

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25499
Docket Number Mh-25414

James Robert Cox, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(**Union** Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Roadway Equipment Operator **H. R. Sabom** for alleged #violation of General **Rule B** and General Regulation 700 of the Form **7908*** was without just and sufficient cause and on the basis of unproven charges (System File S-19-11-14-55).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: An arrest warrant issued by the San Bernardino, California Municipal Court May 3, 1982, charged Claimant Sabom with Assault with a Deadly Weapon. **He** was apprehended and taken off the job in or near the Cal **Cartage** Yard in Los Angeles May 5, 1982. The charges stemmed from a March 7th incident involving a female who required emergency surgery for the removal of her spleen allegedly as a result of a claimed assault by Claimant.

After the arrest, Claimant returned to work May 12th and, after working two days, was removed from service. The Bearing in this matter was conducted May 20, 1982. Claimant was dismissed from service for violation of General Rule B and General Regulation 700. General Rule B requires obedience to Rules and Special' Instructions while Regulation 700 states:

*Employees will not be retained in the service who are careless in the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism or loss of goodwill, or who do not meet their personal obligations:

Claimant's Court date was set for June 7th. According to the record, due to failure to prosecute, charges against Claimant were dropped June 28, 1982.

The evidence does not establish the Claimant engaged in any off duty conduct which adversely affected either his work or the Carrier's operation. No evidence of public knowledge of the arrest was submitted. The arrest by itself does not provide a basis for discipline. There was no admission by Claimant of an assault and neither the alleged victim nor any occurrence witness testified. It is significant that Sabom was allowed to return to work following his arrest and incarceration. The charges do not include a Rule **48(L)** violation and Carrier did not dismiss Mr. Sabom under Rule **48(L)** because of his arrest and removal from Company property by civil authorities.

The evidence also does not support the Carrier's finding that Claimant was in violation of either General Rule B or General Regulation 700. The arrest based upon a citizen's complaint which was not followed up does not establish that Claimant was immoral, quarrelsome, or in any way had conducted himself in a manner that the Railroad would be subject to criticism or loss of goodwill. Moreover, dismissal was not based on any absenteeism factor, only upon the Rules cited above.

For these reasons the Board finds that the **claim** is to **be** granted with Claimant reinstated with seniority and all other rights unimpaired and compensated for wages lost, offset by any outside earnings or unemployment benefits received.

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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June 1985.



5025

CARRIER MEMBERS' DISSENT
TO
AWARD 25499, DOCKET MW-25414
(Referee Cox)

In the **overwhelming** majority of disputes involving the subject of discipline, even strong disagreements with Awards on the merits do not lead to the filing of Dissents. Occasionally, however, the Award is so egregious that good conscience requires that the Award not be allowed to slip into history without **some** final words **of** farewell. The Award in this case falls into such category.

The Claimant was charged with violating Carrier Rule B and General Regulation 700. Rule B is **a** general rule requiring employees to **know** and comply with the rules and regulations of the Carrier. General Regulation 700 is **a** specific rule which, in pertinent part, provides:

"General Regulation 700: Employees will not be retained in the service who are **...quarrelsome** or otherwise vicious..."

The facts established at the Investigatory Hearing are as follows. At the time of the event underlying the dispute, **Claimant** had been in the service of the Carrier for eight **months**. One of the witnesses called by the Carrier at the Investigation was Special Agent Albertson. He testified that on March **7, 1982**, the Claimant was arrested by the local police for creating **a** disturbance involving **a female** victim. It later developed that the victim required emergency service for the removal of her spleen as a result of **an** assault on her by Claimant. The original charge of creating a disturbance was changed to assault with a deadly weapon and **Claimant was** rearrested on Carrier property on **May 5**. The witness testified that his knowledge of the facts was obtained from the local police conducting the investigation. The Claimant was called as **a** witness. He did not dispute any of the testimony of the Special Agent. He did testify that he **made** bail and returned to **work on May 12**; that he worked for two days; and that he was removed from service by the Carrier on **May 14**.

On June 1, 1982, the Carrier notified the **Claimant** that he was dismissed from service for violating **General Regulation** 700. In further **handling on** the property, the **Organization** contended that, by allowing the **Claimant** to return to work for two days before removing him from service pending the Investigation. the Carrier had deprived **Claimant** of a fair and impartial hearing by prejudging Claimant's guilt. It **also argued** that the dismissal violated the Agreement because the criminal court had dismissed the charges against **Claimant**. The Carrier responded **that** the charges had been dismissed only **because** the **complaining** witness (the Claimant's girlfriend) had failed to **appear** at the trial, and that the Carrier's decision was **based** upon the testimony of the Special Agent at the Investigation. The Carrier **also** took the position **that** it **had** the right to suspend the employee pending the **Investigation** under Rule 48(o) of the Agreement.


1. The Carrier's holding Claimant out of service pending **Investigation** was in accordance with Rule 48(o) of the Agreement and did not constitute prejudgment of the Claimant. Rule 48(o) **allows** the Carrier to suspend an employee before an Investigation where serious **violations** of **Carrier** Rules are involved. Claimant was charged in connection with a particularly vicious **assault** and the Carrier certainly was exercising prudence in removing Claimant pending Investigation. Third Division Awards: 21834, 10993, 19877, 11330. The fact that it allowed **Claimant** to return to work for two days after he posted **bail** did not deprive Carrier of its right to invoke Rule 48(o); it **certainly** was no **basis** for **invalidating** the subsequent **Investigation**. At most, if the suspension were unwarranted, Claimant would have been entitled to payment for the period of suspension. Third Division Awards: 22034, 25118.


2. The **Board** has long held that **acquittal** by a court of law is no bar to disciplinary **action** by the Carrier. Third Division Awards: 24608, 20781, 13127, 13116. In this **case**, the Claimant was not acquitted, the charges were dropped only because the complaining witness did not appear at the trial. The **above** cited Award accordingly, **are** even more appropriate **in** this **case**.

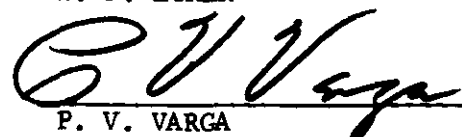
3. There **was substantial** evidence to support the **Hearing Officer's** finding that **Claimant had acted in a vicious manner** in violation of **General Regulation 700**. Special Agent Albertson testified concerning the **Claimant's** guilt on the **basis** of information **obtained** from **local** police. While such **information** was **hearsay**, this Board has long recognized that **hearsay** evidence is **admissible** at Investigatory **Hearings**. Third Division Awards: 21228, 19933, 19558, 16308. Of perhaps even greeter **significance**, the testimony of the Special Agent **was** not controverted by the **Claimant**. Surely, the **testimony** of the **Special Agent**, as well as the fact that **Claimant had** been arrested on Carrier property and **was** out on **bail** at the time of the **Investigation**, constituted sufficient probative evidence to require at **least a** denial by the **Claimant**.

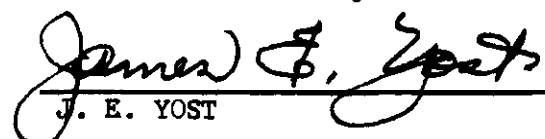
4. The Board **has** long recognized that when the **nature** of the improper conduct of the employee is severe, the employee is subject to discipline whether the conduct happened on or off **railroad** property and without the necessity of **a** finding that such conduct brought disrepute upon the Carrier. Third Division Awards: 24994, 21825, 21334, 21228, 19263. **Certainly**, the vicious **assault** perpetrated by **Claimant** in this **case warranted** the severe action taken by the Carrier.

The **majority** has ordered that the Claimant be reinstated with **backpay** without referring to even one of the above issues. We believe it is clear that **a** Dissent to such an **award** is necessary.


M. W. FINGERHUT


W. F. EUKER


P. V. VARGA


J. E. YOST