

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21415
Docket Number CL-21292

James C. **McBrearty**, Referee

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

PARTIES TO DISPUTE: (

(Southern Pacific Transportation **Company**
(Texas and Louisiana Lines

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7983, that:

1. The Carrier violated the rules of the current Clerks' Agreement including, but not limited to Rule 25 when it discharged Mr. Alvin S. **Rigsby** from its services and then did not sustain its charges as contained in Superintendent B. M. **Flohr's** letter of November 6, 1974, in the formal investigation held commencing at 9:00 a.m., Monday, November 18, 1974, and Carrier further violated those same rules when Mr. **Rigsby** did not receive written notice of the decision of the investigation within ten (10) days following the conclusion of the investigation.

2. **Carrier** shall compensate Mr. **Rigsby** for all time lost, including any overtime he could have earned from November 6, 1974, through January 16, 1975, to include interest at the rate of 10% per annum on all monies due him.

3. The Southern Pacific Transportation Company, Texas and Louisiana Lines be required to clear Mr. **Rigsby's** service record of the charges and discipline assessed in regards to the case at hand.

OPINION OF BOARD: Claimant was dismissed from Carrier's service on November 6, 1974, for his "responsibility in being quarrelsome and vicious; for using boisterous, profane, and vulgar language; and for entering into altercation, scuffling, and wrestling, while on duty as a clerk, East Yard Office, 3:59 P.M. to 11:59 P.M., November 4, 1974."

In conference on January 16, 1975, Carrier agreed, in order to limit its liability, that Claimant would be reinstated to the service of Carrier with seniority and other **employee** rights unimpaired effective Friday, January 17, 1975. This agreement was made without prejudice to the position of either party regarding payment for time lost and discipline assessed.

Two issues are presented in the instant case. The first issue is whether there was a violation of the last sentence of Paragraph 4 in **Rule 25**, which states that: "Written notice of decision of the investigation will be given the **employee** within ten days following the conclusion of the investigation."

The second issue is whether there is substantial evidence in the record to support Carrier's decision.

Turning to the procedural issue first, the Board notes that the parties disagree on the meaning of the phrase "will be given the **employee** within ten days."

Webster's Third New International Dictionary (unabridged edition) defines "give" as "to put into the **possession** of another for his use," and "to **execute** and deliver."

Applying this definition to the last sentence in Paragraph 4 of Rule 25, the clear meaning of that language is that the **employee** is to have the written notice of the decision of the investigation put into his possession within ten days following the conclusion of the investigation.

In other words, the written decision is not only to be rendered or executed within ten days, but also delivered;.

The record shows in the instant case that Claimant did not receive written notice of Carrier's decision until 14 days after the investigation.

Carrier attempted to justify this delay on the ground that it was unable to locate the Claimant until **December 4**, when Claimant arrived to pick up his pay check.

Yet it stands uncontradicted in the record that Claimant provided Carrier's hearing officer with his new temporary address at the conclusion of the hearing. If this were not so, then how could Claimant have received his transcript of the investigation at this temporary address?

Moreover, it is also uncontradicted that Claimant was on the property on November 27, but was unable to obtain a copy of the decision.

In addition, the letter to Claimant was apparently found in the same envelope as the letter to **Bovello**, when the latter came by Carrier's office on December 2.

These last two points contradict Carrier's position that the decision on Claimant was issued on November 26.

In sum, Rule 25 was violated by Carrier in that a written decision was **not** given to Claimant within ten days following the conclusion of the investigation.

Under some circumstances, this procedural shortcoming may well constitute reversible error. Carrier disregards the contractual mandates in this regard at its peril. However, in the circumstances of the instant case, there was no demonstrable prejudicial effect upon Claimant's case by Carrier's procedural defect. Accordingly, we conclude that Carrier's violation does not in the facts of this case constitute reversible error.

Turning now to the merits of the case at hand, a careful reading of the 73-page record of formal investigation, as well as the arguments of the parties, reveals that there is not substantial evidence to sustain all of Carrier's charges against Claimant.

The record reveals that Claimant did argue with Bovello, and was quarrelsome and boisterous, and that both Claimant and Bovello used "lots of profanity." However, the record reveals that the profanity was the normal-type yard office cussing, although "the tone and volume was not."

As far as the wrestling or scuffling between Claimant and Bovello at the carry-all, the record clearly shows that Bovello was the aggressor, while Claimant took no aggressive action whatsoever, but merely did no more than was sufficient to defend himself. Claimant at no time assumed the offensive.

In light of these circumstances the Board finds that Carrier's dismissal of Claimant between November 6, 1974 and January 16, 1975 is exceedingly harsh. Therefore,, Carrier's discipline is to be reduced to a suspension without pay, although with seniority rights unimpaired, for the period of November 6 through **November** 30, 1974.

Claimant is to receive all back pay to which he would have been entitled for the period December 1, 1974 through January 16, 1975, but without payment of interest.

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

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That the Agreement was violated to the extent indicated
in the above opinion.

A W A R D

Claim upheld to the extent-indicated in the **above** opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.

