

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30810
Docket No. CL-31218
95-3-93-3-292

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Davenport, Rock Island & Northwestern Railway

STATEMENT OF CLAIM: "Claim of the System Committee of
the Brotherhood (GL-10957) that:

1. In accordance with the provisions of Rules 59, 60 and 56 of the Clerks' Agreement, the following claim is submitted on behalf of Clerical employe Vance Solverson, Clerk, Davenport, Iowa account Carrier's violation of Rule 56 of the Clerks' Agreement.

2. Carrier acted in an arbitrary, capricious and unjust manner when it subjected the Claimant to discipline based upon evidence which was mere hearsay, and based upon the premise that the Claimant failed to prove his innocence during the course of the hearing.

3. Carrier shall now compensate Clerk, Vance Solverson for all lost wages including applicable premium pay as well as any and all benefits including health and welfare expenses between the period October 16, 1991 and November 29, 1991. Additionally, the Carrier shall remove the forty-five (45) day deferred suspension effective November 30, 1991, through November 29, 1992, such a suspension, in and of itself violates the provisions of Rule 56 of the Clerks' Agreement. The Carrier shall expunge from Claimant's record any and all reference to the above captioned investigation and the discipline assessed."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as a Clerk and was assigned as a Cashier at the Bettendorf Yard Office. His hours of service were 2:00 P.M. to 10:30 P.M.

On September 12, 1991, the Director of Administration observed the Yard Office 9:00 P.M. and found it secured and Claimant gone, not to return during the remainder of his scheduled shift. On September 13, 1991, the Director of Administration and the Manager of Maintenance and Operations observed the Office at 8:20 P.M. and saw Claimant secure the office and leave, not to return.

The Carrier summoned Claimant to an Investigation to ascertain his alleged absence from duty without authority on the two dates, in violation of Rules 604 and 607 of the General Code of Operating Rules. The Investigation was held on October 1, 1991. B. A. Webster, the Carrier's retired General Manager, served as Hearing Officer.

At the Hearing, the Director of Administration, to whom Claimant reported, testified that insofar as he was aware, Claimant had no work-related reason to leave the Office at those times on either date and he had no permission either date to do so. He acknowledged that he did not know where Claimant was on September 12 while the office was secured and that he did not know where Claimant went on September 13 after he left.

Claimant testified that the Chief Clerk at Bettendorf, to whom Claimant also reported, had asked him to deliver mail to West Bettendorf on September 12 at the time in question and that he left about 9:10 P.M. The Director of Administration conceded that had the Chief Clerk so instructed Claimant, he would have expected Claimant to comply with the instruction. The Carrier failed to produce the Chief Clerk to rebut Claimant's statement.

Claimant also testified that, as part of his duties, evidenced by a May 1991 instruction from the Director of Administration, he was to check cars on the South Transfer, which he testified he did on September 13 at the time in question. He testified that he then dropped off mail for the Soo Line at the Carrier's Union Station office. He testified that he left the Office about 8:45 P.M.

Neither party called the Chief Clerk as a witness. He had not

been on duty on either of the evenings in question and was on vacation at the time of the Hearing. The Organization attempted to recess the Hearing (the Organization's version) or agreed to allow the Carrier to recess the Hearing to allow the Carrier to call (the Carrier's version) the Chief Clerk in order to obtain his testimony, but the Carrier's Hearing Officer declined.

Also adduced at the Hearing were the facts that Claimant had been at West Bettendorf earlier in his tour on September 12, that he used his personal vehicle, rather than the Carrier's van, when he left, that late evening was not the usual time to inspect cars from the Iowa Interstate or to deliver mail to the Soo Line, that the route Claimant took on September 13 was indirect and illogical, and that the box into which Claimant allegedly placed mail on the latter date is for the exclusive use of the Soo Line, not the Carrier. Indeed, a number of additional facts, too numerous to list, were adduced, pointing both in favor of the fact that Claimant was assigned, as he testified, and that he was not.

Following the Investigation and based thereon, Acting General Manager E. A. McBride found Claimant guilty of the charges and assessed him a 45 day actual suspension and a 45 day deferred suspension.

The Organization protested the penalty to the Acting General Manager, who upheld her decision and penalty and denied the claim. The Organization requested the Acting General Manager to reconsider, but once again she upheld the penalty and denied the claim. The claim was then conferenced with the Carrier's highest-designated official (the Acting General Manager) but without resolution.

The Organization then brought the claim to this Board.

The Carrier argues that Claimant's guilt is established by substantial evidence in the record and that its imposition of the discipline is neither arbitrary nor excessive. The Carrier points out that Claimant's absence from the Office on the two dates in question is undisputed and that Claimant's explanations for what he was doing on the dates are transparent falsehoods to cover up his unauthorized absences. It points to the long series of circumstances which undercut the credibility of Claimant's explanations for his being gone.

The Carrier denies that it attempted to shift to the Organization the burden of establishing Claimant's innocence. It points out that the Carrier established Claimant's absence, without reason or permission, and that the Organization then raised various

unverifiable explanations. It asserts that the burden of confirming those stories properly lay with Claimant.

The Carrier argues that its procedures did not deny Claimant a fair and impartial Hearing or independent review. It asserts that since the Carrier utilized an outside Hearing Officer and had him review the transcript and recommend discipline, the Acting General Manager did not "initiate discipline." As to the other roles she played, the Carrier points out that it is an extremely small operation, with few managers. It asserts that the precedents cited in support of Claimant's right to independent review at each stage all involve larger properties.

The Carrier urges that the claim be denied.

The Organization argues that the Carrier's action must be overturned because the Carrier violated Claimant's right, under Rule 56 of the Agreement, to a fair and impartial Hearing, including a right to appeal a disciplinary decision to the next higher proper officer. It asserts that the Carrier predetermined the outcome of the Hearing, as demonstrated by the Hearing Officer having written his recommendation on October 4, 1991, prior to the proceeding having been transcribed on October 7. It also asserts that the Carrier violated Claimant's rights by finding him guilty of making false statements in the Investigation, a violation with which he had not been charged.

The Organization asserts that the Carrier further violated Claimant's rights when the Acting General Manager rendered the initial decision assessing the decision, then served as appeals officer for the appeal from that decision and as the Carrier's highest designated official to receive and review the action. The Organization points out that having a single official fill multiple roles, reviewing the discipline the official earlier assessed, violates Claimant's right to have independent review at each level of the appeals process.

With respect to the merits of the claim, the Organization argues that the Carrier failed to prove that Claimant was absent from his position without authorization and, indeed, attempted to shift the burden to Claimant to establish his innocence. It points out that Claimant testified that the Chief Clerk at Bettendorf, Claimant's supervisor, had asked him to deliver mail at the time in question on the September 12 and that the Carrier failed to produce the Chief Clerk to rebut Claimant's statement. It points out Claimant's un rebutted testimony that he was checking cars on the South Transfer on September 13. It urges that there was no evidence to support disbelieving Claimant and that any conclusion to the contrary would be based on hearsay and speculation. The Organization further argues that it was the Carrier's burden to produce the Chief Clerk, who was clearly

established as having information relevant to the dispute, and not the burden of the Organization. To hold otherwise would improperly shift the burden to the Organization to prove Claimant's innocence.

Finally, the Organization argues that the penalty imposed would be excessive for two early quits, even if Claimant were found to be acting without authority, in light of Claimant's unblemished record for the ten years prior to the incident.

The Organization urges that the claim be sustained.

It is basic to the due process which is required under the Act that claimants who have been the subject of discipline receive independent review of their claims. That right is violated when the same person assesses the discipline and then reviews the decision on appeal. Numerous Awards of this Board have so held. See, e.g., Third Division Awards 28567, 25361, 24547, 24476, 23427, 17314, 14031, 9832, 8431 and 7021. Award 24547 is particularly instructive of the Board's concern:

"The independent review and decision at each successive appellate level, whether it is two or three step appeal process, is plainly lacking when the same person judges the discipline he initially assessed. It is a contradiction in terms, which nullifies the hierarchal review process."

Of the Carrier's argument that the Acting General Manager did not "assess the discipline" because she acted on the recommendation of the outside Hearing Officer, the Board is not persuaded. The Acting General Manager clearly rendered the decision and issued the discipline. See, in this regard, her letter dated October 15, 1991. Even assuming that reliance on the recommendation of an outside Hearing Officer would suffice to excuse her from responsibility for the decision and assessment, there is no indication in her letter that that was the case.

It is clearly established that the Acting General Manager then reviewed and denied the claim, reviewed the Organization's appeal from her denial and ruled on it, then further sat as the highest designated official for purposes of the conference, again reviewing her decision at the next and final stage.

It is, of course, possible to shorten the appeal process by agreement between the parties, and it may be possible to waive steps in the process, but so long as the steps are in the Agreement and are utilized, Board precedent clearly requires that the reviews be independent and teaches that a carrier which utilizes an official to review his/her own decision, at any stage, let alone three stages, violates its obligation to afford the employee due process. Such violation requires a sustaining award.

Because of the Board's conclusion in this respect, we do not reach the merits of the dispute or the remaining procedural arguments.

The Carrier violated Claimant's due process by denying him independent review at each stage of the appeal from the Acting General Manager's decision. Claimant's actual and record suspensions shall be rescinded, his records amended so to reflect, and he shall be made whole for all wages and benefits lost.

AWARD

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

National Railroad Adjustment Board
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.