

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22451
Docket Number CL-22268

Abraham Weiss, Referee

(Brotherhood of Railway, Airline and **Steamship** Clerks,
(Freight Handlers, **Express** and Station **Employees**
PARTIES TO DISPUTE: (
(Chicago and North Western Transportation **Company**

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
GL-8475, that:

"1. Carrier violated the current Agreement Rules, particularly
Rule 21, when under date of May 27, 1976 it dismissed from service Mr.
Wayne J. **Jozwick**, Leader Order Filler at **Proviso**, account **investigation**
which was concluded on **May 20**, 1976;

2. Carrier shall be required to reinstate Mr. **Wayne J. Jozwick**
with all **rights** unimpaired, and compensate him for all time lost as a
result of the dismissal."

OPINION OF BOARD: Claimant was **dismissed** from Carrier's **service**,
after investigation on a **charge dated January 29**,
1976, which reads:

'Your responsibility for your failure to protect your
assignment from December 1, 1975 to and including
January 28, 1976, as a result of **your having** been
arrested and charged with homicide, and **following**
such arrest were admitted to a hospital for treatment."

A brief review of the background of the case before us **is in**
order.

The record shows that **on** December 2, 1975, a **woman** identifying
herself as Claimant's aunt called Carrier's Chief Clerk and stated that
Claimant would not be at work for a time because of a "fire **arms**
accident." On December 5, Claimant **informed** his supervisor that he
was staying at his mother's house, that he had completed **some medical**
exams which disclosed a bad liver and a **nervous** condition, that he was
scheduled to appear in court on December 10, and that he would contact
the Carrier after his court appearance. **Claimant's supervisor testified:**

(1) that Claimant did not request permission to absent himself; (2) that he did not notify Claimant that he did not have permission to be off.

As it turns out, Claimant had been arrested for homicide, which accounted for his absence.

The Organization challenges Carrier's action and seeks to have the dismissal voided and Claimant reinstated on the grounds that the investigation on the charges was not timely heard; that Claimant was denied a fair and impartial hearing in that he was denied the right to face his accusers; that Claimant did protect his assignment by arranging for a telephone call to Carrier's Chief Clerk on December 2, the day after the shooting incident, that he would not be able to perform service; and that Carrier failed or refused to send Claimant leave of absence form, even after requested to do so by Claimant's representative.

The Organization holds that Claimant's notification to Carrier on December 2, through his aunt, complied with Rule 26(a) which reads:

"(a) An employee absent from work because of sickness, personal injury or other disability of himself or immediate member of his family, shall notify his supervising officer as early as possible. Such absences for a full calendar month or more must be covered by formal leave of absence as per Rule 23."

Rule 23(a) provides that:

"(a) Leaves of absence for a period of a full calendar month or more must be formally authorized in writing, copy of same to be furnished to employee, Division and General Chairmen and be made a matter of record."

The Organization relies heavily on Rule 21(a), Discipline and Investigation, which requires that "investigation of discipline or dismissal shall be held within 7 calendar days of the alleged offense or within 7 calendar days of the date information concerning the alleged offense has reached his supervising officer." The investigation was set for February 2, 1976, but was postponed until February 5.

The Organization, in its **ex parte submission**, urges dismissal of the charge because the **investigation** was not held **within** 7 days of **the** date Carrier had **knowledge** or information regarding the reason **for** **Claimant's** absence.

Two hearings were held, the first on February 5, 1976, at which Claimant was present but did not testify on advice of his attorney, because of the pending trial; and the second, after several postponements at the Organization's request, on May 20, 1976. Claimant was not present at the second hearing. **Claimant's** representative requested a further postponement of the May 20 hearing, submitting as justification a letter dated May 19 from **Claimant's** physician that **Claimant** "is still under **my** psychiatric care and not as yet ready to return to full time employment." The Hearing Officer denied the request for postponement, over the objections of Claimant's representative.

The Organization's position is that the Carrier was informed on December 2 that Claimant would be absent for an indefinite period, and that within a week or so after that date, Carrier had information that Claimant was admitted to a hospital for **treatment in** connection with the homicide. Nevertheless, **formal** charges arising out of **Claimant's** absence from work were not filed until January 29, 1976, a period far **in** excess of the 7 days specified in **Rule** 21.

The Organization asserts that Claimant, through his aunt, called in **timely** fashion to protect his assent. It contends that the Daily Attendance Record for December 2, 1975, introduced into evidence at the hearing, indicates that Claimant's aunt did protect Claimant's **assignment** by **calling** and notifying the appropriate Carrier official (the Chief Clerk) **that** Claimant **would** not be able to **perform** service.

The Organization also charges that Claimant was not afforded a fair and Impartial hearing because he was not present at the **investigation** held **May** 20, 1976 to face his accusers and cross examine Carrier witnesses. To this the Organization adds that the **Hearing** Officer unfairly cut off its cross-examination of the **chief Carrier** witness, Claimant's supervisor.

Claimant's representative stated at the hearing that he had called Claimant's supervisor on January 3, **1976**, requesting a copy of the leave of absence authorization form. The **forms** were not sent even

though the Organization contends that it was the practice on the property to send such forms automatically to an **employee** who was going to be absent for an extended period.

Finally, the Organization poses to us that **the** basic issue for determination is whether Carrier, under the applicable **Agreement**, can dismiss an **employee** charged with homicide and required to undergo psychiatric **observation** and treatment, and who, consequently, **is** unable to protect his assignment. In essence, according to **the Organization**, Claimant's failure to report to work was due to **circumstances** beyond his control; i.e., he was under arrest on charge of homicide and was undergoing **examination and treatment**. Petitioner points out that Claimant's responsibility in connection with the homicide was still **unresolved at the time** of its **submission** to this Board.

This Board has previously ruled **in** cases **where employees** charged refused to testify or to answer questions at a formal hearing. **In Award** 17946 (McGovern), this Board stated:

"Careful consideration of the record discloses that **Claimant was** provided a fair and **impartial hearing** in accord with Agreement rule. Although Claimant declined to testify at the **investigation** because of the **pendency** of charges in civil **proceedings** the **testimony** of others discloses that Carrier's evidence was substantial and sufficient to support the **finding** of guilty. The claim **must** be denied."

With respect to the Organization's charge that **the** hearing was **held** in Claimant's absence, because his psychiatrist had written **that Claimant** was still **under** his care, **this** Board has held **in many cases that** when a **claimant** failed to appear at a hearing, after having been properly served with notice, Carrier's proceeding with the hearing was not a denial of due process.

Claimant **was** charged with failure to protect his **assignment**; i.e., for **being** absent without permission, **from December** 1, 1975 to **and including** January 28, 1976. The record indicates: (1) **that Claimant, through** his aunt, notified Carrier on December 2, 1975 that he **would** be absent because **of a** firearms accident; and (2) that **Claimant** personally telephoned his supervisor on December 5, 1975 and reported **that** he **had completed some** medical examinations which disclosed **a** bad liver **and a nervous condition and that he was** to appear **in Court** on December 10 **and** that he would **contact** Carrier after his court appearance.

However, the record also indicates that Claimant did not, request permission to be absent during the period in question; **that** he did not request the requisite leave of absence forms for absences in excess of 30 days as specified in Rule 23(a); and that he did not, in fact, have permission to be absent.

On January 3, 1976 Claimant's representative called the supervisor in Claimant's behalf, **and informed** the supervisor that Claimant had called him because he had not received any leave of absence papers. Claimant's representative was told that Claimant had never requested leave of absence forms **and** that Claimant by **then** had been absent **from** his assignment for over 30 days.

Petitioner contends that Carrier **knew** Claimant's **whereabouts** and situation so as to properly prefer charges and issue a notice of investigation prior to January 29, 1976, the date of the letter of charges. Carrier counters that Claimant was absent **from** his **assignment** from December 1, 1975 to and including January 28, 1976; that he was notified on January 29, 1976 to **attend** an investigation on February 2, 1976 concerning his responsibility for failure to protect his **● s6%gnment** during that period; that Claimant's absence on January **28, was** within the **time** limit provision of Rule **21(a)** which provides for a hearing within seven days of the alleged offense; **and** that Claimant's absence on January 28 was simply a continuation of his unexcused absence **starting** December 2, 1975 -- which constituted one offense.

The Agreement contains obligations, **borne** by both the **individual employe** and the Carrier which **must**, like other contractual requirements, be followed. **While we may understand and even sympathize** with Claimant's situation and predicament, it was his duty to report for work as scheduled unless he obtained **management's** permission to be absent. Claimant had an **opportunity** on December 5 -- four days after the start of his absence -- when he called his supervisor. **He knew** then that he was involved in a situation which might well cause him to absent **himself** from his job for a **lengthy** (though **indeterminate**) period of time. He could have requested authorization for a leave of absence, explaining the circumstances as best he could. Contractually, he was obligated to request a leave of absence in order to comply **with** the provisions of **Rule 23(a)**. **He did not make** such **request**; his absence was not excused. **By** the time his representative called Claimant's supervisor for the leave of absence forms, **Claimant** had been **absent** without authorization over 30 days.

Claimant failed to protect his assignment between December 1, 1975 and January 28, 1976, as charged. The reasons for his absence included incarceration and hospitalization while undergoing psychiatric treatment. The weight of arbitral authority upholds the right of an employer to dismiss an **employee** absent from duty regardless of the reason -- even physical or mental illness.

This Board has repeatedly held that an **employee's** arrest or incarceration does not constitute justification for his absence from work **and** consequent failure to protect his **assignment**. We **concur** in this **line** of Awards.

Although Claimant, through his aunt, notified Carrier's Chief Clerk, the person assigned to take such messages, **that** Claimant would be absent, **such** notice alone does not exonerate him from **the** obligation to request **and** receive permission to absent himself for **an extended** period.

Claimant's absence was not confined to a specific date. **His** absence was continuous and uninterrupted between the dates listed in the letter of charges. Carrier's scheduling of the **investigation** for February 2, 1976, therefore, fell within the **time** limits prescribed **in Rule 21(a)**.

Claimant was dismissed for failure to protect his **assignment between** December 1, 1975 and January 28, 1976, as charged. The evidence supports the charge and we **must**, therefore, deny the claim.

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.

Award Number **22451**
Docket Number CL-22268

Page 7

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Claim denied and dismissed as indicated **in** the **Opinion**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulke
Executive Secretary

Dated at Chicago, Illinois, this **13th** day of July **1979**.