

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 24547
Locket Number a-24778

Paul C. Carter, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(**GL-9655**) that:

1. **Carrier** violated the effective **Clerks'** Agreement when, following an investigation held on September 11, 1981, it discharged Mr. Joseph Russo **from** its service, effective September 16, 1981;

2. **Carrier** shall row compensate **Mr. Russo** **for** all time lost as a result of this **dismissal** from **service**, including any lost overtime potential and for the period from 2:00 P.M. to 4:00 P.M. on August 31, 1981, and **for** the period from 9:30 A.M. to 3:31 P.M. on September 11, 1981, when he was removed from service and while he was in attendance at the investigation.

OPINION OF BOARD: Following an investigation conducted on September 11, 1981, claimant was dismissed from **Carrier's** service on September 16, 1981:

"... because of your responsibility in connection with altercation in Clearing Diesel Shop, Clearing Station about 3:00 P.M., August 28, 1981, in violation of General Notice and General Rules A, **E**, Hand **J** of the Belt Railway Company of Chicago Book of Rules as developed in formal investigation.*

The record shows that charges were preferred against claimant and five other employes by the Chief of Motive **Power &** Purchasing Agent. The **same** officer conducted the investigation and **issued** the decision of dismissal. The decision was appealed on both procedural and substantive grounds.

The Organization complains **among** other procedural complaints, that Rule 27 of the applicable Agreement provides the right of appeal by employes or their duly accredited representative in the regular order of succession up to and including the highest officer designated by the carrier to whom appeals may be made; that in accordance with **Carrier** directive, the appeal of the discipline imposed in the present case had to be made to the same officer who preferred the charges, conducted the investigation, and issued the discipline, which procedure deprived the claimant of an objective and impartial appeals review of the hearing officer's disciplinary determination contemplated by the Agreement. In this connection, we have been referred to recent Award No'. 24476 of this Division, involving the same parties as involved herein, in which the Board held:

"In considering Claimant's petition, particularly his arguments that he was not accorded an **objective and** impartial appeals review of the hearing officer's disciplinary determination, consistent with Agreement Rule 27, we agree that it was prejudicial to his interests for the official assessing discipline to also serve as the first step grievance appeals review officer.

In numerous cases dealing with procedural due process issues, **we** consistently held that it **was** not improper **for** a Carrier official to assume a multiplicity of roles viz the investigative hearing process when the **Grievant's** rights are not adversely affected. **Thus**, we held that it was permissible for a Carrier official to write and serve the investigative notice, conduct the trial investigation and assess discipline based upon the record evidence. These three roles per se, in the absence of palpable trial misconduct, are not viewed as precluding an employee's right to a fair **and** impartial investigation.

We do look askance, however, when the same hearing officer also serves as a witness **since** this very action pointedly destroys the credibility of the due process system. In a similar vein, we look askance when the first step grievance appeals officer is also the same person who assessed the discipline. The independent review and decision at each successive appellate level, whether it is two or three step appeals 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.

In the instant case, we cannot agree that Claimant's appeal was progressed in accordance with the manifest standard of fairness and due process set forth in Rule 27. The grievance appeal should have been **reviewed** by another person. In Third Division Award No. 8431, which addresses this judicial point, we held in pertinent part that:

'But the Organization's contention of denial of Claimant's right of appeal to the **"next higher officer"** must be upheld. The plain meaning of the language of Rule **22(c)**, as well as the intent of the Railway Labor Act, is that in a case like this a first **decision on a claim** or grievance by a lower Carrier representative or official may be appealed to one or more higher different officers, including the top or final decision maker.'
See also Third Division Award No. **9832.**"

We do not find Award No. 24476 to be in palpable error. It is supported by other awards of the Division. While **we** are hesitant to dispose of a claim on technicalities, such as the one here discussed and the one covered by Award No. 24476, at the same time we do not think it proper for **the Board** to issue conflicting awards involving the same provisions of the same agreement between the same parties. To do so would mean that **employees** would not receive equal treatment under the Agreement, which **certainly** was not the intent.

The fact that upon appeal in our present case the deciding officer reduced the discipline imposed from dismissal to 75 days suspension, does not change the right of appeal as set out in Award No. 24476, which we find **controlling**.

For the reasons set **forth**, we will sustain the claim to the extent of allowing *claimant* pay for the 75 days suspension, pay to be computed in accordance with Rule 33 of the Agreement.

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 **Employes** involved in this dispute are respectively Carrier and **Employes** 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest.:



Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 4th day of November, 1983

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. **1** TO AWARD NO. 24547

DOCKET NO. CL-24778

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

NAME OF CARRIER: **Belt** Railway Company of Chicago

Upon application of the representatives of the **Employees** 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 is made.

The Organization's notice to file an **Ex Parte** Submission in the dispute covered by Award No. 24547 was dated July 21, 1982. The Carrier's Submission was dated November 22, 1982. The Statement of Claim in the dispute reads:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated the effective Clerks' Agreement when, following an investigation held on September **11**, 1981, it discharged Mr. Joseph Russo from its service, effective September 16, 1981;
2. **Carrier shall now compensate Mr. Russo for all time lost** as a result of this dismissal from service, including any lost overtime potential and for the period from 2:00 P.H. to 4:00 P.M. on August 31, 1981, and for the period from **9:30** A.M. to **3:31** P.M. on September 11, 1981, when he was removed from service and while he was in attendance at the investigation..

The record leading up to Award No. 24547 showed that Claimant had been dismissed from Carrier's service on September 16, 1981. In the course of appeal on the property the discipline was reduced to 75 days suspension, from September 16, 1981, to November 30, 1981. Award No. 24547 sustained the claim "to the extent of allowing Claimant pay for the 75 days suspension, pay to be **computed in accordance with Rule 33** of the Agreement". Rule **33** of the Agreement reads:

'RULE 33

EXONERATION

"If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed the **employe** shall be reinstated **and** paid for all time lost, less amount earned elsewhere during suspension or dismissal."

The question now at issue involves the compensation due Claimant under Award **No.** 24547.

The Organization states that upon being dismissed by the Carrier, the Claimant was compensated for nine days as vacation time earned in 1980 and not yet taken in 1981; that upon receipt of Award **No.** 24547, the Carrier compensated Claimant for **the** days lost, less nine days pay, deducting the previous vacation payment. The Carrier's response to the request for interpretation also indicates that the question at issue is whether it was proper to deduct the nine days paid to Claimant as vacation pay for the year 1982 in arriving at payment due under Award No. 24547.

As previously indicated, when Claimant was dismissed September 16, 1981, the Carrier paid him what it considered was due at that time, including nine days as vacation earned by service in 1980 and not yet **taken** in 1981. The Carrier states that Claimant returned to work on December 3, 1981, and worked each day thereafter to the end of the year.

From September 16, 1981, to November 30, 1981, Claimant was under disciplinary suspension. He was not in the status of being on vacation at any time during that period, nor was he scheduled for vacation during that period. To uphold the deduction of **nine** days' time in computing pay for Claimant for the 75 days **would**, in effect, result in Claimant receiving no vacation or pay in lieu thereof in 1981. In our opinion, such result was never intended. We find, therefore, that the Carrier erroneously deducted the nine days in computing Claimant's pay for the 75 day disciplinary suspension. We agree with Interpretation No. 1 to Second Division Award No. 7030. Had the Claimant been scheduled for 1981 **vacation** during **the time** he was under disciplinary suspension, or granted vacation after he returned to **work**, then we would have a different situation.

Referee Paul C. Carter, who sat with the Division as a neutral member when Award No. 24547 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest::


Nancy J. Fever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1985.