

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23866
Docket Number CL-24068

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-9431)
that :

(a) Carrier violated the rules of the current **Clerks' Agreement** at Los Angeles, California, on August 24, 1979, when it wrongfully discharged Mr. J. Natividad from service, and

(b) Mr. J. Natividad shall now be reinstated and compensated for **all** monetary loss suffered **commencing** August 24, 1979, and continuing **until** such time that he is reinstated as a result of such violation of Agreement rules.

(c) The Carrier shall now be required to pay **10% interest** compounded daily on all wages wrongfully withheld from Mr. J. Natividad **commencing** August 24, 1979.

OPINION OF BOARD: The Claimant, on July 20, 1979, was directed to attend a formal investigation. The letter of charge read in pertinent part:

"... it is alleged that you failed to do as instructed, and were insubordinate to Yardmaster McDaniel, and you were also inattentive to duty at **approximately 10:00 a.m.** on July 15, 1979, while you were employed as Yard Clerk on position 6236..."

Subsequent to the investigation the Claimant **was** dismissed from the service of the **Carrier**.

There are **conflicting** versions of what occurred **on** the day in question. The **testimony** of the **Claimant** and the **testimony** of Yardmaster McDaniel adequately reflect the differing view points **on** the facts. Yardmaster McDaniel testified that Mr. Natividad reported to the tower **approximately 7:30 a.m.** on the day in question. When the Claimant determined that there were no cuts to be worked up, he asked Mr. Marshall, Asst. **Yardmaster**, if he could go to the freight office and was given permission to do so. Before the **Claimant** left, McDaniel testified that he **informed** the Claimant that as soon as an engine became available that they were going to be weighed and that the Claimant was going to be the **Weighmaster**. McDaniel then **testified** that the **Claimant** had not yet returned by **8:45 a.m.** and that he tried to locate the Claimant at various locations including the freight office and could not find him. The Claimant returned to the tower at approximately **11:00 a.m.** Upon his return, McDaniel reportedly instructed the Claimant

to relieve Clerk Rodriguez and he was said to have refused to comply with these instructions four different **times** before he left the tower. Later, it was learned he did relieve Rodriguez. The Claimant testified that he left the tower to get a cup of coffee about **8:15 a.m.** and returned at **9:00 a.m.** and asked McDaniel if there were any tracks to be weighed, to which he received a negative reply. He contends that he remained there until **9:30 a.m.** when he asked **permission** to go to the freight office to pick up a **time** sheet. He testified he arrived at the freight office at **10:00 a.m.**, picked up the time sheet and filled it out. He also indicated that he used the restroom and then he bought a cup of coffee before returning to the tower at **10:50 a.m.** His testimony then indicates that when he returned he was confronted by Mr. McDaniel who was yelling, using profanity and one time made an ethnic reference. The Claimant testified that he then **complied** with the directives and relieved Rodriguez.

Based on the **testimony** of McDaniel, Natividad and other evidence in the record, the parties each made a **number** of arguments in support of their respective positions. The Carrier suggests that the Claimant's behavior is a flagrant violation of his employment responsibilities. They argue that there is substantial evidence to uphold the charges. In addition to the **testimony** of McDaniel, they direct attention to **testimony** of Assistant Yardmaster Marshall, which they contend corroborates that of McDaniel. The Carrier also contends that the past record **of** the Claimant justifies the permanent dismissal.

The Organization argues that there is little evidence to support the charge. Moreover, they contend there is no evidence that there was **any** work to be performed. It is also argued that he had permission to leave his **assignment**. They suggest that the **Claimant's** absence is much **more** brief than suggested by the Carrier and even **more** important, it did **not result** in any delay in the Carrier's operations. In respect to the portion of the charge regarding insubordination, they contend he cannot be found guilty. They point out that he went **immediately** downstairs and began weighing cars. **The Organization also makes** a due process argument regarding the conduct of the hearing officer and his **method** of questioning the witness.

In reviewing the evidence and the **arguments** of the parties, it is the conclusion of the Board that there is substantial evidence to support the charge. The evidence is substantial enough to conclude that when the **Claimant** was given **permission** to go to the freight office, it was clearly **communicated** to **him** that he would be **responsible** for weighing cars and that he should be available to perform such duties. Moreover, **we** are of the opinion that McDaniel, Marshall and the Claimant all understood that if an engine became available for weighing before he returned that he could be contacted at the freight office. It is further evident from the record that the **Claimant** was gone and was **no where** to be found from approximately **7:45** to 11:00 a.m. contrary to instructions to be available to weigh cars. Regarding the insubordination, there is substantial evidence to conclude that **even** though he ultimately complied with the orders to weigh the cars, the Claimant acted in an insubordinate **manner** toward McDaniel. Insubordination has to do with more than technical **compliance** with orders. It also involves the Employee's manner and deportment in receiving instructions. Although the Claimant ultimately complied he did not do so without several refusals and without leaving the Yardmaster with the distinct **impression** that he would not comply.

The evidence regarding the charges is conflicting, however, that does not preclude the Carrier from a conclusion of guilt. The Carrier hearing officer is entitled **to our** deference in respect to the resolution of evidentiary conflicts and the **assessment** of credibility so long **as** his conclusion is supported by substantial evidence. We believe there is substantial evidence to support the Carrier's decision to give more weight to **McDaniel's testimony**. Assistant **Yardmaster** Marshall's **testimony** corroborated **McDaniel's**. He testified that it was **7:45 a.m.** when the **Claimant** first left and that contrary to Claimant's **testimony** the Claimant did not contact the **tower** anytime between **7:45 a.m.** and 11:00 a.m. **In** addition, he also testified that when the **Claimant** requested permission to go to the freight office he replied "... Yes we can get a hold of you **over** there." This coupled with the Claimant's testimony that "... I advised him I would be checking in with the head clerk (in the freight)..." is substantial evidence that McDaniel was correct in expecting that he could reach the Claimant at the freight office. Marshall also corroborated McDaniel's testimony and the **testimony** of Mr. Hamilton, Agent, that the Claimant could not be located at the freight office or anywhere else. This all adds up to support the conclusion that the Claimant was not available as instructed to weigh cars. Moreover, in respect to the portion of the charge relating to insubordination, Marshall's testimony was similar to McDaniel's in terms of the **Claimant** refusing four times to weigh the cars. Marshall also reported that McDaniel did not use abusive language as the **Claimant** contended.

The **arguments** made by the Organization failed to **overcome** the prima facie case established by the Carrier. The Organization relied heavily on the fact that there was no delay to operations caused by the incident. However, while this might mitigate the charge to some degree, it doesn't change the fact that the **Claimant** failed to follow instructions to be available to weigh the cars. The Claimant simply doesn't have any valid excuse for his unavailability for such a significant length of **time**. We do not believe the Carrier acted arbitrarily in assessing **some** discipline. Regarding the due process argument, we find it unpersuasive.

The remaining question is whether dismissal is justified for the instant offense. The Carrier argues that the past record justified permanent dismissal. However, the Carrier, as best we can determine, has not included a **copy** of the actual record. They did make **some** notations in their submission about his record. **However**, there is a certain ambiguity involved in their **remarks**. Therefore, **we** are left to **assume** based on the past record **as** noted in **the** Carrier's submission, that the **Claimant** has had only **two** incidents involving discipline, one related to the instant offense and one unrelated. We also are left to assume that the Claimant's record is free of any related offenses for approximately five years and free from any discipline for four **years**. It is our belief that the past record, as it is in the record, isn't so bad and that the offense isn't so serious that the **Claimant** should not be given one last chance. We direct the Claimant be reinstated with rights unimpaired but without pay for time lost.

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;

The 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 **wet** the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April 1982.

