

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26395

Docket Number CL-26758

Edwin H. Benn, Referee

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

PARTIES TO DISPUTE: (

(The Atchison Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10039) that:

1. Carrier violated the rules of the current Clerks' Agreement at **Calwa**, California, when it removed Mr. J. Q. Castro from service on April 27, 1984, as a result of a formal investigation held on April 9, 1984, and

2. Mr. J. Q. Castro shall now be returned to Carrier service and paid for all loss of wages and benefits commencing on or about April 27, 1984."

OPINION OF BOARD: As a result of an audit conducted by the Carrier on March 26, 1984, Claimant was charged and ultimately dismissed after Hearing on April 9, 1984, for deliberate falsification of Unemployment Compensation Claims for January 1, 2, 26 and 27, 1984.

Claimant was an off-in-force employee and asserted that at the time he filed the January 1 and 2, 1984, Unemployment Claims he made a mistake since he did not know if he was going to work enough days in the month to qualify for holiday pay which he ultimately received. With respect to the Unemployment Claim for January 27, 1984, Claimant asserted that he went to an assigned job only to find that he was bumped which prompted him to claim deadhead time in addition to his Unemployment Claim. Claimant asserts that he was unaware that he could not claim deadhead time for that day.

Initially, we reject the Organization's argument that the formal **Investigation** held April 9, 1984, was convened outside of the 20 day limitation found in Rule 24-A of the Agreement. Rule 24-A states that the Investigation must be convened "not later than 20 days from date the Company has factual knowledge of occurrence of the incident to be investigated" The record clearly establishes that factual knowledge of the occurrence was not obtained by the Carrier until March 26, 1984, when the results of the audit became apparent. The April 9, 1984, Investigation was therefore held well within the 20 day limit as required in Rule 24-A. The fact that another employee of the Carrier may have signed the Unemployment Claim Form is insufficient to start the running of the limitations period found in this Rule. See Third Division Awards 26155, 21957.

With respect to the merits of this matter, Claimant essentially admits that the Unemployment Claims were false since he was also compensated by the Carrier for the dates claimed. However, we note that the charge against Claimant is for "deliberate" falsification of his Unemployment Claims. The record shows that with respect to the Unemployment Claims for January 1 and 2, 1984, Claimant filled out those Claims requesting unemployment benefits at a time when he was arguably not **aware** that he would be eligible for holiday pay by working sufficient days in the month to qualify for holiday pay. With respect to the Unemployment Claim for January 27, 1984, the record does not establish that Claimant was aware that he could not make an Unemployment Claim and a deadhead claim for that time. Further complicating the matter is the different and overlapping reporting periods for unemployment benefits as compared to the Carrier's payroll periods. Thus, although Claimant submitted what ultimately turned out to be "false" documents in the pure sense of the term and Claimant may have further been guilty of not being fully aware of his status and the Rules under which he was required to operate and indeed was lax in keeping track of his eligibility for unemployment benefits, we are not satisfied that Claimant deliberately falsified the Claims at the time those Claims were submitted. See Third Division Award 26189.

Nevertheless, we note that Claimant did nothing with respect to his receipt of unemployment benefits and wages for the dates claimed even after he should have realized that he was receiving double payments. Thus, although at the time he filed the Unemployment Claims Claimant may not have intended to falsify his Claims, after he received payment and did nothing to return those monies when he should have realized that he received double payment, the falsification, in our Opinion, the "became deliberate. Further, we take particular note of the fact that although Claimant explained the January 1, 2, and 27, 1984, instances, he did not satisfactorily explain, beyond the mere assertion of having made an innocent mistake, why he claimed eight hours sick pay on January 26, 1984, and at the same time sought unemployment benefits for that date. The explanation given by the Organization that in such circumstances the Railroad Retirement Board has made subsequent adjustments does not relieve Claimant of his responsibility to be more careful in his Unemployment Claims filings.

Under the circumstances presented, particularly the confusion that may have resulted due to overlapping reporting periods of the Railroad Retirement Board and the Carrier's pay periods and the fact that Claimant's eligibility for holiday pay may not have been ascertainable until after the Unemployment Claims were filed as well as the other factors mentioned above, we conclude that the penalty of discharge is excessive in this case. Therefore, we shall award that Claimant be returned to service with seniority unimpaired, but without compensation for time lost.

We disagree with the Carrier that by sustaining this Claim we are condoning other employees' potential attempts to receive double payments by claiming unemployment benefits for time also compensated by the Carrier. On the contrary, as a result of this Award Claimant will have lost several years' earnings because of his actions involving a few days' pay. Coupled with knowledge that each case will be reviewed on its facts and the ongoing audits exist to validate Unemployment Claims, we view such a result as more of a deterrent against similar conduct than an encouragement thereof.

In light of the above, it is unnecessary to address the issue raised by the parties concerning the effect of Claimant's refusal to accept the Carrier's leniency offer.

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

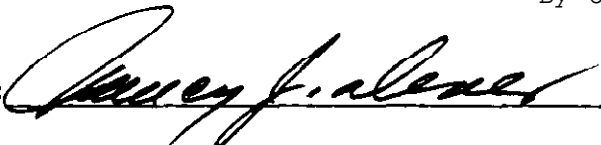
That the discipline was excessive.

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 13th day of July 1987.