

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24642

Docket Number U-23489

Herbert **Fishgold**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight **Handlers**, **Express** and Station **Employees**

PARTIES TO DISPUTE: (

(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (**GL-9257**),  
that:

1. Carrier violated Rule 38 of the Agreement when it failed to **give** Clerk E. J. Smith, Jr., Tampa, Florida, proper written notice of investigation, which was scheduled for 10:00 a.m., Monday, July 2, 1979, and later postponed to **9:30 am**, Thursday, July 5, 1979, thereby depriving Claimant of his protection, provided for in the Agreement, which requires the Carrier to apprise the **employee** in writing of the **specific** charge, or charges, against him.

2. Carrier further violated Rule 38 and other rules of the **Agreement**, acting arbitrarily, capriciously and in a harsh and discriminatory manner, when it assessed thirty (**30**) days actual suspension of Clerk E. J. Smith, Jr., Tampa, Florida. following investigation held at Tampa, Florida, July 5, 1979.

3. As a consequence of the above stated violations, Carrier shall:

(a) Clear service record of **E. J. Smith**, Jr., and any reference to **above** stated investigation and discipline shall be cleared from record and personal file of Claimant.

(b) Compensate Claimant for all time lost and other benefits taken from him as a result of Carrier's action.

(c) Discontinue practice of letting Crew Clerks notify **Employees** on phone **regard-**ing "**Notices** of Investigation."

(d) Initiate a procedure for having "Notices of Investigation" **hand-**delivered to the accused **employee**, by a Supervisor, or Official, of the Carrier.

OPINION OF BOARD: Claimant in this case is employed as a Utility Clerk, Vceta Yard, Tampa, **Florida**. In the performance of his duties on June 21, 1979, Claimant sustained a personal injury which was properly reported to his Supervisor. Thereafter, on the **morning** of Tuesday, June 26, the start of Claimant's week of vacation, pursuant to a request from the Carrier, Claimant reported to the **Trainmaster**, Mr. Rowe, at approximately **8:30** a.m. to give a statement concerning his injury. Rowe then made **an** appointment for Claimant to see the Company doctor that morning. After reporting to the doctor's office, and waiting for one hour, Claimant left without seeing the physician, and proceeded to take his scheduled vacation.

By letter dated June 27, 1979, Superintendent Cherry advised Claimant to report on July 2, 1979 for a formal investigation regarding alleged insubordination for failing to remain in the company doctor's office to be examined as instructed by Trainmaster Rowe on June 26, 1979. The letter was never delivered to Claimant. Neither **was** a subsequent letter dated June 28, 1979 advising Claimant that the investigation was being rescheduled to July 5, 1979. A **formal** investigation at which Claimant was present, was held on July 5, 1979, following which Claimant was given a 30-day suspension for the incident of June 26, 1979.

As a preliminary matter, the Organization alleges that Carrier violated Rule **38(a)**, which requires that an employe "will be apprised in writing of the specific charges against him." Apparently, the practice in Tampa is to have the disciplinary letters left with Crew Clerks for delivery, who in turn telephone the **employe** in question about the notices, and the accused then goes to the office to pick up the letter. In the instant case, the Crew Clerk received a copy of the June 27 letter addressed to Claimant with instructions to "Notify Mr. Smith of this investigation, advising when notified.\* The Clerk called Claimant's wife that morning with a request that Claimant call back. **Upon** his return from vacation and prior to the July 5 formal investigation, Claimant had both notices read to him over the telephone, could have picked them up, and at the **formal** investigation indicated that he had knowledge of the original scheduled notice of investigation and the postponement, and, further, that he was prepared to proceed with the investigation.

The Organization. as part of its Claim, seeks to require the Carrier to discontinue the telephone notification and to have **"Notices of Investigation"** hand-delivered. To the extent that the Organization is in fact seeking new procedures as regards Rule 38, this matter is not properly before the Board. While the Board can agree that similar problems regarding delivery of Notices of Investigation under Rule 38 could be avoided if Carrier tightened up on the delivery process, nonetheless the record here is clear that Claimant both knew the nature of the charges and was prepared to go forward at the formal investigation. Accordingly, there was no violation of Rule 38.

The Board turns next to the question of whether Carrier acted "arbitrarily, capriciously or in a harsh manner" when it assessed a **30-day** suspension for the incident of June 26, 1979. The Board is of the opinion that Claimant was insubordinate when he left the doctor's office without getting a physical examination and without notifying **Trainmaster** Rowe, who had instructed Claimant to get an examination that morning.

Having so found, however, does not end the Board's inquiry. Although the Board hesitates to substitute its judgment in discipline cases when the evidence supports the Carrier's action, there are mitigating circumstances present which dictate against sustaining a 30-day suspension. In this regard, it must be noted that Claimant, who had 16 years of service, was beginning his scheduled vacation on June 26 and only came in because Trainmaster Rowe requested. In addition, Claimant obviously did not realize the consequences of failing to stay for the physical examination. Under these circumstances, the Board finds that reducing the **30-day** suspension to seven (7) **working** days is the proper penalty for the violation.

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 **Employee** 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:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984