

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25116
Docket Number CL-25172

George S. Roukis, Referee

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

PARTIES TO DISPUTE: (

(The Baltimore and **Ohio** Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9759) that:

(1) Carrier violated the Clerk-Telegrapher Agreement when, on July 28, 1981, it imposed discipline of five (5) days "overhead suspension", holding three (3) months probation upon Mr. C. E. Davis, Chief Caller, Camden Station Crew Callers Office, Baltimore, Maryland, and, two (2) days later on July 30, 1981, Carrier further imposed ten (10) days' "actual suspension" from service upon Mr. Davis, as a result of two (2) formal investigations conducted on the dates of July 7 and 10, 1981, which action was unreasonable and unjustified, and

(2) As a result of such improprieties, Carrier shall be required to compensate Claimant C. E. Davis those wages lost between the suspension period of August 6, 1981, through and including August 15, 1981, and that Mr. Davis's service record be cleared of all notings of charges and disciplinary measures administered therefrom.

OPINION OF BOARD: In this dispute, Claimant had been the subject of two separate investigations. The first investigation was held on July 7, 1981 to determine whether he failed to protect his assignment on June 8, 1981 and the second investigation viz his alleged failure to call crew, per written instructions on June 29, 1981 was held on July 10, 1981.

Based on the record evidence in the first investigation, Carrier found him guilty of the cited specification and he was given a five (5) day overhead suspension. Following the second investigation, wherein he was also found guilty of the asserted infraction, Claimant was assessed an additional five (5) day suspension, and he was required to serve in **toto** a ten (10) day suspension. These dispositions were appealed on both procedural and substantive grounds.

In defense of his petition, Claimant ~~argues~~ **argues** that he was not accorded the due process rights required by Rule 47 since ~~the~~ the charging officer who was not present at the investigation, assessed the discipline. Moreover, he contends that the first in line Carrier appeals officer affixed his signature to the report of Investigation/Board of Inquiry/Hearing Form, which by definition prejudiced his right to **an** independent review at the first appellate stage. It is the Claimant's position that he was unfairly prejudged when Division Manager J. M. Emmett approved the discipline recommended by Superintendent-Division Administration W. M. Acken. He cited several Third Division Awards to buttress his interpretative points. (See for example, Third Division Awards 7088, 10547 et al.)

As to the substantive merits of the dispute, Claimant contends with respect to the first specification that his wife called in and properly reported him sick on June 8, 1981, and thus, his absence was not a disciplinary offense. Regarding the second specification, Claimant asserts that while he was responsible for implementing the instructions placed in the Baltimore Caller's Log Book, he complied with those instructions when he advised General Clerk-Caller V. J. Taylor to call two (2) 'Helpers' for the 7:00 A.M. Yard Job **1-A**, located at Washington, D.C. He maintains that he was disciplined for failure to follow up instructions, which was not required of Chief Crew Callers.

Carrier asserts that he was provided all the due process protections required by Rule 47 since the record transcript shows that the hearing was conducted in a fair and impartial manner. It avers that the charges were clearly articulated and he was accorded sufficient time to prepare a thoughtful defense, and provided every opportunity to present and cross-examine witnesses. It argues that it was not procedurally inconsistent with Rule 47 for the Hearing Officer not to issue the discipline nor prejudicial for the Superintendent - Division Administration to assess the discipline. In fact, it contends that the Board's holding in Third Division Award No. 7088 involving a previous dispute between the parties herein, pointedly supports this position. In its rebuttal submission it takes umbrage at the inclusion of **Employees'** Exhibits 11 and 12 since it argues that these documents are internal Carrier documents and were never discussed nor exchanged on the property.

Similarly, Carrier asserts that the investigative record amply demonstrates that Claimant marked off improperly on June 8, 1981 since he had not shown by any credible proof that his wife apprised Clerk Caller Moore that he was sick when she requested that he be marked off on June 8, 1981. It asserts that he failed to protect his assignment. With respect to the second specification, Carrier argues that as the Chief Caller an integral aspect of his responsibility is to see that crews are called for vacancies on subsequent tricks. It maintains that while he instructed General **Clerk-**Caller V. J. Taylor to call the crew for the Washington, D.C. vacancies on June 29, 1981, Claimant failed to insure that the assignment was completed when he did not follow through on his instructions. It avers that he cannot abdicate his responsibilities and noted that he acknowledged at the hearing that it was his responsibility to see that Mr. Taylor **calls employees**.

In the instant **case** we are confronted with new procedural assertions that were not raised nor discussed on the property. We have carefully reviewed the investigative transcript and the appeals correspondence, but we do not find any mention **or** implicit reference to **Employees'** Exhibits 11 and 12. The procedural arguments raised refer to the propriety of the **Superintendent-Division Administration** signing the discipline and not the approval signature of Division Manager J. M. Emmett. These documents were new evidence and are inadmissible under **our** procedures. Circular 1 precludes their introduction. Accordingly, since we find that it was not impermissible for Mr. **Acken** to sign the disciplinary letter dated **July 30, 1981**, the dispute is properly before us.

As to the substantive merits of this dispute, we find no clear evidence that Claimant's wife indicated that he was reporting off sick on June 8, 1981. A letter by his wife **or** her appearance at the investigation might have strengthened his position. Claimant did not answer questions by oral articulation because of his religious beliefs but merely nodded his head yes **or no** when questioned. He was **aware** of the procedures for reporting off properly and could have prepared a better response at the **investigation**. We find no evidence that Carrier was under any impression, even inferentially, that he was sick on June 8, 1981. His wife was told that he could not be marked off.

As to the second specification, Claimant's own admission that he did not follow through to insure that the crew was called on June 29, 1981 is a clear indication of culpability. While he argued that it was not his job to follow through on this matter, he offered no proof that this was a normative requirement. **He** acknowledged that it was his responsibility to see that General Clerk-Caller V. J. Taylor called crews and this acknowledgement underscores his avoidance of this integral task.

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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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Nancy J. Dever*
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.



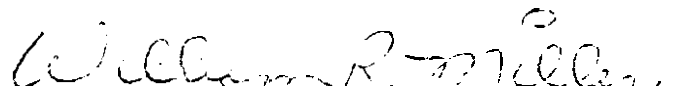
LAEOR MEMBER'S DISSENT TO
AWARD NO. 25116, DOCKET NO. CL-25172
(REFEREE ROUKIS)

The issue in this case is the denial of Claimant's right to proper application of Rule 47 of the parties' agreement.

Rule 47 contemplates that an employe will be notified of the precise charge placed against him and that he will receive a fair and impartial investigation at which he may be represented and have the presence of necessary witnesses. Then, he is to be furnished a decision which is based upon the evidence developed in the investigation and any discipline imposed must be fair, just, evenhanded and commensurate with the offense. But these concepts were denied to this Claimant.

In this particular case, the Claimant was subjected to two charges, two investigations and two impositions of discipline. Suspension was imposed for each of the two offenses involved. In both instances, the Carrier misapplied Rule 47 exactly the same. The appellant process which followed eliminated any chances of fairness or impartiality.

The right of independent consideration on appeal has been respected by this Board in the past, but in this instance, the majority opinion has erred and their Award should be considered incorrect.



William R. Miller, Labor Member

Date November 22, 1984 - - -