain offices and facilities. The entire record supports the conclusion that **Claimant** received a fair investigation; that he refused to perform a reasonable order of his authorized Superior, without, **demonstrable** mitigating circumstances; and, that the discipline imposed was not **inappropriately** severe in **all** of the circumstances. Accordingly, the claim must be denied.

**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 11, 1934**;

That this Division of the **Adjustment Board** has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Paulson*  
Executive Secretary

Dated at Chicago, Illinois, this 13th day of August 1976.