

Award No. 12103
Docket No. CL-14187

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5361) that:

Case 1

(a) The Carrier violated and continues to violate the provisions of Clerks' General Agreement when, on Friday, July 6, 1962, it arbitrarily held John Chan Coleman out of service and refused to allow him to work in his regularly assigned position, Position No. C-21, Tractor Operator, Merchandise Piers, Passenger Piers, and Hampton Transfer, Newport News, Virginia, and failed to accord him an investigation within ten days from July 6, 1962, and the Claimant, Coleman, has not been reinstated and paid what he would have earned had he not been taken out of service, therefore, the claim continues day after day, and

(b) The Carrier shall be required to return John Chan Coleman to his former position, Position No. C-21, Tractor Operator with all seniority rights, vacation and other privileges restored, and

(c) The Carrier shall pay to John Chan Coleman the sum of \$2.3703 per hour or \$18.97 per day for July 6, 1962, and for each subsequent day that he is withheld from working in his own regularly assigned position, Position No. C-21. The claim to continue from day to day as a continuing claim.

Case 2

(a) The Carrier violated the Agreement when, on Wednesday, July 18, 1962, it dismissed John Chan Coleman from service.

(b) John Chan Coleman shall be restored to service with all seniority and other rights unimpaired and shall be compensated for all loss sustained by reason of his dismissal.

OPINION OF BOARD: This is a discipline case. The pertinent rule of the Agreement which we have been petitioned to interpret and apply reads:

**"RULE 27—INVESTIGATIONS, REPRESENTATION,
APPEAL, ETC.**

(a) An employe who has been in the service 60 days or more, or whose application has been approved, will not be disciplined or dismissed without investigation. He shall have a fair and impartial investigation at which he may be represented only by one or more duly accredited representatives of his own choice. An employe may, however, be held out of service pending such investigation. When necessary to call an employe to the office for investigation he will be called at such time as will not cause him to lose time and, if possible, not cause him to lose rest.

An employe will within a reasonable time prior to the investigation be apprised in writing of the specific charge or charges against him, and will have reasonable opportunity to secure the presence of necessary witnesses and duly accredited representatives. The investigation will be held within 10 days from date charged with the offense or held out of service (unless an extension of time is agreed to between the proper officer and Division Chairman). The investigation and decision will be confined to the specific charge or charges, and the decision will be rendered within 10 days after completion of the investigation. All investigations will be in writing unless mutually agreed otherwise between the Management and Division Chairman. Two copies of the transcript will be furnished the duly accredited representatives of the employes on request."

FACTS

Claimant, a tractor operator, was one of six employes assigned to the "Train Gang" servicing passenger trains at Hampton Roads Transfer and at Newport News with assigned hours of 7:00 A. M. to 3:30 P. M., Monday and Tuesday being rest days.

On July 6, 1962, at about 7:00 A. M., according to the Check Clerk in charge of the "Train Gang," Claimant appeared to be unsteady and under the influence of intoxicants. Also, shortly thereafter, Claimant was missing from the work force and the Check Clerk and a Special Officer were unable to find him. At approximately 11:00 A. M., Claimant was observed walking down the track. As Train No. 42 departed Claimant attempted to board the moving train where there was no doorway, and finding no footing, was thrown or fell to the ground. The Check Clerk and Special Officer immediately went to Claimant to see if he was injured and Claimant advised them that he was not. The Check Clerk and Special Officer then took Claimant to the Assistant Superintendent, who after questioning Claimant, told him "to go back to his gang, but not to get on any power equipment during the remainder of the day. I also told him that I would hold a Board of Inquiry, and that the charges had not been determined at that time." Claimant did not return to the gang. Instead, he went to a beer parlor. When this was brought to the attention of the Assistant Superintendent, he instructed that Claimant be told to leave the premises. The instructions were conveyed to Claimant and he left the premises at approximately 12:00 Noon.

Claimant was paid for a full day for July 6. On July 7, he was off with permission. On July 8, he worked two shifts. July 9 and 10 were assigned

rest days. July 11, he was off sick. On July 12, 13, 14 and 15, he worked. July 16 and 17 were rest days. On July 18 and thereafter Carrier held Claimant out of service.

On July 12 Claimant was served with the following charge:

"Attend investigation in the office of the Assistant Superintendent—Merchandise Piers, Newport News, Virginia at 9:30 A.M., Tuesday, July 17, 1962.

You are charged with violation of Rule G on July 6, 1962.

Arrange for representatives and/or witnesses if desired."

On July 13, Claimant submitted a written resignation "from the services" of Carrier. The following day, July 14, he withdrew the resignation.

On July 17 Claimant and his representative appeared at the time and place appointed for the hearing in the July 12 charge. For reasons which do not appear of record Carrier did not proceed to conduct the hearing as scheduled. By letter dated July 20 Carrier rescheduled the hearing for July 21. The hearing was held on that date and a transcript of the proceedings is in the record. Under the same date, Carrier found Claimant guilty as charged and dismissed him from the service. Until this occurrence Claimant had a "clear" record during 34 years of service.

CONTENTIONS OF PARTIES

Petitioner contends that: (1) when, on July 6, Carrier directed Claimant to leave the premises before completion of his work day it "held [Claimant] out of service" within the meaning of that phrase as employed in Rule 27, *supra*; (2) Rule 27 required that the hearing be held "within 10 days" from July 6; (3) the hearing was held on July 21, more than 10 days after Claimant was held out of service; and (4) the hearing not having been held within the prescribed time limitation, Claimant stood exonerated. Further, the bare charge of "violation of Rule G on July 6, 1962" does not satisfy the requirement of Rule 27 that "An employee . . . be apprised in writing of the specific charge or charges against him." And, in addition, the findings of violation of the charge are not supported by the evidence.

Carrier contends: (1) Claimant was not held out of service on July 6; (2) the time limitation of Rule 27 began to run from the date of the charge, July 12; and (3) the hearing was held on July 21, which was within 10 days from the date of the charge. Also, the Claimant was fully aware of what he was being charged with and this satisfied the requirement of "specific charge or charges." And, Carrier's finding of guilt as charged is supported by substantial evidence.

RESOLUTION

At the outset, let us dispose of the time limitations in Rule 27. There are two, each distinct, prescribed limits: (1) the 10 days limitation begins to run from the date an employee is "held out of service"; or (2) the 10 days limitation begins to run from the date an employee is "charged". The Petitioner argues that the date from which the time limitations begin to run is from the date of the occurrence giving rise to the charge. This argument finds no support in the unequivocal language of Rule 27.

There can be no question that the disciplinary hearing in this case was held within 10 days from the date of the charge.

The troublesome issue is whether Claimant was held out of service on July 6. Of course, if he was, the disciplinary hearing mandated by Rule 27 was not timely held.

We cannot disregard that the hearing as originally scheduled for July 17 would satisfy either time limitation in the Rule. Nor, can we disregard that Claimant of his own volition submitted a resignation, on July 13, before the scheduled hearing; and, then for reasons unknown, withdrew it on the following day. This created confusion for which Claimant must be held responsible. Nor, can we disregard that a Joint Statement of Facts, in the record, states that "Coleman was held out of service from 11:45 A.M. to the end of his tour of duty" on July 6. Certainly, the representatives of Claimant and Carrier who handled this claim on the property must be presumed to have known the meaning of the phrase "held out of service."

Carrier "concedes that if the Board should find from the facts in this case and in the light of the antecedent awards, that the Petitioner was held out of service on July 6, 1962, within the meaning of Rule 27, then the rule has been violated and the subsequent discharge of the Petitioner was procedurally defective, since the investigation was not held within ten days from that date."

Weighing the evidence we find that: (1) Claimant was held out of service on July 6; (2) the Claimant's action in submitting and withdrawing his resignation contributed to the hearing not being held on July 17; (3) technically, Carrier violated the Agreement by not holding the hearing within 10 days from July 6; and (4) there is substantial evidence in the record that Claimant was guilty as charged.

Notwithstanding Carrier's technical violation of the Agreement, we are convinced that Carrier acted in good faith when instead of relying upon the resignation, it chose to give Claimant the benefit of a hearing.

We will sustain the claim to the extent it prays that Claimant "be restored to service with all seniority and other rights unimpaired." We will deny the claim to the extent that it prays that Claimant "shall be compensated for all loss sustained by reason of his dismissal."

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 Carrier violated the Agreement.

AWARD

Claim sustained as prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.