

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23456
Docket Number CL-23151

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: {
Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8891) that:

1. Carrier violated the Agreement between the parties when on December 7, 1978, they assessed Mr. R. A. Burr five (5) days actual suspension.
2. Carrier's action was unjust, unreasonable and an abuse of Carrier's discretion.
3. Carrier shall reimburse Mr. Burr for all lost time with all rights and privileges unimpaired and allow 18% Interest on all monies due. They shall also submit a written apology to Claimant for the harassment he was subjected to.

OPINION OF BOARD: At approximately 7:00 AM on November 11, 1978, Claimant, an Extra Nabisco Mill Clerk at Toledo, Ohio, was called by Carrier representative to fill an Extra Board position beginning at 9:00 AM that same morning. According to Claimant, he had previously scheduled a 9:00 AM appointment with his attorney also for that morning and that he could not contact the attorney at that early hour to cancel the meeting on such short notice. Therefore, Claimant maintains that he reported to work early (approximately 8:00 AM), completed his assigned duties, and attempted to contact the Yard Master at the Front Street office for permission to leave the property for a short time in order to notify the attorney that he was working and to arrange for a later appointment. The Yard Master, however, was unavailable, and after briefly talking with the Yard Clerk at the Front Street office, Claimant left work anyway and drove his personal automobile off company property some 2.2 miles away to a location which is "approximately 100 yards south of the Homestead Yard tracks across Corduroy Road away from the Homestead Yard Office itself."

While at this meeting, Claimant did in fact meet with an attorney as well as with two other Carrier employees who were off duty at the time. At approximately 9:05 AM, however, this gathering was observed by Ft. J. Cooper, the Terminal Trainmaster at the Homestead Yard, who just happened to be looking through a window in the Assistant Agent's Office and who recognized Claimant and the two other employees. The Trainmaster contacted the Crew Caller to determine the assignments of the three employees and whether they were on or off-duty. The Crew Caller reported that Claimant had been called for the Extra Clerk for the Nabisco Mill at 9:00 AM; and so the Trainmaster, together with the Sergeant of Police, walked over to the assemblage and asked Claimant if he had received permission for absenting himself from his assignment. Claimant responded that he did not have

such permission, and as a result,, the **Trainmaster** relieved **Claimant** from duty for the remainder of his assignment that, day and Claimant was charged with "being absent from (his) assignment...without permission from the proper authority..." An investigation was conducted concerning this matter and, as a result thereof, **Claimant** was adjudged guilty as charged and was assessed a five (5) day suspension without pay. Said suspension is the basis of the instant claim.

Organization's position in this dispute is that **Carrier's** actions herein were undertaken solely in retaliation for **Claimant's** involvement in a previous work stoppage. Thus, **Organization** contends that **Claimant's** hearing was neither fair nor impartial as required by the Rules, and in support of this charge **Organization** further alleges: (1) **Hearing Officer** was biased in his conduct of the investigation (**Third Division Award 18963**); (2) charge which has been leveled against **Claimant** by **Carrier** was vague and not sufficiently specific; (3) penalty which was assessed was not commensurate with the alleged infraction; and (4) **Claimant** was disciplined twice for the same offense and **Carrier**, therefore, is guilty of "double jeopardy" in this matter.

In addition to the foregoing procedural objections, **Organization** further contends that **Claimant** did properly perform his assigned duties and that any assessment of discipline is completely unwarranted; and furthermore, in its final area of argumentation **Organization** maintains that the appropriate remedy which is to be applied herein should include reimbursement "...for all lost time with all rights and privileges unimpaired and allow 18% interest on all monies due...and also submit a written apology to **Claimant** for the harassment he was subjected to."

Carrier's position, simply stated, is that **Claimant** admitted that he was away from his assignment without permission; that such a commission is itself a serious infraction which alone would justify the discipline of permanent dismissal; and the five (5) day suspension which has been imposed is a lenient penalty imposition (**Third Division Award 3171** and **Award 102 of Public Law Board No. 1790**); and that the Board may not substitute its judgement for that of **Carrier** when guilt is established (**Third Division Awards 11009, 12954, 14272, 19791 and 20034**).

Regarding the various procedural considerations which have been raised by **Organization**, **Carrier** further contends that: (1) **Hearing Officer** exhibited no bias toward **Claimant** during the investigation and that said hearing was conducted fairly and properly in accordance with the applicable Rules; (2) **Organization's** charge regarding a "double jeopardy" imposition of discipline is insupportable since **Rule 27(a)** of the Agreement "expressly states that an employee may be held out of service pending investigation "...and thus..." "...there is no provision in the agreement to sustain the **Organization's** arguments relative to due process"; and (3) **Organization's** request for 18% interest payment and an apology lack agreement support (**Award 27 by Public Law Board No. 1790**).

After careful reading and studying the entire record in the instant dispute, the Board finds that **Organization's** arguments as posited hereinabove are completely unpersuasive and, therefore, must be rejected.

Regarding the various procedural allegations which **Organization** has raised, concerning the conduct of the **investigation** hearing itself, suffice it to say that the hearing transcript fails to show that the Hearing Officer in any way "exhibited **manifest bias**," "demonstrated **prejudgement**," "inhibited **cross examination**," "restricted questioning on the part of **Organization** representative" or in any other way failed to allow a "full and **impartial** hearing" such as **Organization** charges. Quite to the contrary, if the hearing transcript shows anything at all in this regard, it shows that the Hearing Officer carried out his duties in a most patient and responsible manner, given several outbursts of vituperative and otherwise uncomplimentary language directed by **Organization** representative toward the Hearing Officer and **Carrier** witnesses; and also given the fact that many areas of questioning which were developed by **Organization** representative were themselves so completely unrelated to the charge(s) being investigated, or were so obtuse to the central issue as to make one wonder as to the real purpose for their being offered.

As to **Organization's** "double jeopardy" contention and its request that an "apology and 18% interest to be added to the remedy," it is quite clear that the rationale or logic of these arguments/requests either have not been sufficiently developed in the record so as to enable any meaningful comment by this Board or they simply are not authorized by the parties' current Agreement. For these reasons therefore, these particular arguments can only be viewed as being unmeritorious.

Having disposed the numerous procedural questions which have been raised by **Organization**, our attention now turns to the writs portion of this dispute, and, as has been noted previously, these arguments must also be rejected for obvious reasons. There can be no doubt that **Claimant** was away from his assignment without permission--this is admitted to by **Claimant** himself. There can also be no doubt that such an infraction is a serious matter and that a five (5) day suspension, under the circumstances, is indeed a lenient penalty. Moreover, it is quite clear that **Claimant** in this dispute has attempted to usurp **Carriers'** managerial function to manage the workplace by deciding and acting upon matters which were completely beyond his authority and which were vested solely in the hands of **Carrier**. Not only did **Claimant** take it upon himself to decide that he would come into work early to complete his assignment, but he also decided which duties needed to be partially completed prior to his leaving his assignment and which duties would remain incomplete until his later return; and finally he decided when he would leave the assignment and whom he would tell about this undertaking. All of this was done without knowledge to any supervisor whatsoever and such unilateral, unauthorized undertakings by an **Employee** are, for obvious reasons, completely improper and unacceptable.

Proof of **Claimant's** guilt has been more than adequately demonstrated in this matter and there are no procedural objections which would otherwise impact upon this consideration. Under such circumstances, therefore, the Board may not/will not substitute its judgement for that of **Carrier**, and the penalty which has been imposed herein will remain undisturbed.

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. Paulsen

Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1981.

