

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24401
Docket Number CL-24428

Robert Silagi, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, **Airline** and Steamship Clerks,
Freight **Handlers**, Express and **Station** Employees
{ Union Belt of Detroit

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (CL-9537)
that :

Claim No. 1 (File UB-58, Carrier file 7-CG-14430)

(a) The **Carrier** violated Rule 20 of the Clerks' **Agreement** when as a result of an investigation held April 19, 1980, (sic) it **wrongfully found Claimant** Plichta at fault for absenting himself from duty April 3 and 4, 1978 and administered discipline in the form of five (5) days werhead suspension.

(b) Carrier should now **rescind** such discipline and Claimant's record be made clear.

Claim No. 2 (File UB-59, Carrier file 7-CG-14430)

(a)' The Carrier violated Rule 20 of the Clerks' Agreement when as a result of an investigation held April 19, 1978, it **wrongfully found Claimant** Plichta at fault for absenting himself from duty April 5, 6, 9, 10, 11 and 12, 1978 and administered discipline in the form of fifteen (15) days overhead **suspension which** resulted in Claimant being required to serve five (5) days actual suspension as a consequence of **discipline having** been assessed at an investigation held previously the **same** date.

(b) Carrier should now **rescind** such discipline, and Claimant's record be made clear and he should be made whole for all time lost.

Claim No. 3 (File UB-60, Carrier file 7-CG-14432)

(a) The Carrier violated the Clerks' Agreement when as a result of an investigation held April 27, 1978, it **wrongfully found Claimant** Plichta at fault for absenting himself **from** duty April 13, 16, 17, 18, and 19, 1978 and administered discipline in the form of thirty (30) days werhead suspension which resulted in Claimant being required to serve fifteen (15) days actual suspension as a consequence of discipline having been assessed at an investigation held **April 19, 1978.**

(b) Carrier should now **rescind** such discipline, and Claimant's record be made clear and he should be made whole for all time lost.

OPINION OF BOARD: On Friday afternoon, March 31, 1978, Clerk J. L. Plichta telephoned Superintendent L. E. Acton requesting a leave of absence due to nervousness. Acton advised Claimant that he would grant the leave if Claimant secured a statement from his personal physician verifying his medical problem. That same afternoon Claimant informed Acton that his doctor would not give him a stat-t. Acton then advised Claimant to see a company doctor at Carrier's expense, and a leave would be granted ff such physician gave Claimant a statement. Arrangements were made for Claimant to see the company doctor that evening. however Claimant could not keep his appointment due to lack of transportation. A new date was arranged for Monday, April 3rd. Claimant asked for and received Sunday, April 2nd as a day off. Claimant did not keep his medical appointment on April 3rd. Two days later Carrier sent Claimant a written notice to appear at an investigation on April 12th charging him with being absent without proper authority on April 3rd and 4th. The Carrier's letter was ret-d by the U.S. Postal Service as undeliverable. At the hearing on April 12th, the Local Chairman requested a postponement to April 19th. Said request was granted. Carrier then instructed Claimant to attend another hearing on April 19th on charges of absenting himself for 5 days beginning April 5th. Thereafter a third hearing was scheduled cm April 27th when Claimant was charged with 5 days' absence beginning April 13th. At the first hearing Claimant was found guilty and discipline imposed of 5 days overhead suspension. The second hearing also resulted in a guilty finding with a 15 day overhead suspension. The third investigation followed the pattern of the first two and resulted in a 30 day overhead suspension. For his absence of 13 days, Claimant received a total of 50 days overhead suspension of which he actually served only twenty.

The Organization contends that Claimant was not accorded a fair and impartial hearing into the charges. Various defenses were raised.

(1) The "double jeopardy" argument. The Organization argues that the hearing on claim numbers 2 and 3 are nothing more than extensions or continuations of the initial hearing on claim number 1 since the facts and circumstances are identical except for the dates of the absences. By segmenting the continuous work days into three separate incidents the only purpose served was to impose progressively greater levels of discipline.

The Carrier notes that each day's absence without permission constitutes a separate violation and nothing in the Agreement limits the number of hearings even ff the charges are essentially identical. "Double jeopardy" describes the peril of a defendant who is tried for the same offense more than once. The concept of "double jeopardy" applies in criminal matters, but even ff it were applicable to a labor agreement it would not be relevant in the instant case.

(2) The use of the same officer to bring charges and act as hearing officer or for a witness to act as an appeal officer. Such arguments have been considered and rejected by the Third Division.

Award 21228 - Wallace

"The fact that the hearing officer was also the charging officer is not a defect which undermines the essential fairness of the

hearing. **There** is no prohibition of this in the agreement and the **Third Division** awards have not viewed this as a basis for **unfairness.**"

Award 19708 - Lieberman

"... there is nothing **in** the Rules prohibiting an officer who acted as a witness from serving as a* appeals officer. **There** appears to be **no** evidence or support in the Rules for the contention that the **function** of the Superintendent as the **presiding** officer, after appearing as a witness in the earlier investigation, in **any** was impaired the rights of the Claimants."

(3) **The** alleged duty of the Carrier to produce witnesses whom the Organization deems necessary for its defense. Carrier contends that it has always been the responsibility of the Claimant and/or **Organization** to arrange for their witnesses **and** in this case Plichta was so advised in the charge letters. **Decisions** of the **Third Division** support the Carrier's contention, (Award 15025 - Mesigh, 16261 - Dugan, 11443 - Dolnick).

(4) **The** argument that **certain testimony** was **improperly** excluded. The **Organization** sought to elicit **testimony** bearing upon Claimant's emotional or personal problems. **The** record shows that the Hearing Officer noted that Claimant had personal problems **which** created his work related problems but excluded a detailed recitation of **the personal** problems. **This Board** is **convinced** that all relevant and pertinent evidence was received and no prejudicial error was **made** by the exclusion. (See Award 8806 - Bailer).

Prolonged, **unauthorized** absences **from** duty create a serious disruption of Carrier operations, (Award 14601 - Ives). **Upon** the entire record it is apparent that the Carrier sustained its burden of proof. The discipline imposed was not arbitrary, capricious or unsupported by the record. The claim is therefore denied.

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.

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Claim denied.

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 26th day of May 1983.

