

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23120

Docket Number CL-23161

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8892)
that:

(a) Carrier violated the current Clerks' Agreement and continues to violate the current Clerks' Agreement when on February 27, 1978, effective 8:00 a.m., it removed A. L. Sims from service per Mr. B. T. Randolph's letter of February 21, 1978, file 29-40-s, as result of formal investigation held February 10, 1978, for allegedly being found asleep on duty approximately 12:30 a.m., Sunday, December 18, 1977.

(b) A. L. Sims shall now be returned to service effective February 27, 1978, with all rights unimpaired and record cleared of all charges stated in formal investigation.

(c) A. L. Sims shall now receive eight hours' pay at the current rate of Store Helper Position 6012 each Saturday, Sunday, Monday, Tuesday and Wednesday from February 27, 1978, forward (40 hours per week) until violation of the Clerks' Agreement ceases.

(d) In addition to above monies claimed, A. L. Sims shall now receive ten (10%) per cent interest on monies claimed, such interest to be compounded on each and every pay period from February 27, 1978, forward.

OPINION OF BOARD: In this discipline case the Organization raises procedural defects, claiming that Carrier violated the time limit provisions of Rule 24-A by not holding the investigation within twenty (20) days and that the Claimant was not given a fair and impartial hearing in the "vacant chair" investigation that was held on February 10, 1978.

The Claimant, Mr. A. L. Sims, was charged with violation of Rule 2 and the second paragraph of Rule 17 of Carrier's General Rules for the Guidance of Employees when allegedly found asleep on duty 12:30 a.m., Sunday, December 18, 1977.

The Carrier notified Claimant and his representative, Division Chairman Helmke, on December 27, 1977 of the charges and set 10:15 a.m., January 6, 1978, for formal investigation thereof. About 8:45 a.m. on the 6th of January, Carrier Officer Meggison, the designated hearing officer, called Division Chairman Helmke and informed him that the investigation was postponed and would be reset. Later that day Carrier addressed a letter to Claimant Sims, with copy to Helmke, advising that the investigation scheduled for that date had been postponed and was rescheduled for 10:15 a.m., Wednesday, January 18, 1978. Claimant Sims and his representative, Division Chairman Helmke, appeared on the 18th at the appointed place and time and were informed by Hearing Officer Meggison that the investigation was postponed account a Carrier witness was not available. Another letter was addressed by Carrier to Claimant Sims on January 19, with copy to Helmke, advising that the investigation set for the 18th had been postponed and reset for 9:00 a.m., January 25, 1978. Division Chairman Helmke was unavailable that date and asked for and received a postponement. The Carrier reset the investigation for 9:00 a.m., February 10, 1978.

On February 10, 1978 at 9:35 a.m. Claimant Sims had not arrived at the appointed place of the investigation and the Carrier commenced the hearing without his presence as a "vacant chair" investigation. Division Chairman Helmke stated he arrived at 9:45 a.m. (Carrier in its brief contends he arrived before 9:00 a.m.) but was informed by Hearing Officer Meggison that he could not attend the investigation as he had no knowledge that he, Helmke, was Claimant Sims' representative. Thus, the investigation continued without the Claimant or Helmke. Claimant Sims arrived at 10:15 a.m. apparently after the investigation had been concluded. Claimant Sims indicated that with all the changes in the times and dates for the investigation he overlooked the fact that the time had been moved up to 9:00 a.m.

The Organization contends that it did not agree to the postponements of the investigation. Division Chairman Helmke contends that Hearing Officer Meggison informed him on January 6 and 18 of the postponements that he did not ask for or seek his concurrence. The record shows Helmke objected to the January 18 postponement.

The Carrier argues in its brief that the investigation was postponed in the usual manner, but produced no affirmative evidence that it had secured concurrence from the Division Chairman.

Rule 24-A is a mandatory rule, not permissive. The only exception being "*** unless such employee shall accept such dismissal or other discipline in writing and waive formal investigation ***", which exception is not involved here. The key language of the rule reads: "An employee *** shall not be dismissed or otherwise disciplined without a formal investigation, which shall be promptly held but in any event not later than 20 days from date the Company has factual knowledge of occurrence of the incident to be investigated ***". The incident occurred on December 18, 1977, and the investigation, a vacant chair investigation (about which more will be said below), on February 10, 1978, well beyond the 20-day time limit.

There is no provision in the rule for postponement of investigations. However, through long custom and practice on the property, investigations have been postponed. It would appear to the Board that a Carrier when applying such a rule without specific provisions for postponement and specifically since the situation involved the livelihood of an employee, would have confirmed in writing the verbal communications it had with the Division Chairman confirming his concurrence to the postponements.

X-1 Carrier's contention as set forth in its letter to Division Chairman Helmke dated May 16, 1978, reading: "Since Mr. Sims was not present for the investigation, there was no reason for you to have remained as it was not established that Mr. Sims had a representative." is rejected by this Board. The rule specifically provides that the employee may be assisted by his duly accredited representatives. Carrier was aware of the fact that Helmke accompanied Sims at the January 18 investigation which was postponed, and, in addition, all the letters addressed to Sims by Carrier on this subject were copied to Helmke. The Hearing Officer has the duty and responsibility to seek out all the facts surrounding the incident in question even those which are detrimental to his employer's position as well as those which militate against the Claimant. If there was any question or doubt with respect to Helmke's status in the investigation, the Hearing Officer should have ruled in Claimant's favor and allowed Helmke to attend and participate in order to avoid a charge of being unfair.

X-2 Thus, the Board concludes Carrier erred when it refused to allow Helmke to be present and participate in the investigation; therefore, the claim should be sustained.

The Claimant shall be reinstated with full seniority and all other rights unimpaired with back pay in accordance with Rule 24-F. Part (d) of the Claim is denied as the rule does not contemplate payment of interest.

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.

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Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1981.

