

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21371
Docket Number CL-21522

William G. Caples, Referee

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

PARTIES TO DISPUTE: (

(The Texas and Pacific Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-8083, that:

1. Carrier violated the Agreement between the parties when on February 24, 1975, it dismissed Mrs. Darlene Presswood, Clerk, Mineola, Texas, from service of the Texas and Pacific Railway Company following formal investigation held on February 20, 1975.

2. Carrier's action in dismissing Mrs. Resswood from the service of the Carrier was unjust, unreasonable, arbitrary, capricious, and an abuse of its discretion.

3. **Carrier** shall now be required to reinstate Mrs. Resswood to the service of the Carrier with seniority and **all** other rights unimpaired with compensation for all wages and all other losses sustained by Mrs. Resswood due to her unjust dismissal from Carrier's service.

OPINION OF BOARD: On August 5, 1974, Carrier issued a draft made payable to Claimant in the amount of \$926.25. Attached to and a part of the draft was a piece of paper entitled "Statement of Payment" which showed "**Loss & Damage Claim**," twice, in amounts of \$507.00 and \$419.25, and a "Payee No. 10581." The Carrier alleges the payment was made to Claimant through a clerical error and should have been made to a customer as settlement of two loss and damage freight claims totaling \$926.25; that the clerical error occurred in Carrier's freight claim office at Palestine, Texas, through using Claimant's **employee** payee code No. 10531 instead of the customer's code **No. 10581**. On August 13, 1974, Claimant endorsed the draft, under this **statement**, "By acceptance hereof payee acknowledges payment **in** full of items identified on attached stub," and deposited the amount thereof in her personal checking account. In November 1974, the customer made inquiry of Carrier about non payment of its loss and damage freight claims and Carrier then discovered the error which led to the issuance of the draft to Claimant. On November 22, 1974, Carrier's General Freight Claim Agent wrote Claimant as follows:

"We regret to advise you MP draft 193332, August 5, 1974, for \$926.25 was issued to you in error due to an incorrect claimant code number being used. Since payment was made to you in **error**, please refund \$926.25. Please show claim numbers (shown as the subject of the letter) on your check."

Claimant on November 27, 1974, answered the General Freight Claim Agent as follows:

"I received your letter dated November 22, 1974, requesting that I send you a check for \$926.25. This has me very puzzled because the check which I received in August of this year was made out to me with no explanation as to what it was for except two claim numbers.

Over the years I have turned in many time claims for having been handled in violation of my working agreement while working as clerk at Longview, Texas. Some of these claims would amount to a great deal of money, which I am entitled to, due to the length of time that the violations continued. When I received the check in August, naturally I assumed that I had been awarded some of these time claims, since there was no other explanation on the check as to what it was for. I cashed the check in good faith and have long since used the money.

Since I have not claimed any compensation fraudulantly (sic) or in any incorrect manner, I do not think that I have any cause to send you a check for the amount you request."

The record does not disclose any response to Claimant's letter of November 27, 1974, a point to which the Organization gives great weight. Subsequently Carrier's representative called asking Claimant's intentions and there were conferences between the Carrier's representative and Claimant and her husband about the matter in which the Carrier's position was stated and restitution asked. A payroll withholding was suggested but an amount of withholding not agreed to. The Carrier asserts, "Neither Mrs. Presswood nor her husband authorized any deduction to be made from payroll earnings and it was, therefore, necessary that Carrier effect the necessary withholding, which was accomplished" between the second half of December 1974 and the second half of March 1975. On January 27, 1975, a notice of a formal investigation to be held February 7, 1975, was sent to Claimant "to develop facts in connection with your allegedly accepting Missouri Pacific Railroad Co. Draft, Audit No. 193332 dated 08-05-74, sent to you in error and which was identified as payment of Loss & Damage Claims No. 071068 and 071069 and your failure to return said Draft to point of origin and to place responsibility, if any, in connection with the charge that you converted said Draft for your personal use." The formal investigation was postponed to February 20, 1975, at which time it was held. Subsequently, on February 24, 1975, Carrier advised Claimant in writing that her record had been assessed with dismissal effective 12:01 a.m. February 24, 1975, "for your accepting Missouri Pacific Railroad Co. Draft Audit No. 193332 dated August 5, 1974, and which was identified as payment of Loss and Damage No. 071068 and 071069, your failure to return said draft to point

of origin, and your converting said draft for your own personal use, per formal investigation held **Mineola**, Texas, February 20, **1975**. Your **record** now stands Dismissed."

The assessment of dismissal has been appealed by the Organization without change by the Carrier until it reaches this Board.

It is the position of the Organization that Claimant responded promptly to Carrier's original letter, that she assumed the check to cover her claims against the Carrier and did not think there was cause to return the money, that the letter of November 22, **1974** did not allege the serious offenses set forth in the letter of **January 27, 1975**, that the Carrier "was derelict in not following up and clarifying the issues raised in the letter of November **27, 1974**."

It is the Carrier's position that the Claimant converted to her own personal use a **\$926.25** loss and damage claims draft which had been sent to her in error and this act is sufficient to warrant **permanent** dismissal.

It is well established that the **Board** is bound to follow the action of dismissal taken by the Carrier unless the action was unjust, unreasonable, arbitrary, capricious or an abuse of its discretion.

We must, therefore, **examine** what Claimant's original intent might have been when a draft was sent to her in error but which was clearly marked as to its purpose and her actions after receipt of the Draft. The Claimant had been employed as a Clerk by Carrier for six years in two locations and was married to another **employee** of Carrier whose experience had been such as to give them knowledge of **railroad practice** and terminology. The assertion was made by Claimant when advised the Draft had been sent to her in error that she assumed it was for claims she had made, but evidence at the investigation showed that in six years she had had only **three** such claims and these in modest amounts compared with the amount of the claims shown on the stub accompanying the Draft. The Carrier sustained its burden of proof that the act of depositing the Draft without **inquiry** as to the **reason** for Claimant's receipt of it was, in fact, a conversion of the money to her own use as this was the only positive action taken.

Although the method used for restitution is questionable, it is not a matter over which this **Board** has jurisdiction.

The amount of discipline is questioned as being arbitrary and capricious. There is no evidence **in** the record to sustain this, thus, having found the Claimant's action subject to discipline, the amount of the discipline is a matter of Carrier's discretion and not of the **Board**.

We do not substitute our judgment for that of the Carrier (See Awards 5032, 9422, 17914) where there is substantial evidence that **the** offense charged was committed.

The action of the Carrier was not arbitrary or capricious, as is supported by the record and this **Board** will not upset it.

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. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

