

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23950
Docket Number CL-24082

Gilbert H. Vernon, Referee

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-9441)
that:

(a) **Carrier** violated the current Clerks' Agreement at Oklahoma City, **Oklahoma**, when on **February** 15, 1980 it dismissed T. S. Bendau from service, and

(b) **Carrier** shall **now** restore T. S. Bendau to service with all seniority rights **and** other rights accruing thereto **unimpaired**, and

(c) **Claimant Bendau** shall be **allowed** eight (8) hours' pay for **each** work day (forty (40) hours per **week**), commencing February 16, 1980 up to **and including** date of return to service of the Carrier at the rate of her Clerk to District **Supervisor's** position, plus **any** subsequent wage adjustments.

(d) Claimant's record shall be cleared of all charges that now appear in the **transcript** of the investigation held February 15, 1980.

OPINION OF BOARD: On February 4, 1980, the **Claimant** was directed to **attend** the **formal** investigation concerning her alleged falsification of **time claims** for the period of January 16 through January 30, 1980. The **investi-**gation was held February 15 and subsequent thereto, on March 4, 1980, the Carrier dismissed the Claimant.

The **Organization** first argues that the **discipline** should be overturned because Rule 24 (b), which requires a notice of **precise charge** prior to investigation, was violated. They argue the Carrier violated this rule because the letter of charge **was** not precise as to the nature of the charges to be **investi-**gated. Quoting from the letter of charge, they argue that the mere statement:

"... concerning Ms. T. S. Bendau allegedly falsifying **time** claim for period January 16 through January 30, 1980"

cannot be considered precise. The **Organization** also argues that while the **Claim-**ant may have been late **on** several of the days **under** investigation, the Carrier failed to refute the Claimant's allegation that she made up the lost time as she had previously done in **line** with past practice. The **Claimant** testified that she tried to **make** up the time by **working** over her lunch period and/or after assigned hours and cited **one** occasion where she worked over while **wait-**ing for a ride home. The Organization asserts that in light of the past prac-
tice of **making** up her lost time, Carrier **has** not met its burden of proof by

simply shoving the **Claimant** was late and claimed full time. The Organization next argues that even if the Carrier had met its burden of proof, the **penalty** of dismissal is excessive and unreasonable, especially in light of the extenuating circumstances involved. They believe a **review** of the Board's awards concerning charges for falsifying **time** sheets reserve dismissal for only the most blatant of cases. Moreover, they direct attention to a variety of awards **which have** reinstated **employees** under **similar** circumstances. In this regard, they direct the Board's attention to Third Division Award **21122** wherein Referee **McBrearty** stated:

"This **Board** appears to agree generally that some discipline is **warranted** when an employee is proved to **have** falsified time or production **records**, employment applications or other Carrier documents. However, It must be **shown** that the act was a deliberate one with intent to defraud rather **than** a mere oversight or lapse of memory Because a charge of dishonesty reflects upon a person's character and standing in society at large, the evidence presented by the charging party, the Carrier, must be fully persuasive i.e., truly substantial."

The **Organization** further argues that there is no **evidence** that the Claimant acted with deliberate intent to defraud the Carrier. On the contrary, they believe the record shows the opposite to be true. They direct attention to the **Claimant's** testimony that it was not her intent to **claim** more than properly due her. They suggest that the mistakes, if any, were the result of an employee working under duress. In this **regard** they direct attention to a letter from the Claimant's personal doctor **which indicated** that the **Grievant** had surgery on January 20, 1980, and that it had been **recommended** to her **that** she take two-three weeks off from work **in order to recover from the** surgical procedure. The doctor's letter also noted **that the patient did not** take off the **recommended time** and that she was not fully recovered from the surgery **and** as a result was under a **great** deal of stress **and** that this possibly had been affecting her ability to **perform** her normal duties.

The Carrier argues that there is clear evidence that the **Claimant** was guilty as charged. They direct attention to testimony by the **Claimant's** supervisor and **clear admissions** by the **Claimant** that **she claimed pay for time** that she did not work. They believe the testimony establishes there were **discrepancies between time claimed and time actually worked** on nine different occasions. Discrepancies ranged from **two minutes to 45 minutes** in duration. Moreover, they direct attention to testimony **which** they believe **established** that the **Claimant** **claimed** sick pay for **two** days when she was actually off for reasons other than sickness. The Carrier also asserts that the **Organization's** argument that the **Claimant** was not advised of the precise nature of the charge is totally unfounded. They believe the **charge** to be sufficient and they believe **it** adequately apprised the **Claimant** of what set of facts and circumstances were under inquiry. They believe the charge was precise enough to allow the Claimant to prepare a defense and as evidence of this they direct attention to the testimony of the

Claimant which is **indicative** that she **came** to the hearing **armed** with statements concerning dates under the investigation **and** therefore knew the nature of the charges. Regarding the quantum of discipline, they believe that dismissal is appropriate for a charge such as **this one**, which involves dishonesty. Moreover, they direct attention to the **Claimant's** past record which indicates she was given **discipline** on six occasions, all of which involved tardiness and absence **from** duty without proper authority. **This "discipline"** involved **one** reprimand **and** five (5) **separate** issuances of demerits.

In respect **to** the **Organization's** argument the charge was not precise, the **Board** finds that it **is** without sufficient foundation to overturn the dismissal. The **Board** concludes that the charge was sufficiently adequate to enable **the** defense **and** moreover, if the Organization were **surprised** or disadvantaged at the hearing then a postponement could have been requested. It is clear that the Claimant **came** to the hearing sufficiently prepared to defend herself.

Regarding the evidence, it is the conclusion of the Board that there is substantial evidence that the Claimant was guilty of the charge. There were **in** fact **discrepancies** between the **time** claimed and **time** actually worked on the various **dates** outlined by the investigation. However, the Board **cannot** conclude that permanent dismissal is **appropriate under** the circumstances. The Board is not **convinced** that these discrepancies were deliberate or purely intentional acts of dishonesty. Although such mistakes are serious, we agree with Referee **McBrearty** in Award **21122** that dismissal cases such as this should be reserved for **situations** where there is persuasive and substantial evidence that the discrepancy was deliberate or **part** of a pattern of **behavior** which was **not** altered by corrective **discipline**. The Board does not believe that dismissal **under** the facts **and** circumstances of this **case** is **appropriate** for a first offense. The **Carrier** did argue in their submission **and** rebuttal that the dismissal was appropriate **considered in light of** the **Claimant's** past record. However, the Organization properly objected to the inclusion of the **past** record into the **Carrier's** submission **and** rebuttal because it was never **introduced** on the property. A review of the record confirms **that** the **past** record was never made a matter of evidence **or** argument **on** the property **and** therefore **cannot** be considered. **In** view of this **and** other considerations discussed above, it is the conclusion Of the Board that the **discharge** is excessive and we direct the **Carrier** to reinstate the Claimant to service with all seniority 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;

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 discipline was~~ excessive.

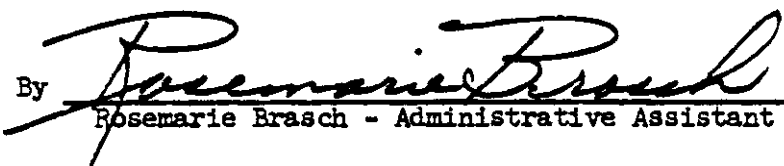
A W A R D

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 14th day of July 1982.

