

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23482
Docket Number MW-23917

John B. LaRocco, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Denver and Rio Grande Western Railroad Company

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

(1) The discipline imposed ('suspended from service as section laborer from January 18, 1980, to and including January 31, 1980') upon Section Laborer Lugardo B. Rodriguez for allegedly 'selling and removing used company ties' at Thompson, Utah on December 8, 1979 was without just and sufficient cause and on the basis of unproven charges (System File D-2-80/MW-14-80).

(2) The investigation held on January 10, 1980 was not held as required under Rule 28(a).

(3) For the reasons set forth in either or both (1) and (2) above, the claimant shall be allowed the benefits prescribed in Agreement Rule 28(a)."

OPINION OF BOARD: Claimant, a section laborer, was suspended from service from January 18, 1980 to January 31, 1980 for allegedly removing and selling used company ties without the Carrier's written permission on December 8, 1979. On January 8, 1980, the Carrier had notified the claimant to attend an investigation on January 10, 1980 which was held as scheduled.

Except for the issue of whether or not claimant had permission to take the ties, the pertinent facts are uncontested. On December 8, 1979, a Carrier Special Agent was informed (by the crew of a passing train) that a truck loaded with ties was leaving Thompson, Utah. The Special Agent immediately alerted law enforcement authorities. The authorities and the Special Agent intercepted the truck in Colorado as claimant was in the process of selling 56 switch ties to a rancher for \$336.00. Claimant readily conceded that he had taken the ties but the claimant told the Special Agent that his foreman had given him the ties. Upon demand, claimant turned the proceeds of the sale over to the Special Agent. The Special Agent then contacted the Roadmaster (at Grand Junction) who stated that the claimant lacked permission to take the ties. According to the Roadmaster, the railroad intended to sell some of the ties to another party. However, the Carrier elected to ratify the transaction that claimant had arranged. The ties were delivered to the purchaser and the Carrier retained the \$336.00.

At the onset, the Organization urges us to summarily sustain the claim because the investigation was not held within the time requirements in Rule 28(a) of the applicable agreement. On the merits, the Organization contends the Carrier failed to proffer substantial evidence showing that the claimant committed theft. The Organization argues that the record demonstrates that claimant sincerely thought, though perhaps incorrectly, that he could take and sell the ties.

The Carrier argues that the investigation was timely held and that the record contains substantial evidence showing claimant committed the charged offense. The Carrier acknowledges that claimant may have been confused about his right to use the ties but the Carrier took this mitigating circumstance into account when it assessed a relatively light penalty for a serious offense.

The pertinent time constraints on holding an investigation are set forth in the following portion of Rule 28(a):

"When an investigation is necessary it will be held as soon as possible, ordinarily within ten (10) calendar days but not to exceed thirty (30) calendar days from date of report."

The rule specifically states that an investigation must be held within thirty days from "... date of report." Those last three words render the rule imprecise since the thirty-day period does not commence to run until the date of report. The Organization contends that the date of report in this case should be the day the incident occurred because on December 8, 1979 the alleged theft was reported to the Carrier and the Carrier's Special Agent reported it to the Roadmaster. The Carrier argues that date of report refers to some formal report (either written or oral) rendered after the completion of a full investigation, and in this instance, December 17, 1979 was the first written report.

While the "date of report" language in Rule 28(a) may not always refer to the date the claimant allegedly commits an offense, under the peculiar circumstances of this case, the thirty-day period commenced to run on December 8, 1979. Not only was the Carrier's Special Agent put on notice concerning claimant's infraction on that date but the Roadmaster was apprised of the events. The Roadmaster told the Special Agent that claimant lacked permission to sell the ties which shows a carrier officer had knowledge that an employee may have committed theft. All the significant facts were reported to the Roadmaster on December 8th and the report was so complete that the Carrier decided to ratify the sale of the ties. Rule 28(a), with strict time limits, does not contemplate the necessity of a formal report to start the thirty days. However, we are only interpreting the rule and applying it to the facts of this case and under other facts the date of report could be a date other than the day the incident occurred.

The investigation was held on January 10, 1980 which was more than thirty days after the date of report (December 8, 1979) and, therefore, the investigation was not convened within the Rule 28(a) time restrictions. Thus, we must sustain the claim without making any finding on the merits. Rule 28(d) provides the proper remedy. Claimant shall receive the wages he lost during the suspension at the rate of pay in effect when he served the suspension.

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 Employee involved in this dispute are respectively Carrier and Employee 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

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson

Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1982.