

Award No. 4929

Docket No. 4792

2-NOUPT-SM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Sheet Metal Workers)**

NEW ORLEANS UNION PASSENGER TERMINAL

DISPUTE: CLAIM OF EMPLOYEES:

1 — That Sheet Metal Worker, E. J. Gerstner, Jr., was unjustly dismissed from the service on February 6, 1964.

2 — That accordingly Mr. Gerstner be reinstated to the service with:

- a) Seniority rights unimpaired.
- b) Pay for all time lost since February 6, 1964.
- c) All vacation rights.
- d) Hospital Association dues paid while out of service.
- e) Premiums on group insurance paid while out of service.

EMPLOYEES' STATEMENT OF FACTS: Sheet Metal Worker, E. J. Gerstner, Jr., hereinafter referred to as the claimant, was employed by the New Orleans Passenger Terminal, hereinafter referred to as the carrier or terminal, with seniority dating November 12, 1946.

Claimant was notified by letter dated January 22, 1964 to appear for investigation, the charge being:

"falsely certifying on January 13, 1964 that you were the original purchaser of a ticket of the Louisville and Nashville Railroad issue Form 184. No. 02567 sold at New Orleans, Louisiana to Syracuse, New York on January 12, 1964 and thereby obtaining \$46.60 refund under false pretenses.

Signed: F. R. Denney
Mechanical Superintendent"

Th above principle applies in this case. It was only through the adamant stand taken by the employees that wage loss was not held to a lesser degree. Mr. Gerstner was offered reinstatement without pay for time lost the first time the degree of discipline was discussed which was on June 1, 1964.

For these several reasons, the terminal requests that your division deny these claims.

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

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

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

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

This is a discipline case. Claimant was charged in a letter addressed to him by F. R. Denney, Mechanical Superintendent, as follows: "You are charged with falsely certifying on January 13, 1964, that you were the original purchaser of ticket of the Louisville and Nashville Railroad issue Form 184, No. 2567, sold at New Orleans, to Syracuse, New York, on January 12, 1964 and thereby obtaining refund under false pretenses." The investigation was set for and held on January 30, 1964.

The following facts appear from the transcript: At about 3:00 A. M. on January 13, 1964, a stranger approached Claimant, as he had others that morning, offering to sell a railroad ticket to him for \$10.00; he could not secure a refund at that time himself as the ticket office did not open until 6:00 A. M. After the office did open on January 13, Claimant presented the ticket for a refund and signed a blank form which contained among other things the following: "This is to certify that I am the original purchaser of ticket." No questions were asked of him by the agent and Claimant was refunded the sum of \$46.60. There was reliable testimony that this was the usual and customary procedure when tickets were refunded because of non-usage, the forms were signed in blank and no questions asked. It further appeared that employes had on previous occasions had tickets refunded and no complaint was ever made; there was no evidence that any complaint had been registered by the original purchaser of the ticket with the Carrier.

It is quite significant that Claimant was charged with falsely certifying he was the original purchaser and that he obtained a refund under false pretenses. Carrier having made the charge had the burden of proving it. False, in the sense that it is here used, is defined as "intentionally untrue" or "adjusted or made as to deceive".

As was positively stated by Superintendent Denny during the investigation: "The only thing in the charge is that Edward Gerstner certified UPT Form 216-1, Revised, on January 13 and obtained \$46.60 under false pretenses." Under his own statement the question of intent becomes important. It was testified to that the practice of refunding cash for unused tickets merely on the signing of the form in blank and asking no questions had been general on this property. The ticket agent could not have been deceived as

she had redeemed tickets for employes in the past. The only person who could have been defrauded and parted with anything of value was the original purchaser of the ticket who had made no complaint. No company rule was involved. The burden of proof being on the Carrier there is a very serious question as to whether or not the charge made was sustained.

Rule 30 of the Agreement provides "No employe shall be disciplined without a fair hearing by a designated officer of the Terminal." In the instant case, Superintendent Denney preferred charges against the Claimant and then acted in the triple capacity of prosecutor, judge and jury. He insisted that the testimony be taken over a tape recorder which he operated and edited, over the protest of Claimant's representatives. The recital of two incidents would indicate that he was not entirely objective in his view of the testimony. At one point he referred to the ticket involved as having been stolen though later he attempted to explain this statement as "a slip of the tongue", and further by referring to the purchasing of the ticket from a drunk though there was no competent evidence that the man was drunk at the time the claimant purchased the same from him.

Though we appreciate that some deviation from strict legal procedures in hearings of this kind are contemplated by the parties when entering into the collective bargaining agreement and some degree of tolerance can be expected from this Board, the procedure in the instant case has retained not the slightest semblance to the precepts of a fair trial. See Third Division Awards 4317 — Robertson; 6087 — Whiting; 8088 — Lynch.

The fact that as punishment for the offense charged Claimant received the most severe punishment that could be meted out, dismissal from the service, which was entirely unwarranted, viewing it most favorably from Carrier's side, only confirms the conclusion that Claimant did not have a fair trial and the Agreement was violated.

It appears that on June 1, 1964, the Carrier offered to reinstate Claimant without pay for the time lost as the discipline assessed had served its purpose. Claimant felt the penalty was too severe a one for the act he was accused of committing so he refused the offer. He actually returned to work on November 22, 1964.

In accordance with Rule 30 of the Agreement, if Claimant's seniority rights have not already been restored, they shall be, unimpaired, and he shall be compensated for his wage loss, if any, between February 4, 1964, and November 22, 1964, resulting from his dismissal, less any amount he may have earned in other employment.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1966.

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