

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20014  
Docket Number CL-19933

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7161)  
that:

1) Carrier violated the Clerks' Rules Agreement at Chicago, Illinois, when it failed to notify employee C. Mascolo in writing of the precise charge and/or charges made against her in addition to not receiving a fair and impartial investigation.

2) Carrier further violated the Agreement when it suspended employee C. Mascolo from Carrier service for a period of thirty days.

3) Carrier shall now be required to clear employee C. Mascolo's record and compensate her for all time lost.

4) Carrier shall be required to pay, on the total amount claimed in Item 3 above, 7% as interest commencing on June 22, 1971 and compounded annually until this claim is paid in full.

OPINION OF BOARD: Claimant, after an investigation, was suspended for thirty days on the finding that she violated an office rule, insubordination, and that she was absent from her position without permission on a certain date. Claimant, upon her request, was also accorded an unfair treatment hearing following the imposition of the discipline.

Petitioner first claims that the charges in this matter were not precise. We do not agree. The charges indicated the location, time, date and nature of the conduct under investigation. Subsequent testimony and conduct of Claimant's representative clearly indicated that they were prepared for the investigation, were aware of the precise incidents in question and were not in any manner prejudiced by the statement of charges. That there was no request for a postponement by obviously sophisticated local officials representing claimant further bolsters our view that the statement of charges did not jeopardize claimant's rights.

The conduct of the hearings in this matter gives us considerable concern. Hearings under the grievance provisions of the Agreement (Rule 22) are neither adversary proceedings nor criminal trials. As fact finding investigations

such hearings must be conducted with utmost fairness and objectivity by the hearing officer; they must not be impeded by technical rules of evidence and must accord employees reasonable latitude in developing their defensive positions. Above all, such hearings must be conducted in such a manner that the conduct of the hearing officer is unimpeachably objective and unbiased in the development of facts. In the case before us, even though Claimant's representative may have been contentious, the hearing officer's conduct was clearly beyond the pale of acceptability. In the initial hearing the hearing officer interrupted Claimant's witnesses on over thirty occasions, attempting to exclude their testimony, we think grossly improperly. He attempted to answer questions put to Carrier witnesses and generally exhibited unmistakable bias and prejudicial conduct. The hearing officer was also in error when he refused to testify upon request of Claimant's representative. Contrary to Carrier's contention that a hearing officer may not testify without subjecting the proceeding to attack on the grounds that the hearing officer was acting as prosecutor, judge, jury and witness, we think that such position is erroneous when he is called by Claimant; Claimant would be estopped from that defense under such circumstances. (First Division Award 20071) If Claimant feels that the hearing officer has relevant information to the fact finding process, his testimony should not be excluded. The fairness of the entire matter was further sullied by the arbitrary termination of the "unjust treatment" hearing by the same hearing officer without permitting Claimant to present her case.

We regard the hearing officer's conduct in this case to constitute a serious breach of the intent of the parties as expressed in Rule 22. The right of a claimant to a fair and impartial hearing may not be impeded if the integrity of the grievance procedure is to be maintained. We will sustain paragraphs (1), (2) and (3) of the claim.

Paragraph (4) of the Claim requests 7% interest on the total amount claimed. Although there have been some Awards of this Board providing for interest, the preponderance of our decisions have denied this remedy. We do not agree with the thinking expressed in a recent Award (19953) which interprets a Supreme Court decision upholding the "make whole" doctrine. Our powers are limited to the interpretation of the provisions of the Agreement between the parties; we have no authority to create new rules or rights and rules of damages applicable to statutory law are not applicable to breach of contract such as we have here.

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

Paragraphs (1), (2) and (3) sustained.  
Paragraph (4) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Parker  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1973.