NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26368

THIRD DIVISION Docket Number CL-27025

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10089) that:

1. Carrier violated the Agreement Rules, particularly Rule 21, when on February 7, 1985, it dismissed Claimant S. Koscielniak from the service of the Carrier account formal investigation which was held on February 1, 1985, and

2. Carrier shall now be required to compensate Claimant S. Koscielniak for all time lost as well as for any monies he may have spent for health benefits he would have otherwise received under the group policies he was covered by prior to his dismissal."

OPINION OF BOARD: The letter directing Claimant, a Ticket Seller, to report for Investigation on January 25, 1985, was dated January 21, 1985. It was signed by Assistant Vice President - Division Manager McIntyre. The charge to be investigated was:

> "Your responsibility for theft of Company funds when you were employed as a ticket seller in the Chicago Passenger Terminal Ticket Office during 1984 and January of 1985."

On January 23, 1985, the Investigation date was postponed until February 1, 1985.

The matter began on January 2, 1985, when Claimant reported he thought some money had been taken from his cash drawer and it was determined that $568.00 was missing. On January 11, 1985, Special Agent Vogel, investigating the shortage, asked Claimant if he would take a polygraph examination. Vogel told Claimant he, Vogel, would not take such a test and he would understand if Claimant refused. Claimant however agreed to take the test and it was administered on January 16, 1985, by Steve Kirby, a licensed polygraph examiner who is not an employee, of Carrier but was paid by Carrier to administer the test. The tes: was given in the offices of Carrier's Police Department. After the test, in which Kirby believed Claimant's answers were deceptive, Claimant told Kirby that he had in the past twelve month period taken $50.00 of Company funds and also made reference to taking a Susan B. Anthony 'dollar.

Later Claimant told Vogel that the $50.00 was possibly only $20.00. On this same day Vogel reported the admissions to Manager of Suburban Administration Munari - Austin and Suburban Division Agent Gregory, Claimant's Supervisor. Vogel told them Kirby's report should be awaited. That report was received by Munari-Austin on January 21, 1985, and a copy was given by Carrier to the General Chairman.

At Hearing Claimant did not deny making the admissions but he did deny they were true. Rather, he made them because:

> "Mr. Kirby seemed pretty assured of the fact that he was going to get numbers out of me on his paper for the clearance of the conscience. He's not the type of man that will take no for an answer. I also wanted to make sure I cleared my conscience."

A: the Hearing Claimant denied he had ever taken any of Carrier's money.

By letter of February 7, 1985, McIntyre notified Claimant of his Dismissal.

Rule 21 of the Agreement requires an employee shall be "notified in writing of the precise charge." The Organization contends Claimant was never given precise charges because the charges covered a thirteen month period and dealt with no specific sum of money. We do not agree as we consider the "theft of Company funds," charge sufficiently precise. In context there can be no doubt that Claimant was aware of the nature of the charges against him. It is also the Organization's position that the time limit of Rule 21 was not met. The Rule requires that:

> "The investigation shall be held within seven calendar days . . . of the date information concerning the alleged offense has reached his supervising officer."

The Organization argues that information concerning the alleged offense reached Supervisors' attention on January 16, 1985, when Claimant's admissions were communicated to Munari-Austin and Gregory. Thus neither the charges nor the original Investigation date was within the time limits. Carrier insists the charges were timely as the charges were based on the report received from Kirby on January 21, 1985. We agree with Carrier that the information "reached" the supervising Officer within the meaning of the Rule when the complete report was received from Kirby. To hold otherwise would require Carrier to take very serious action on incomplete information which it had had no opportunity to evaluate.

The Organization further contends Vogel's testimony suggests Carrier's conduct "smacks of . . . the rubber hose in the precinct basement." It takes the position tha: Vogel entrapped Claimant by "stimulating" him. as Vogel had testified he had:

> "Attempted to stimulate (Claimant) into opening up as to anything in the past, so he could possibly - I'm trying to figure out how I could put this - be open, candid and truthful, so that he would not respond with a distorted or inconclusive answer to the $568.00."

The record does not support this contention. Vogel had in fact advised Claimant against submitting to a polygraph examination. Also his attempts to "stimulate" Claimant came after the examination and were in the context of Claimant possibly taking a second test at a later date. At the Investigation Vogel testified:

> "I was not on a hunting expedition. I am somewhat disappointed in that this subsequent information became known. However, the action taken on (Claimant's) admissions were beyond my control."

We do not believe the record justifies a conclusion that Carrier's conduct was improper. While the Organization notes Claimant had no representation at the time of the polygraph there is no evidence of record that he sought or requested such representation.

With reference to the Organization's position regarding polygraph examinations generally we must clearly point out that the reliability or admissability of results of a polygraph examination is not at issue here. Claimant has not been charged with responsibility based upon the opinion of a polygraph examiner that untruthful answers were given during a test. The charge is based upon admissions Claimant made to two individuals after completion of the test. While the entire report was submitted into evidence no action was based on the test portion of the report. Claimant is not charged with the theft of the $568.00 which formed the basis for the test. As we stated in Third Division Award 20931:

> "We have noted the various contentions concerning polygraph tests and have considered their possible effect upon Claimant's rights. We do not find Carrier attempted to substitute the result of said tests for substantive evidence of wrongdoing, and thus we are not inclined to overturn Carrier's findings - under the facts of this record - and in consideration of the admissions contained therein."

On the day the missing money was reported Claimant said he thought it may have been taken by a telephone employee working nearby. The Organization protests that person was never questioned. However at the Investigation Munari-Austin testified Illinois Bell was notified and its investigators did an "entire investigation" before advising Carrier the employee was not guilty of taking the money.

No proof has been offered that any theft took place, or that Claimant was guilty of anything, according to the Organization, and this is fatal in view of Carrier's burden of proof. This overlooks Claimant's admissions. At the Investigation Claimant agreed he made the admissions but contended they were nottrue and were merely devised to get Kirby "off his back." Carrier chose to believe the admissions and not to credit their subsequent retraction. As we have concluded the admissions were not the result of intimidation or improper conduct on Carrier's part there is no basis for us to interfere with Carrier's judgment in this regard.

Finally the Organization argues that Claimant's right to an independent review on appeal has been violated in that the first appeal had to be taken to McIntyre, the Carrier Official who signed the original charges and who also signed the discipline. Carrier argues the Rule does not prohibit this and notes this Board in the past has approved multiple role participation.

We have been directed to Third Division Awards on this question which are in seeming conflict. In Third Division Award 24476 we stated:

> "In numerous cases dealing with procedural due process issues, we consistently held that it was not improper for a Carrier official to assume a multiplicity of roles viz the investigative hearing process when the Grievant's rights are no: adversely affected. Thus, we held that i: was permissible for a Carrier official to write and serve the investigative notice, conduct the trial investigation and assess discipline based upon the record evidence. These three roles per se, in the absence of palpable trial misconduct, are not viewed as precluding an employee's right to a fair and impartial investigation.
>
> We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system. In a similar vein, we look askance when the first step grievance appeals officer is also the same person who assessed the discipline. The independent review and decision at each successive appellate level, whether it is two or three step appeals process, is plainly lacking when the same person judges the discipline he initially assessed. It is a contradiction in terms, which nullifies the hierarchal review process."

Subsequently in November, 1983, we were faced with a Claim in which Appeal had to be made to the same Officer who preferred the charges, conducted the Investigation, and issued the discipline. In Third Division Award 24527 we held:

> "We do no: find Award No. 24476 to be in palpable error. It is supported by other awards of the Division. While we are hesitant to dispose of a claim on technicalities, such as the one here discussed and the one covered by Award No. 24476, at the same time we do not think it proper for the Board to issue conflicting awards involving the same provisions of the same agreement between the same parties. To do so would mean that employes would not receive equal treatment under the Agreemen:, which certainly was not the intent."

Several months later, in April, 1984, faced with yet another multiple role situation in Third Division Award 25149. we held:

> "Finally, we do not find ground for sustaining the Organization's allegations in this case that Claimant was denied due process as a result of the fact that the Carrier official rendering the initial decision on the discipline also judged the case on one level of the appeal process. The hearing in this case was full and complete and without taint of prejudice; the Carrier official in question did not testify or otherwise participate in the hearing. This one instance of 'multiplicity of roles' which marked the processing of this case on the property did no:, in any way we can detect, unduly or fatally prejudice Claimant's due process rights to have this matter fairly decided."

Thus it appears this Board has moved from the per se approach of Award 24476 which was followed by Award 24547 because it was no: in "palpable error,- and because we felt i: Improper to issue conflicting Awards involving the same provisions of the same Agreement between the same parties, to a case by case approach in which some evidence that a Claimant's rights have been impinged must be shown.

In this case Munarf-Austin testified she prepared the charges. McIntyre, by virtue of his position, signed them. McIntyre was not the investigation officer. He was not a witness at the Investigation nor was he present at it. There is simply nothing of a factual nature to suggest that in this case Claimant was prejudiced by McIntyre's multiple roles.

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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Ac: as approved June 21, 1934;

That this Division of the Adjustmen: Board has jurisdiction over the dispute involved herein; and

That the Agreemen: was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1987.