

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24835
Docket Number CL-24041

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9402)
that:

1. Carrier violated the terms of the current Agreement, particularly Rule 21, when it dismissed from its service, Mr. Henry Jones, Order Filler-Clerk, account investigation which was finalized on June 30, 1977, and

2. Carrier shall be required to reinstate Mr. Henry Jones to service with all rights unimpaired and make him whole for all losses suffered commencing June 20, 1977, and continuing until the violation is corrected, to include all fringe benefits which would have accrued to his employment had he not been dismissed from service.

OPINION OF BOARD: On June 27, 1977, the Carrier directed the claimant to attend an investigation on the following charge:

- 1.) "Your responsibility for not protecting your assignment on June 20, 1977; specifically your leaving your assignment at approximately 11:20 p.m., Monday, June 20, 1977, without authorization."
- 2.) "Your responsibility for not performing the duties of your assignment on June 20, 1977, specifically, your failure to complete physical counts per written instructions and your incorrect completion of Material Tickets and your failure to clean storage shelves as instructed."

On July 6, 1977, the Carrier issued the following notice of discipline:

"To: Henry Jones, Order Filler

You are hereby notified that after investigation of

- 1.) Your responsibility for not protecting your assignment on June 20, 1977, specifically your leaving your assignment at approximately 11:20 p.m., Monday, June 20, 1977, without authorization.

- 2.) Your responsibility for not performing the duties of your assignment on June 20, 1977, specifically, your failure to complete physical counts per written instructions and your incorrect completion of material tickets and your failure to clean storage shelves as instructed.

the following discipline has been applied:

DISMISSED FROM SERVICE

Signature: /s/ Glenn R. Holmblad

Title: MATERIAL DISTRIBUTION MANAGER"

The Organization makes a number of procedural and due process arguments which must be addressed before consideration of the merits. The following arguments are made: (A) That the Carrier failed to properly notify Claimant of the reasons and the charges on his suspension from service. (B) That the Carrier failed to grant the opportunity to cross examine witnesses. (C) That during a recess, the Hearing Officer conferred with witnesses. (D) That the Carrier at the highest level of appeal prejudiced his role by improperly injecting certain issues, and (E) That the Claimant's rights were deliberately violated.

The Carrier responds to the Organization's due process arguments. With respect to the notice issue, the Carrier denies that Claimant was not properly notified of the investigation and that he was being withheld from service. They note numerous attempts were made to notify the Claimant. Notice was sent to him via certified mail and several attempts were made to serve him personally. If these attempts were unsuccessful it was because Claimant made himself unavailable for service of this notice. Moreover, they contend that the Board has held numerous times that an employee cannot avoid the disciplinary process by his own failure to make himself available either for notice of a hearing or for the investigation itself. If Claimant made himself unavailable, he did so at his own peril. Regarding the suggestion that the Claimant was denied the right to cross examine at the hearing, the Carrier contends that a review of the transcript of the investigation fails to disclose anywhere where the Claimant made a request to cross-examine the witnesses. For instance, on page 64 of the transcript the Claimant began to question one of the Carrier witnesses and the hearing officer directed that such questions be directed through his representative. No objection was made to this ruling at the time and questioning was conducted by the Claimant's representative. If this is the event to which the Employees refer in their objection, the Carrier fails to find any evidence of prejudice against the Claimant in this connection. Furthermore, the Carrier asserts that it is within the discretion of the Hearing Officer to require an employee under charge to address all his questions through his representative. In addition to keeping the hearing orderly, this generally operates to the employee's benefit by allowing him the more experienced representation which could be offered by an officer of the Union. The Carrier next denies that reference to the Claimant's law suit as having any material bearing on the incident case. Lastly, they deny any bias on the part of the Hearing Officer.

The Board has reviewed the record relative to the due process arguments put forth by the Organization and finds they have no basis. Under the circumstances, the Carrier more than fulfilled its obligation to notify the Claimant. In fact, Mr. Jones was present at the investigation. With respect to the conduct of the hearing officer and the allegation that the Claimant was denied the right to cross examine the witnesses, the record fails to reveal any meaningful objections during the hearing on these points. Therefore, they must be considered waived. Further, the Carrier is correct that their remark about any pending litigation is immaterial. It is clear that the case must stand or fall on the evidence presented at the hearing regarding the charges.

With respect to the merits it is well established that the Carrier has the burden of showing the Claimant's guilt by way of substantial evidence. The charges against the Claimant are bi-fold. The Board will consider them separately.

With respect to the portion of the charges relating to leaving his position without permission, the Carrier makes the following argument:

"The testimony of his supervisors shows that there were specific instructions that he was not to absent himself without authority. He was given the phone number of the officer whom he was to call if he needed to leave work early. The fact that that officer was in Canada at the time did not relieve claimant from making the call. Claimant had no knowledge that the officer was on vacation, and the officer had made arrangements to receive messages of this nature. The evidence shows that claimant was not ill on the date in question. He was observed by the shop superintendent and the trainmaster immediately after leaving work and did not appear to be ill."

The Carrier's arguments reveals the crux of the issue as it relates to the first charge. This is whether the Claimant had knowledge of the supervisors absence due to a vacation period. If the Claimant did not have such knowledge, it is easy to conclude that he was guilty of the first portion of the charge because it is undisputed that he made no attempt to call the supervisor. Moreover, there is no question that he left at 11:20 p.m., forty minutes before the end of his shift. However, the Carrier's position has been based on an incorrect reading of the facts in a number of respects. First, the Claimant, on page 31 of the transcript, testified without refutation that he was aware that his supervisor was on vacation. Therefore, based on this fact, the nature of the supervisor's instructions to the Claimant for reporting off and the nature of the store department, the Claimant cannot be found guilty of having failed to leave work without permission.

The Claimant was employed as an Order Filler in the store department in the Diesel Shop. He had been assigned to this position on June 15, 1977. The District Material Manager testified that the procedure for second shift Order Fillers to report off was to call W. E. Koff, storekeeper (Jones' direct supervisor) at his home to secure permission to be absent or to leave early. Koff confirmed that he gave these instructions to the Claimant upon his start

in the store department. It is extremely important to note that on page 22 of the transcript Koff clearly stated that he did not designate an alternative procedure to Jones for reporting off. For instance, he indicated that he had not made arrangements with his father at home to contact him if anyone from the railroad called. Thus, it is perfectly clear that the Carrier's assertion that Koff "-- had made arrangements to receive messages of this nature" is simply without foundation in the evidence. He also acknowledged--evidently because the store room was a department separate and apart from the Diesel facility--that there was no one else in the building whom Jones could report off on second shift. (See pages 23 and 24 of the transcript.) It is also noted that there is simply no meaningful evidence to dispute that the Claimant was not ill and could not finish his shift. Moreover, he was not charged with laying off under false pretenses.

Based on the foregoing and keeping in mind the fact that the Claimant had knowledge of his supervisor being on vacation and had not been advised of an alternative report-off procedure, the Claimant cannot be faulted for leaving his assignment. The Claimant cannot be held responsible if the Carrier's supervisors had not made some arrangements for him to report off.

With respect to the second portion of the charge, there is substantial evidence to support the Carrier's findings. For instance, the fact that the Claimant had failed to complete the physical inventory counts was made abundantly clear when he admitted he had failed to return the count sheets from home.

The Board is left to consider whether discharge is appropriate under the circumstances. In view that only a portion of the charge was supported, it is viewed as excessive. However, in view of the guilt of the Claimant on the second portion of the charge and his very poor past record, it is appropriate only to require the Carrier to offer reinstatement without back pay to the Claimant.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1984