

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Robert Lowry, Referee

Award Number **23120**

Docket Number CL-23161

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express **and** Station **Employees**
(
(The Atchison, Topeka **and** Santa Fe **Railway** Company

STATEMENT OF CLAIM:

Claim of the System **Committee** of the Brotherhood (GL-8892)
that:

(a) Carrier violated the current Clerks' **Agreement and** continues to violate the current Clerks' Agreement when on February 27, 1978, effective 8:00 a.m., it removed A. L. **Sims** from service per Mr. **B. T. Randolph's** letter of February 21, 1978, file **29-40-s**, as result of formal investigation held February 10, 1978, for allegedly being **found asleep on** duty approximately **12:30** a.m., Sunday, December 18, 1977.

(b) A. L. Sims shall **now** be returned to service effective February 27, 1978, with all rights unimpaired and record cleared of all charges stated in **formal** investigation.

(c) A. L. **Sims** shall **now** receive eight hours' pay at the current rate of Store Helper Position **6012** each Saturday, **Sunday, Monday, Tuesday** and Wednesday from February 27, 1978, forward (40 hours per week) until violation of the Clerks' Agreement ceases.

(d) In addition to above monies claimed, A. L. Sims shall now receive ten (10%) **per cent interest on monies** claimed, such interest to be compounded on each **and** every pay period **from** February 27, 1978, **forward**.

OPINION OF BOARD: **In** this discipline case the Organization **raises** procedural defects, claiming that Carrier violated the time limit provisions of Rule 24-A by not holding the **investigation** within twenty (20) days and that the Claimant was not given a fair and impartial hearing **in** the "vacant chair" investigation that was held on February 10, 1978.

The Claimant, Mr. A. L. **Sims**, was charged with violation of Rule 2 and the second paragraph of Rule 17 of Carrier's General Rules for the Guidance of **Employees** when allegedly **found** asleep on duty **12:30** a.m., Sunday, December 18, 1977.

The Carrier notified **Claimant** and his representative, Division **Chairman Helmke**, on December 27, 1977 of the charges and set **10:15** a.m., January 6, 1978, for **formal** investigation thereof. About **8:45** a.m. on the 6th of January, Carrier Officer Meggison, the **designated** hearing officer, called Division Chairman **Helmke** and informed him that the **investigation** was postponed and **would** be **reset**. Later that day Carrier addressed a letter to Claimant **Sims**, with copy to **Helmke**, advising that the investigation scheduled for that date had **been** postponed and was rescheduled for **10:15** a.m., Wednesday, January 18, 1978. Claimant **Sims** and his representative, Division **Chairman Helmke**, appeared on the 18th at the appointed place and **time** and were **informed** by hearing Officer Meggison that the **investigation** was postponed **account** a Carrier **witness** was not available. Another letter was addressed by Carrier to Claimant **Sims** on January 19, with copy to **Helmke**, advising **that** the investigation set for the 18th had been postponed and reset for 9:00 a.m., January 25, 1978. Division **Chairman Helmke** was unavailable that date and asked for and received a postponement. The Carrier reset the investigation for 9:00 a.m., February 10, 1978.

On February 10, 1978 at **9:35** a.m. Claimant **Sims** had not arrived at the appointed place of the investigation and the Carrier commenced the hearing without his presence as a "vacant chair" investigation. **Division Chairman Helmke** stated he arrived at **9:45** a.m. (Carrier in its brief contends he arrived before 9:00 a.m.) but was informed by Hearing Officer **Meggison** **that** he could not attend the investigation as he had no **knowledge** that he, **Helmke**, was **Claimant Sims'** representative. Thus, the investigation continued without the Claimant or **Helmke**. **Claimant Sims** arrived at **10:15** a.m. apparently after **the** investigation had been concluded. Claimant **Sims** indicated that with all the changes in **the** times and dates for **the** investigation he overlooked the fact that the time had **been** moved up to 9:00 a.m.

The Organization contends that it did not agree to the postponements of the investigation. Division Chairman **Helmke** contends that Hearing Officer **Maggison** informed him on January 6 **and** 18 of the postponements that he **did not** ask for or seek his concurrence. The record shows **Helmke** objected to the January 18 postponement.

The Carrier argues in its brief that the investigation was **postponed** in the usual manner, but produced no affirmative evidence that it had secured concurrence from the Division Chairman.

Rule 24-A is a mandatory rule, not permissive. The only exception being **"*** unless such employe shall accept such dismissal or other discipline in writing and waive formal investigation ***"**, which exception **is** not involved **here**. The key language of the rule reads: "An employe ******* shall not be dismissed or otherwise disciplined without a formal investigation, which shall be promptly held but in any event not later than 20 days from date the Company has factual knowledge of occurrence of the incident to be investigated *******". The incident occurred on December 18, 1977, and the investigation, a vacant chair investigation (about which more will be said below), on February 10, 1978, well **beyond** the 20day **time** limit.

There is no provision in the rule for postponement of investigations. However, through long custom and practice on the property, investigations have been postponed. It would appear to the Board that a Carrier when applying such a rule without specific provisions for **postponement** and specifically since the situation involved the livelihood of an employee, would have confirmed in writing the verbal **communications** it had with the Division **Chairman** confirming his concurrence to the postponements.

Carrier's contention as set forth in its letter to Division Chairman **Helmke** dated May 16, 1978, reading: "Since Mr. Sims was not present for the **investigation**, there was no reason for you to have remained as it was not established that Mr. Sims had a representative." is rejected by this Board. The rule specifically provides that the **employee** may be assisted by his duly accredited representatives. Carrier was aware of the fact that **Helmke** accompanied Sims at the January 18 investigation which was **postponed**, and, in addition, all the letters addressed to **Sims** by Carrier on this subject were copied to **Helmke**.

X-1 The Hearing Officer has the duty and **responsibility** to seek out all the facts surrounding the incident in question **even** those which are detrimental to his employer's position as well as those which militate against the Claimant. If there was any question or doubt with respect to **Helmke's** status in the investigation, the Bearing Officer should have ruled in Claimant's favor and allowed **Helmke** to **attend** and participate in order to avoid a charge of being unfair.

X-2 Thus, the Board concludes **Carrier** erred when it refused to allow **Helmke** to be present and participate in the **investigation**; therefore, the **claim** should be sustained.

The Claimant shall be reinstated with full seniority **and** all other rights unimpaired with back pay in accordance **with Rule** 24-F. Part (d) of the Claim **is** denied as the rule does not contemplate 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 apprwad June 21, 1934;

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

That the Agreement was **violated**.

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Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this **15th** day of **January 1981.**

