

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20766  
Docket Number CL-20763

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: ( **Brotherhood of Railway, Airline and Steamship**  
( **Clerks, Freight Handlers, Express and**  
( **Station Employees**  
(  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood  
(**GL-7638**) that:

1. Carrier violated **Rule 18** of the Clerks' Agreement, when, on August 6, 1973, following investigation, it disciplined Clerk **Robert E. Hollowell**, after failing to sustain the charge as set forth in the caption of the Investigation (**Carrier's** File 205-4785).

2. Carrier's action in assessing Mr. **Hollowell's** personal record with thirty (30) days' deferred suspension was arbitrary, harsh and an abuse of discretion.

3. Carrier shall now be required to expunge the discipline assessed and all reference thereto **from Mr. Hollowell's** personal record.

OPINION OF BOARD: This is a discipline dispute involving Claimant's alleged falsification of the reasons he gave for not protecting his assignment on June 30, 1973.

Petitioner raises serious questions concerning the conduct of the investigatory hearing in this case. The record reveals that the conduct of the hearing Officer was far from exemplary in that he did **im-**pede Claimant's representative in a number of questions he desired to raise with Carrier's witness and in other respects as well. **Although we** do not condone the conduct of the hearing **Officer**, on **balance**, we do not **find** that it was sufficiently prejudicial per se to upset the discipline in the case.

The crux of this **dispute** is whether or not there was sufficient evidence adduced in the investigation to support Carrier's conclusion that Claimant was guilty of falsification. The record indicates that Carrier's **entire basis** for the charge and **conclusion** of guilt is that **Superintendent Lang saw Claimant** eating dinner at a restaurant at about 7:00 P. M. and walk out of the restaurant - **some** seven hours after he had **called** in sick. **The record** contains **unrefuted** testimony that **Claimant was** prone to **lower back problems** and had **injured his** back on **the morning** in question while moving **furniture**, causing **him** to rest and take medication. Carrier believes this is not credible **in** view of the fact that he was **in a restaurant** the same evening; "...**Claimant's** story is not **believable**." We do not agree with **Carrier's** conclusion; there

was literally no evidence presented to substantiate Carrier's "belief". It is well settled in this industry as well as in the entire labor **man-  
agement** field that the burden of proof in disciplinary cases is entirely upon the employer; there must be convincing evidence, not merely suspicion, to establish the guilt of the **employee** (see for example First Division Award 20471). In Award 18551, we said:

"We are forced to conclude that the dismissal of **claimant** was not supported by substantive evidence. The dismissal was based on testimony totally uncorroborated. The decision **stemmed** from nothing more than surmise and speculation and cannot be allowed to stand."

Similarly in the instant case Carrier has relied **on** surmise and suspicion rather than probative **evidence** to support its conclusion of Claimant's guilt. Consequently Carrier has failed to satisfy its burden of proof and the Claim must be sustained.

**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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

*A. W. Poulos*  
Executive Secretary

Dated at **Chicago**, Illinois, this 18th day of July 1975.