

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21293
Docket Number CL-23.212

James C. **McBrearty**, Referee

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

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood,
GL-7825, that:

1. The Carrier acted In an **arbitrary, capricious. and unjust manner** and violated the Agreement between the **parties** when on **October 23, 1974**, it dismissed **Clerk J. J. Hawkins from service** of the Carrier.

2. In view of the foregoing **arbitrary, capricious and unjust** action of the Carrier it **shall** now be **required** to:

(a) Restore Clerk J. J. **Hawkins** to **service** of the Carrier with **all** seniority, **vacation** and other rights **unimpaired.**

(b) **Pay** Clerk J. J. **Hawkins** for all time **lost commencing with October 23, 1974**, and continuing **until** Clerk **Hawkins** is restored to service, less outside **earnings.**

(c) **Pay** Clerk J. J. **Hawkins** any amount he **incurred** for medical or surgical **expenses** for himself or **dependents** to the extent that such **payments** would **have** been paid by **Travelers Insurance Company** under Group **Policy No. GA-23000** and, in the event of the death of Clerk J. J. **Hawkins**, pay **his estate** the **amount** of life insurance provided for under said policy. In addition, **reimburse** him for **premium payments** he **may** have **made** in the purchase of **substitute health, welfare and life insurance.**

(d) **Pay** Clerk J. J. **Hawkins** **interest** at the **rate** of ten (10) per cent, compounded annually on the anniversary of this claim, for **amounts** due under **Item (b) above.**

OPINION OF BOARD: **Claimant** began service with the Carrier on **June 8, 1970**. He first worked the extra clerk list at **Victoria**, and later be- an Extra Clerk at **Crewe, Virginia**. **Crewe, Virginia**, is an intermediate point on Carrier's **8 Norfolk Division**, **approximately** half way between **Roanoke and Norfolk, Virginia**. **The Carrier maintains a clerical** extra board there to which **Claimant** was assigned on **October 27, 1973**.

On **October 27, 1973**, **Claimant** ms involved in on altercation off Carrier's property, which resulted in **Claimant** being served **with** an arrest warrant for "Unlawfully and feloniously **making** on assault on a. one **James Ray Hazelwood** with the intent to **main**, disfigure or disable the said **James Ray Hazelwood**." On **December 3, 1973**, the Grand Jury in the Circuit Court of **Lunenburg County** (Virginia) returned a **true bill**. (A "true bill" is the **indorsement made** by a **grand jury** upon a bill of **indictment**, when they find it sustained by the evidence laid before them, and are satisfied of the truth of the accusation). As a result, on **April 25, 1974**, **Claimant** was sentenced to **confinement** in the County Jail for a term of **twelve (12) months**, and **assessed** a fine of **\$500.00**.

On **May 14, 1974**, an Assignment of Error was **made** by **Claimant**. (Au "Assignment of Error" is a **formal complaint** against some action of the trial court). As a result of the "Assignment of Error" being at least **partially** sustained, the felony charges were reduced to a **misdemeanor**, and on **September 12, 1974**, the **twelve (12) months' jail** sentence was suspended subject to **Claimant** serving a period of **thirty (30) days** in **Lunenburg County Jail** **commencing** on **September 12, 1974**, end ending at **5:00 P.M. on October 11, 1974**. Moreover, **Claimant** was ordered to serve an **additional full thirty (30) days** in the **Lunenburg County Jail** during the **calendar year 1975**. Furthermore, after **Claimant's** completion of the **initial thirty (30) day jail** sentence, **Claimant** was placed on **probation** for a period of **two (2) years**, fined **\$300.00**, end ordered to pay all court costs.

Claimant was notified by Carrier on **September 20, 1974** (at which **time Claimant** was in jail) **that** an investigation would be held on **September 27, 1974** to "determine your responsibility, if any, in connection with conduct unbecoming an employee of Carrier **resulting** in being sentenced **by Lunenburg County** Court to a monetary fine and jail sentence on **April 29, 1974**."

Since **Claimant** could not be released **from jail** on **September 27, 1974**, to attend the hearing, the hearing was postponed until **October 14, 1974**.

As a result of the hearing, Claimant was notified by Carrier on October 23, 1974, that he (Claimant) was being dismissed from the service of Carrier "for your responsibility in connection with conduct unbecoming an employee of Carrier due to your being sentenced by Lunenburg County Court to a monetary fine and jail sentence on April 25, 1974."

Numerous prior awards of this hoard set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

Turning then to the case at hand, the Board notes that an employe may commit improper acts which subject him to disciplinary action while he is on duty or off duty. The most common cases involve on-duty misconduct. However, employes are also frequently disciplined or discharged for committing improper acts while off duty. In the latter type of cases, however, in order to justify disciplinary action, including discharge, there must be some evidence of damage to the Carrier.

Looking at the record as a whole, the Board finds in the instant case that there is not substantial evidence to indicate that Claimant's offense injured his effectiveness on the job, or damaged Carrier's reputation in the marketplace or in the industrial community.

The generally understood principle in the industry is that a Carrier may not discipline an employe for what he does off duty. To do so would constitute an invasion of the employe's personal life by the Carrier and would place the Carrier in the position of sitting in judgment on neighborhood morals, a matter which should be left to civil officers.

An exception to this principle permits discipline when the off-duty conduct affects the employer-employee relationship. Critical to such an exception, however, is the guiding principle that the outside activity, in order to be subject to discipline, must definitely relate to Carrier's operations. By this it is meant that the misconduct must have arisen out of plant activities or carry with it a serious threat of disrupting the orderly, efficient, or safe conduct of the Carrier's business. Such has not been shown by substantial evidence in the instant case.

In view of the foregoing, Parts 1 and 2 (a), (b) and (c) of the Claim are sustained, but Part 2 (d) is denied.

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 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 to the extent set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Doted at Chicago, Illinois, this 12th day of November 1976.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 21293

DOCKET NO. CL-21212

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station **Employes**

NAME OF CARRIER: Norfolk and Western Railway Company

Upon application of the representatives of the **Employes** involved in the above **Award**, that this Division interpret the same in light of the dispute between **the** parties as to the meaning and application, as provided for in Section 3, First **(m)** of the Railway Labor Act, as approved June 21, 1934, the **following** interpretation is made:

Part 2 **(b)** of the Claim in the instant case reads:

"Pay Clerk J. J. Hawkins for all time lost **commencing** with October 23, 1974, and continuing until Clerk Hawkins is restored to service, less outside earnings."

Part 2 **(h)** of the Claim was sustained by the Board. However. Carrier **only** paid Claimant for **93 workdays** between the period of October 23, 1974 and February 28, 1975. On February 28, 1975, Claimant entered military **service** in the U.S. Army, where he remained until he obtained his discharge on March **30**, 1977. On April 7, 1977, Claimant was **re-employed** by Carrier, exercising his seniority on the Clerk's extra list.

Carrier argues that Claimant is not entitled to any back pay for the period of time he was in military service, because during this time, **Claimant** was "unavailable for all types of service with Carrier." (See National Labor Relations Board v. Revlon Products Corporation, 144 F. 2d 88 (1944), and National Labor Relations Board v. Harbison-Walker Refractories Co., 137 F. 2d 596 (1943)).

The Organization argues that military service is indeed **in** the category of gainful **employment**, "the same as **any** other employment **in** which Claimant may have been engaged while discharged from service of the Carrier."

This is an issue of first impression before this Board, and we find that in the **instant** case, Rule 27 **(d)** of the Agreement is clear and unambiguous in this regard.

Rule 27 **(d)** states:

"If the charge against the **employee** is not sustained, his record shall be cleared of it. If dismissed or suspended, on account of unsustained charge, the **employee** will be **reinstated** and **compensated** for wage loss, if any, suffered by him, less compensation received from other employment." (Emphasis added)

Military service is to be considered "other employment" for purposes of Rule 27 **(d)**. This Rule takes precedent over the **NLRB** decisions cited by Carrier, **since** it came after these decisions, and **makes** no exceptions for military **service**.

Claimant, therefore, **is** to be compensated for the wage loss suffered by him during his military service, less his military compensation.

H-et, **Claimant** is only to be compensated up through January 15, 1977, since it was his responsibility to report for duty with Carrier **in** a reasonable **time**, after being notified on January 10, 1977, that he was medically qualified for **service** with Carrier.

Referee James C. **McBrearty**, who sat with the Division as a neutral member **when** Award No. 21293 was adopted, also participated with the Division in **making** this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, **Illinois**, this 31st day of March 1978.