Award No. 10415
Docket No. CL-10318

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Phillip G. Sheridan, Referee

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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

(a) That the suspension from service January 2 to February 1, 1957, of J. S. Ardoin, Yard Clerk, Port Arthur, Texas, was unjust.

(b) That Mr. Ardoin's record be cleared of the charge of failure to comply with the instructions of Day Yardmaster J. C. Kilgore on December 31, 1956, relative to delivery of Yard Office mail to the Local Freight Office at Port Arthur and that he be paid for wage loss sustained during the period of his suspension.

OPINION OF BOARD: This is a discipline case.

The Claimant is employed as a yard clerk, this position was obtained pursuant to a successful bid on a bulletin posted by the Carrier on or about June 1954. There was no requirement in this bulletin that the Claimant had to use his personal automobile in the performance of his duties.

At the time of the Claimant's employment, there was in existence Rule 58 (b) of the Agreement between the Carrier and the Organization which reads as follows:

"Where the Management requires an employe to regularly use his automobile, motorcycle or bicycle in the rendition of service, instructions to that effect will be in writing and an equitable allowance therefor will be made, with the approval of the Carrier and the Organization."

Sometime during the course of Claimant's employment with the Carrier, both parties entered into an oral Agreement, wherein the Carrier would compensate the Claimant by paying him at their established mileage rate six (6) cents per mile, and a flat monthly allowance of $15.00 for handling company business between the Yard Office and Freight House for the use of his automobile.

A dispute arose between the Carrier and the Claimant over the amount of mileage claimed by the Claimant in his monthly claims. The mileage had increased from February 1956 in the amount of 260 miles per month to the total of 470 miles per month for October 1956. The mileage for October 1956 was reduced by the Carrier.

On December 10, 1956, the Assistant Superintendent of Terminals called the Claimant for a conference and at said time informed him that he must

reduce his mileage to 310 miles per month. Claimants response was that he would walk from then on "as he could not afford to use his car and lose money on it." Claimant stopped using his car as of said date.

On December 31, 1956, the Claimant at 2:58 P. M. was orally instructed by the Yardmaster to deliver the mail pursuant to instructions from higher authority to the Freight House on his way home. The Claimants tour of duty terminated at 3:00 P. M.

The Claimant walked the mail to the Freight House, a distance of approximately one-half mile and after delivering the mail walked back to the Yard Office, where upon arrival at 3:30 P. M., he time-slipped Carrier for 30 minutes overtime, then got into his car and drove off.

On January 2, following, Claimant was notified he was suspended from service pending investigation of his failure to comply with Yardmasters instructions on December 31, 1956.

An investigation was held on January 8, 1957, and pursuant to the findings of said investigation, the Claimant was found guilty of insubordination in that he failed to comply with the Yardmaster's instructions. He was assessed discipline by being suspended from the service for a period of thirty (30) days.

The evidence is in conflict as to whether the Claimant was to use his own vehicle or to walk, the Yardmaster's testimony denied that he instructed the claimant to use his car on the mission in question, but the Claimant and another witness testified that the Claimant was instructed at that time to use his car. However, it is interesting to note that the Carrier in its submission stated "Just why the Yardmaster Killgore begged the point in his answers on this subject is not known."

The issue is simply whether the Carrier abused its discretion in finding that Claimant acted in subordinately by refusing to obey the order issued him by the Yardmaster.

The Carrier in support of their action against the Claimant assert that the Claimant's oral Agreement was binding upon the Claimant in that it had been ratified by practice and had been in effect for a long period of time, therefore, Claimant in refusing to carry the mail by using his automobile was insubordinate; that at the time said instruction was given, he knew he was to use his automobile as expected.

We do not agree with this interpretation of the oral Agreement between the parties. This was an oral Agreement subject to termination at the will of either party. On December 10, 1956, there was no mutuality between them.

The Claimant elected to walk, and we cannot say that he was insubordinate.

We are aware of the many precedents established by this Board relating to disciplinary matters. They involve abandonment of work; refusal to accept work after being called; the negligent performance of work etc.

We are cognizant of the many precedents established by this Board confirming the Carriers authority to exercise discipline, and that it is not the function of the Referee to interfere with this authority or to substitute his measure of discipline. We believe that their precedents are distinguishable from the instant case.

In the instant case, the Claimant performed his work by delivering the mail.

There is no credible evidence in the entire record supporting the fact that the Claimant could terminate his tour of duty without incurring overtime.

Therefore, we conclude that the Carrier did not act in good faith and with just cause. The Claimant was punished for putting in an overtime slip.

Claim sustained.

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 Employe involved in this dispute are respectively Carrier and Employe 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 between Carrier and Employes was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 14th day of March 1962.

CARRIER MEMBERS' DISSENT TO **AWARD 10415, DOCKET CL-10318**

There is serious error contained in the majority opinion.

In the last paragraph thereof it is stated:

> "Therefore, we conclude that the carrier did not act in good faith and with just cause. **The claimant was punished for putting in an overtime slip."** (Emphasis ours.)

Carrier regularly paid out overtime, and the conclusion of the majority that it administered discipline to this particular employe because he submitted an overtime slip borders on the preposterous. Such statement by the majority, falling as it did immediately following the statement that "carrier did not act in good faith and with just cause" was an admission, albeit possibly inadvertently disclosed, that the majority opinion was based on a shallowness of reasoning which defies ordinary comprehension. It completely ignored the fact that this employe refused to follow the instructions of his supervisor as to how he was to accomplish the mail delivery, and that it was for such refusal that he was disciplined.

Throughout the majority opinion there was evidence of an attempt to play down the claimant's transgressions. For example, in the fourth paragraph of such opinion it is stated:

> "A dispute arose between the Carrier and the Claimant over the amount of mileage claimed by the Claimant in his monthly claims. **The mileage had increased** from February 1956 in the amount of 260 miles per month to the total of 470 miles per month for October 1956. The mileage for October 1956 was reduced by the Carrier." (Emphasis ours.)

The mileage had not increased. The only thing which increased was the mileage claimed by the claimant each month. His territory had not increased, but he arbitrarily had kited the mileage from month to month until it had almost doubled the actual mileage involved.

On December 10, 1956 the claimant, when told to reduce the mileage on

his expense account to 310 (actual mileage) began bulling and refused to use his auto, although carrier (and claimant knew it) was willing to pay him the carrier's standard and heretofore regularly applied and accepted rate per mile for use of his auto. The carrier's supervisors put up with this arbitrary refusal on claimant's part for several days, but on December 31, 1956 he was instructed (orally, it is true) to deliver mail by use of his auto, which claimant refused to do.

Claimant had been filing written expense accounts for auto mileage for a long time, and had been paid by voucher, which he endorsed, which completely confirmed the "verbal" understanding referred to in the third paragraph of the majority opinion, and claimant therefore was in no position to "turn off and on" the arrangement in question on a day-to-day (or mail-packet-to-mail-packet) basis. It was a commitment which claimant was obliged to recognize; it had the sanctity of a contract; it was subject to question only as to its equitableness, and then only as a matter strictly between the parties. To state that for the Yardmaster's instructions in this case to have been effective, should have been in writing, is ethereal and unrealistic, to say the least.

The majority opinion reflects a serious confusion of thought as to what this case actually involves. For example, compare these two statements:

> "The issue is simply whether the carrier abused its discretion in finding that **claimant acted insubordinately by refusing to obey the order issued him by the Yardmaster.**" (Emphasis ours.)

and:

> "The claimant was punished for putting in an overtime slip."

Somehow the majority lost its way in determining whether claimant acted insubordinately by refusing to obey the Yardmaster. It went off on a tangent, and gave the prime issue little attention.

Another good example of the lack of depth in the reasoning contained in the majority opinion is this statement:

> "There is no credible evidence in the entire record supporting the fact that the claimant could terminate his tour of duty without incurring overtime."

The majority again missed the point. The matter of overtime, if not totally irrelevant, was secondary; but there was credible evidence that the overtime could have been avoided or greatly reduced. The transcript showed that claimant received these instructions at 2:50 or 2:52 P. M. He did not go off duty normally until 3:00 P. M. He could have driven the mile to the Superintendent's office easily in that period of time, and his instructions were to go on home from there.

Certainly the majority's opinion shows a complete disregard for the facts, and represents an incursion into a field which by the law to which this Board owes its very existence, is prohibited. It in effect attempts to write a new rule, which is permissible only through negotiation of the parties.

For the reasons stated, we submit that the Award is erroneous, and must dissent thereto.

O. B. Sayers
G. L. Naylor
R. A. De Rossett
R. E. Black
W. F. Euker