

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21398
Docket Number MW-21335

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (**Brotherhood** of Maintenance of Way **Employees**
(Norfolk and Western Railway Company (Western Region)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
that :

(1) The suspension of Assistant Foreman Floyd **Rowry** for thirty (30) days on the charge of "failure to comply with instructions" was excessive and without just and **sufficient** cause and on the basis of **un-proven** and disproven charges (System File **NW-DET-74-3**).

(2) That the remedy prescribed within Agreement Rule 20 (g) now be afforded to **Claimant**, said **rule reading:**

"If the charge against the employee is not sustained, it shall be stricken from the record. **If** by reason of such unsustained charge the employee has been **removed** from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the railroad company at not less than the rate of pay of position formerly held or for the difference **in the** rate of pay earned, **if in** the service or otherwise employed."

OPINION OF BOARD: The Carrier raises a question as to the propriety of this appeal in view of the fact complainant did not process his appeal in **accordance** with Rule 20 (f). That rule requires that notice of appeal must be given to the official rendering the decision. **Originally, carrier** asserted an objection that the **claim was** "not handled in the usual and customary **manner** as prescribed by Section 3, First (i) of the Railway Labor Act." Carrier's reference to Rule 20 (f) was first made before this **Board**. As we view this rule **requirement**, carrier could have waived this objection. For some reason it chose to make its objection on the broader basis of the **more** general **provisions** of the Railway Labor Act. We believe this is too vague a basis to operate as a disqualification of this appeal. Further, the July 5, 1974 letter of appeal indicates a copy was sent to the appropriate official **and** we do not believe Rule 20 (f) requires **more** in this connection.

On the substantive issue the claimant was charged with failing to follow instructions. **Presumably** claimant could have been faulted for an unauthorized absence from his work location and his failure to respond

to his superior's questions as to the reasons for his absence. With respect to the former question there is a conflict of evidence regarding claimant's whereabouts **during** the period **10:30** a.m. to **11:30** a.m. on **May 16, 1974**.

The testimony of Supervisor **Dietrich** and Mr. Cipponeri (the claimant's supervisor and the crane operator claimant supervised, respectively) supports the decision reached that claimant failed to comply with instructions and was absent from the **workplace** during the period described. In addition, claimant's own testimony indicates he had full understanding of his work assignment even though he did not agree with the assertions as to his absence. With respect to claimant's failure to respond to his supervisor's questions as to his location, that assertion is based upon the testimony of the supervisor and claimant neither denied or refuted that contention in his testimony.

The official charged with the conduct of the investigation reached his **conclusion based** upon substantial **evidence in** the record and **under** these circumstances this **Board** cannot substitute its view of the evidence and **must** defer to the decision reached. We conclude, therefore, there was just and sufficient cause for the charge that grievant failed to comply with instructions.

With respect to the penalty imposed, 30 days suspension, 'it cannot be said to be arbitrary, capricious, or discriminatory. **Claimant** had been **in** service **for** over 20 years, including five **or** more years as an Assistant Section Foreman. It must be as-d he **knew** the seriousness of such a violation.

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.

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Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Paulose*
Executive Secretary

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