

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26309
Docket Number CL-26753

Edwin H. Be", Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employes**

PARTIES TO DISPUTE: (

(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the **Brotherhood**
(GL-10034) that:

1. Carrier violated the Agreement Rules, particularly Rule 21 when under date of August 14, 1984, **Carrier** issued Discipline Notice #2 dismissing Mr. Frank **Guyton** from the service of the Carrier effective that date account investigation held on August 8, 1984, and

2. Carrier shall now be required to return **Mr. Frank Guyton** to the service of the Carrier with all rights unimpaired and compensate him for all time lost as a result of such dismissal along with health and welfare benefits due him.

OPINION OF BOARD: Claimant was employed as a Leader Order Filler at the Material Distribution Center at the Carrier's Proviso Yard. Prior to being dismissed, Claimant had 17 1/2 years of service with the Carrier.

On July 28, 1984, a switch crew arrived at Claimant's assigned building and was unable to gain access to that building. **After** repeatedly ringing the bell Claimant was paged several times without response. The Material Distribution Manager and District Material Manager went to the warehouse and observed Claimant sleeping in a sitting position on a barrel with his back against a wall. Attempts by Carrier Officers to awaken Claimant proved unsuccessful. The local Police were called and a Police Officer arrived accompanied by an ambulance and paramedics. Further attempts to awaken Claimant were initially unsuccessful. The Police Officer had to eventually shake and jab Claimant in order to awaken him. During the attempts to awaken Claimant, the Police Officer noticed a bulge in Claimant's pocket. Claimant was asked if he had a gun. Claimant responded in the affirmative. Claimant removed the firearm and placed it on a table. Inspection showed that the gun was loaded. After the Police Officer determined that Claimant's possession of the gun was not authorized by the Carrier, **Claimant** was arrested and charged with unlawful possession of a firearm and failure to possess a valid firearm owner's identification card.

Claimant admits that he was sleeping. Claimant further admits that he was carrying a gun at the time of the incident. Claimant asserts that he was carrying the gun because he took it from a despondent friend as a result of a call from that individual's wife at 1:00 A.M. Claimant asserts that he took the gun from his friend out of a concern that his friend was going to hurt himself. As a result of spending time with his friend until Claimant had to leave for work, Claimant was up almost the entire night prior to reporting for work.

According to Carrier's Special Agent J. Haley who was present while Claimant was at the Police Station, Claimant stated that his mother was visiting and he had been up the previous night because of that visit. Further, according to Haley, Claimant told him that he would rather be caught by the police with the gun than apparently without it in his neighborhood.

By letter dated July 28, 1984, Claimant was notified that he was being held out of service pending the results of an Investigation set for August 3, 1984, because of the July 28, 1984, incident for conduct allegedly in violation of Rules 14, 19 and 23 which require employes to be alert and attentive and prohibit employes from having firearms in their possession and from sleeping while on duty. By letter dated August 1, 1984, the Carrier, by Certified mail with a copy to the Organization's Local Representative, notified Claimant that:

"The formal investigation that was scheduled for Friday, August 3, 1984, at 9:00 a.m., at the M.D.C. Conference Room has been postponed.

It is now scheduled for Wednesday, August 8, 1984. at the M.D.C. Conference Room."

At the Investigation on August 8, 1984, the Organization stated that there was no concurrence with the postponement and it took the position that the Investigation was not being held in accord with Rule 21 of the applicable Agreement. The Investigation was completed on that date and by letter dated August 14, 1984, Claimant was dismissed from service.

The Organization first raises a procedural question asserting that since the Investigation was not held in conformance with the time requirements in Rule 21, the Claim must be sustained.

Rule 21 states, in pertinent part:

"The investigation shall be held within seven calendar days of the alleged offense or within seven calendar days of the date information concerning the alleged offense has reached his supervising officer."

Thus, the Organization's argument that Rule 21 was violated is well taken. The words of Rule 21 quoted above are clear. The opening phrase contains the mandatory command "shall." Hence, there is no element of discretion

on the Carrier's part and absent agreement of the parties that the Investigation may be postponed to a date outside the seven day period, the Carrier has no authority under Rule 21 to unilaterally postpone the proceeding as it did in this case. The position of the Carrier that the Organization acquiesced in the postponement is without merit. See Third Division Award 22258. As we stated therein, the fact that the delay in holding the Investigation:

"was accomplished by a unilateral decision by Carrier to postpone the hearing from an earlier date (which would have been well within the seven days) does not exonerate Carrier Carrier is mistaken in its contention that failure of Claimant to protest the postponement when it was instituted made Claimant a party to such deferral. The action was a unilateral one by Carrier and was timely protested at hearings."

The issue presented becomes one of remedy for the Rule 21 violation under the circumstances of this case. The Organization argues that the Claim should be sustained in its entirety with an award to Claimant of return to service and compensation for time lost without consideration of the merits. The Carrier's position is obviously otherwise.

This is not the first time that the issue of untimely holding of investigations by this Carrier has arisen. In Third Division Award 21289 the Carrier official issuing the notice of charges became aware of the **employee's** misconduct on November 4, 1974. The charges were filed on November 6, 1974, and the Hearing was held on November 13, 1974. We concluded:

"The Organization is correct in its assertion that the agreement time limits are important safeguards against dilatory handling and prejudicial delays which can negatively impact on accused **employees**. But we do not find such fatal flaws in the handling of this matter. *** There is not a shred of evidence to show that [the **employee**] . . . was prejudiced by the failure to hold the hearing on November 11, 1974 rather than on November 13, 1974. We recognize and Carrier concedes that there was herein a technical violation of the Rule but **in** our considered judgment such does not warrant invalidation of the entire procedure. We shall award Claimant two **(2)** days compensation at the hourly rate applicable to his position, however, as damages for the two-day time limit violation and delay in hearing by Carrier."

In Third Division Award 22258, on August 3, 1976, the Carrier herein notified the employe to attend formal Investigation on August 4, 1976, and on the same date unilaterally postponed the Investigations to August 17, 1976. We set aside the discipline rendered (suspensions totaling 30 days in length) on the ground that the seven day requirement for holding investigations was not followed by the Carrier. This Board stated:

"The first obligation of the parties, and of a tribunal which has the duty to judge their fidelity to those words, is compliance with the commitments to which the parties put their signatures. Beyond general assertion by Carrier that it was acting in conformance with customary routine postponements designed to allow the fairest and fullest trial process, there has been no showing that such was the reason or the need here for the postponement nor that there were any circumstances justifiably impeding adherence to the contract rule on this subject.

* * *

The Board declines Carrier's request to examine the merits of the charges on which Carrier acted as a way of determining whether deprivation of this contract rule should be ignored because truth and justice nevertheless allegedly prevailed. The rights embodied in Rule 24(a) are not dependent on such post hoc facts and should not be judged by them. They are mandatory in themselves. Their violation nullifies the process which has followed, because Rule 24(a) is a condition precedent for such process."

In Third Division Award 22575 we declined to set aside the Carrier's dismissal of an **employe** notwithstanding the fact that the misconduct was discovered on January 1, 1974. In that case, the Notice of Charges was issued on January 6, 1974, setting an Investigation for January 7, 1974, which was postponed by Carrier on January 7, 1974 until January 9, 1974. The Investigation was not held until January 15, 1974, due to a subsequent request for a postponement by the employe. We stated:

"The claim is before us strictly on technical or procedural grounds. There is no question of Claimant's guilt nor, given the nature of the offense and his past discipline record, can the penalty be deemed excessive. The only question is whether Carrier violated Rule 21 by failing to provide timely hearing. In the particular facts of this case we cannot find such a violation. The hearing was scheduled for

January 7, 1974, well within the seven day time limit of Rule 21. We are not persuaded that a two day postponement vitiates the proper notice and renders the whole process invalid, particularly since Claimant himself requested and was granted an additional one-week postponement. The manifest purpose of the timely hearing request is to avoid the trial of stale cases where evidence and recall by witnesses may wither with time. Balanced against this is the accused **employee's** right to adequate time to prepare a defense. We believe Claimant received everything to which he was entitled under the particular facts of this case and within the meaning of Rule 21."

In Public Law Board No. 2006, Award No. 20, the discrepancy between Third Division Awards 21289 and 22575 (which permitted examination of the merits of the Claim notwithstanding the Carrier's violation of the requirement for holding an investigation within seven days) and Third Division Award 22258 (which did not permit the reaching of the merits) was explained. In that case, the Carrier became aware of the alleged employe misconduct on September 21, 1979, and on September 27, 1979, issued a notice setting an Investigation and further unilaterally issued a notice postponing the Investigation until October 5, 1979. Thereafter, the employe also requested a postponement and the Hearing was eventually held on October 10, 1979. The Board stated:

"The claim comes to us on both procedural and merits grounds. The Organization urges initially that the failure to [sic] Carrier to hold the hearing within seven (7) days of September 21, 1979 renders void ab initio the entire disciplinary action. Carrier replied that at most its liability in such circumstances should be limited to damages for delay in hearing rather than voiding the entire discipline. In handling on the property and before this Board, Carrier relied upon NRAB awards involving the same issue, parties, and contract language. See Awards 3-21289 and 3-22575.

Upon careful reflection, this Board is persuaded that the principle of stare decisis requires that in this case we sustain Carrier's **position**. Some additional comments are warranted and particularly appropriate since the author of the cited precedent awards is chairman of the present Board. The view that Carrier's liability **is** limited in such instances is not universally held and reputable authorities have

reached contrary conclusions in cases involving similar contract language on this very property. See Award 3-22258 (**Yagoda**). We are not blind to the potential for abuse by Carrier in such instances, and anyone who construes our earlier decisions as an invitation to play fast and loose with contractual **time** limits does so at his peril. The decision in Awards 3-21289 and 3-22575 were based in considerable part upon equitable considerations presented in the particular facts of those records. They should not be viewed as a license to ignore contractual time limits with relative impunity. In the absence of extenuating circumstances, management is ill-advised to push the time requirements of Rule 21 to their outer limits, let alone to exceed them. Finally, we are of the considered opinion that in the interests of effective labor-management relations and improved contractual grievance handling, mutual agreement to adjournments should be sought and freely granted whenever either party has good cause to request an adjournment."

Under the circumstances presented, we believe that it would be manifestly unfair to sustain the Organization's position in this case and award a return to service with full compensation for time lost. First, we have taken the opportunity to set forth at length those portions of the above cited Awards to show that if anything, this Board has offered different views concerning violations of the seven day requirement for holding investigations. It is thus fair to conclude that the parties have received mixed messages as to what the remedy will be for violations of Rule 21. Second, we are not satisfied that the Carrier has totally failed to heed the admonition found in Public Law Board No. 2006, Award No. 20 by playing "fast and loose" and ignoring the contractual time limits with "relative impunity." That admonition was given on December 29, **1980**. The issue in this case was joined in August, 1984 - more than four and one-half years later. Therefore, we shall not sustain the Claim in its entirety. There has been no showing that Claimant was prejudiced by the four day delay in the holding of the Investigation. Indeed, we note from the Transcript of the Hearing that when it became apparent to the Organization that further evidence was necessary, the Hearing Officer was willing to recess the matter to a later date in order to afford the Organization an opportunity to bring in further witnesses indicated by the **Organization** as necessary to develop a complete record. Therefore, upon considering all of the factors presented, as a remedy in this case for the Rule 21 violation we shall only require that the Carrier compensate Claimant for the four day delay caused by the Carrier's unilateral postponement.

Nonetheless, although we have found in this case that the Carrier's violation is not of a degree sufficient to warrant the setting aside of the disciplinary action in its entirety, we do note **that notwithstanding** the language in the above cited Awards the Carrier has once again taken action that is in violation of the strict time limits for holding investigations as required by Rule 21. To permit such an action to remain without further comment might well send another mixed message to the Carrier - a message we clearly do not intend to convey. Rule 21's requirements are clear. "The investigation shall be held within seven calendar days [emphasis added]" That language was negotiated by the parties and it has no meaning if the Carrier continues to assume that it meets its obligation by setting a hearing within the seven day period and then unilaterally postponing the proceeding to a date beyond the seven day limit only to suffer the potential liability of compensation to the **employee** for that period of time beyond the seven days. In light of the history of this issue on the property, the prior Awards rendered and the admonitions given and further in light of our decision in this matter, the Carrier is now on clear notice that if faced with the same issue again where a hearing is not held within the required seven days as a result of a unilateral postponement by the Carrier without the Organization's openly given consent or a request for a postponement by the Organization or the employee, we shall have no choice but to sustain the claim in its entirety. To hold otherwise would amount to an unwarranted emasculation of the parties' words.

With respect to the merits of the Claim, we find substantial evidence in the record to support the Carrier's conclusion that Claimant's conduct violated Rules 14, 19 and 23. Claimant admitted that he was sleeping while on duty. Sleeping on duty is prohibited by Rules 14 and 23. Claimant also admitted that he was carrying a firearm. Such conduct violates Rule 19. Imposition of dismissal, under the **circumstances**, cannot be said to be an arbitrary and capricious act by the Carrier. Sleeping on duty has been the basis for upholding dismissals from service. See Third Division Award 22027; Second Division Awards 9386, 8537. Similarly with respect to carrying firearms, this Board has upheld dismissals for such conduct. See Third Division Awards 26250, 20199. Claimant's asserted reasons for sleeping and carrying the loaded firearm, even if accepted cannot, in our opinion, change the result. Even assuming Claimant's version of the incident as to how he **came** into possession of the **gun is true**, **no** sufficient reason exists in this record justifying Claimant's unauthorized possession of the firearm while on duty.

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 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 Agreement was violated.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Devel - Executive Secretary

Dated at Chicago, Illinois, this 13th day of May 1987.