

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23503
Docket Number CL-23824

Paul C. Carter, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
{ Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9361) that:

1. Carrier violated the Agreement between the parties when it dismissed Mr. C. J. Pickett from its service by letter dated December 4, 1979, without affording him a "fair and impartial investigation." (Carrier's File - C).
2. Carrier also violated the Agreement between the parties when it failed to hold the investigation within the time limits set forth in Rule 24.
3. Carrier further violated the Agreement when it failed and refused to grant a temporary postponement of the investigation and held same in absentia, without giving any consideration to the mitigating circumstances concerning Mr. Pickett's absence.
4. Carrier's actions were arbitrary, unjust, unreasonable and completely uncalled for.
5. Carrier shall now be required to compensate Mr. C. J. Pickett for all wage losses sustained, beginning December 4, 1979, and continuing each workday, five days per week until returned to service; and shall also be required to expunge the investigation transcript from his personal record file.

OPINION OF BOARD: The claimant was employed by the Carrier as Leverman-Operator with a Company seniority date of February 23, 1963.

Claimant was displaced from his regular assignment on October 7, 1979 and exercised his seniority to another position designated as swing position No. 6 on October 12, 1979, which required that he be qualified as Leverman-Operator at SH Interlocking Tower. On October 12, 1979, he worked at SH Tower on second shift, breaking in since he had not previously qualified on the position. After working on October 12, 1979, he laid off and did not work thereafter. The Carrier states that on November 1, 1979, he called the train director at ID Tower, who maintains the Interlocking Department assignment board, okayed himself for duty, expressing a desire to break in on the first shift. He was told he would have to break in on the second shift November 2, 1979, but he failed to

report for that assignment. As he failed to protect the assignment on the date in question and did not communicate with the Carrier regarding his reasons for failure to do so, Carrier's Trainmaster notified the claimant on November 14, 1979:

"An investigation will be held in the Conference Room, second floor, Brooklyn Shops, Lovejoy, Illinois at 1:30 P.M., Wednesday, November 28, 1979, to develop the facts, discover the cause and determine responsibility, if any, in connection with your alleged failure to protect your assignment breaking in at SH Tower on the second shift at November 2, 1979.

"Arrange to attend this investigation. You are entitled to representation and witnesses, if you so desire."

The notice was sent certified mail - return receipt requested, and the Carrier received receipt showing delivery of the letter. The claimant failed to appear at the investigation, which was conducted in his absence, and on December 4, 1979, claimant was notified of his dismissal from service.

In the appeal on the property and in its submission to this Board, the Organization contends that Carrier violated Rule 24, which reads in part:

"An employee shall not be suspended or dismissed from service without first being given a fair and impartial investigation. The employee may, however, be held from service pending an investigation if insubordination, theft, violation of Rule (g) or an offense of equal seriousness is involved. Such investigation shall be held within ten (10) days from date charges are preferred except the parties may agree to a reasonable postponement not exceeding thirty days..."

The Carrier contends that the ten-day provision only applies in the event the employee has been suspended or dismissed from service. We do not consider the language of Rule 24, quoted above, to be subject to such interpretation. The rule is clear in providing that the investigation will be held within ten days from the date charges are preferred, except that the parties may agree to a reasonable postponement not exceeding thirty days. The Carrier has not submitted any evidence in support of the practice that it alleges exists. At any rate, where a rule is clear and unambiguous, either party to the agreement may insist upon its literal application at any time, notwithstanding any contrary practice. We have carefully reviewed the transcript of the investigation and we cannot determine from the lengthy statement of the Local Chairman that he was specifically objecting to the timeliness of the investigation. It is well settled that any objection to the timeliness of an investigation must be raised during the course of the investigation, otherwise such objection is considered waived. We consider such to be the case here.

There is evidence in the investigation that claimant had a conversation with the Assistant Superintendent about accepting some discipline without an investigation, but claimant failed to follow through on that proposition. Neither did he make a clear request on the Organization or on the Carrier for postponement of the investigation. Under all the circumstances we cannot find claimant blameless for not attending the investigation, even though he may have been on his honeymoon.

Based on all the circumstances in the case, the Board finds that permanent dismissal was excessive and that the best solution is to award that claimant be restored to service with seniority unimpaired, but without any compensation for time lost while out of service.

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 permanent dismissal was excessive.

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 29th day of January 1982.