

NATIONALRAIROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number **24128**
Docket Number **CL-24056**

Gilbert H. Vernon, Referee

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

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (**CL-9421**)
that:

(a) **Carrier** violated the rules of the current Clerks' Agreement at San Bernardino, California, on September 6, **1979**, when it wrongfully discharged Mr. **K. P. Herron** from service, and

(b) Mr. **K. P. Herron** shall now be reinstated and compensated for all monetary loss suffered **commencing** September **6, 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. K. P. Herron commencing** September **6, 1979**.

OPINION: **On September 6, 1979**, the Claimant was directed to attend a formal investigation in connection with the following charge:

"... with your alleged **failure** to obey instructions from your **supervisor**, possible insubordination..."

The investigation was held on **September 14, 1979**. On October **4, 1979**, the Carrier directed a letter of dismissal to the Claimant.

The first issue to be considered by the Board is a procedural one. The Organization argues that the Claimant was denied due process when it failed to inform the Claimant of the discipline within 20 days after the investigation in violation of Rule 24 (c) which reads:

'24-C. An **employee** disciplined as a result of **formal** investigation shall be informed of that fact within 20 days after the investigation is held, unless a longer **time** limit is mutually agreed to in specific instances."

The Organization doesn't dispute that the notice was mailed on the 20th day but argues that the rule requires that the notice be received within 20 days. **They** cite a variety of awards in support of the proposition that to be "**informed**" or "notified" actual receipt must have occurred. **The** Carrier, on the other hand, argues that compliance with Rule 24(c) requires only that they have such notice in the mail. They cite a **variety** of awards holding, under similar language, that the date of mailing is controlling. They also argue that the parties have

signed a mutual understanding regarding the handling of time claims (Article V) that indicates that the date of the letter not receipt is controlling. They suggest this is indicative of the parties intent in respect to Rule 24 as well. Moreover the Carrier argues that even if Rule 24(c) is found to have been violated that such violation has not been shown to have prejudiced Claimant's right to due process. In this respect they cite Third Division Award 20423.

The Carrier's argument in respect to Article V and the lack of prejudice cause the Organization to respond that Article V doesn't deal with discipline and additionally that Third Division Award 20423 and others like it establish a double standard in respect to the handling of claims. They allow the Carrier latitude for time limits in discipline but hold the Organization to a stricter standard in other time limit matters.

In considering the competing arg-ts of the parties on this procedural issue we recognize that there are conflicting awards on the point whether date of mailing is controlling or whether notice must be physically received within the specified time limit. The awards conflict as a result of different interpretations of the tens "informed" or "notified". It is this Board's opinion that the better reasoned awards hold that the date of mailing is controlling in matters such as this. For instance, we observe recent Third Division Awards 22723 and 22277 to this effect. We believe that constructively speaking a party is "informed" within the time limit if there is evidence the notice was mailed within the time limit. In this case, there is no dispute that it was mailed on the 20th day therefore there has been no violation of Rule 24(c).

The Organization also argues that the Claimant was not afforded a fair and impartial hearing inasmuch as the hearing officer acted in multiple roles. In reviewing the transcript we cannot conclude that the conduct of the hearing officer in his various roles prejudiced the Claimant. It has often been held that a hearing officer acting in multiple roles doesn't per se establish a violation of due process. The determining factor in deciding whether a fair hearing was held is how the hearing was conducted not who conducted it.

In respect to the merits and the issue of guilt, the Board concludes, after reviewing the transcript, that there is substantial evidence to support the charge. The charges were based on an allegation that the Claimant, a janitor, refused to clean coffee cups. Mr. Edward Zylman, Chief Clerk, testified that on the day in question he was discussing the Claimant's work assignment with him including the cleaning of cups and that the Claimant refused to clean the cups. The conversation went further before Mr. Frank Shuman, Chief Clerk, was called into the conversation. Mr. Zylman indicated that the talk lasted about twenty minutes, that his instructions were clear and that the Claimant refused to comply with 5 different requests to comply with the order. Mr. Shuman's testimony corroborated that of Zylman. He also testified that on other occasions the Claimant had been instructed to wash the cups.

The Organization argues that the Claimant cannot **be found** guilty of insubordination because at the time the instructions were issued there were no cups to be washed. A review of the record does not factually establish that there were no cups to be washed. Even if there **were** no cups to be washed at the time, in the context of this case, insubordination is still evident. **The** issue of the Claimant refusing to wash coffee cups had previously been discussed and there is evidence that the Claimant had recently failed to wash some. If the discussion that, ensued on the day in **question** did not take place in the context of cups to be washed at that time, it did deal with a real problem that had a recurring nature. The Supervisor was well within his rights to question the Claimant regarding his intention to comply with the order in principle. The Supervisor also had the right to act upon a clear and uncompromised refusal of the Claimant to wash cups. We note also that this refusal persisted even after being reminded that he had been subject to previous reprimands and demerits **for** refusing to do the **same** thing.

Regarding the propriety of the penalty, the Carrier argues that the penalty of discharge is supported by the **Claimant's** past record relating to the identical charge. On May **31** and June 20, 1979, he was "admonished" **for failure** to wash coffee cups. He **also** was subjected to an investigation **June 6, 1979**, on an identical charge for which he received **15** demerits. In considering the **arguments** of the Carrier in respect to the appropriate penalty, we cannot justify discharge in this case. While refusal to comply with orders is serious and while the Claimant's consistent refusal to carry out simple requests to clean cups lends **some** weight to the Carrier's argument that **he is** not deserving of continued employment, we believe that dismissal is excessive as a first time suspension for an offense such as this. It is often been said that the aim of discipline should be to teach not to punish. We believe the Claimant is entitled to a chance to show that he has benefitted from his absence from the employ of the Carrier and has learned what his responsibilities are. We will direct the Carrier to reinstate him with rights unimpaired but without pay for **time** lost. It should be clear that he **is** obligated to comply with the instructions of his supervisors even if he is somehow **agrieved** by their orders. If he is **agrieved** by their instructions, he should **comply** and grieve later.

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 violated.

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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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of January 1983.

