

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 1, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Electrical Workers)
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That under the terms of the controlling agreement, Electrician Joseph Akalski was unjustly dismissed from the service of the Consolidated Rail Corporation (Conrail) on August 23, 1977.
2. That, accordingly, the Consolidated Rail Corporation (Conrail) be ordered to reinstate dismissed Electrician Joseph Akalski to their service with all rights unimpaired and reimbursed for wages lost.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was suspended from service on July 29, 1977 and following a trial held on August 19, 1977, was adjudged guilty as charged and subsequently was discharged by Carrier, effective August 23, 1977.

On July 29, 1977, Claimant was given notification he was to be held out of service beginning immediately, based on his admission that he had removed, without authorization, seven (7) payroll checks of other Conrail employees from Substation #7 located in Bronx, New York on June 29, 1977. Also on July 29, 1977, Carrier issued a letter of notice to Claimant, requesting his appearance at a trial scheduled for August 10, 1977, in connection with the aforementioned charge as well as the following three additional charges:

- (1) Unauthorized endorsement of three (3) pay drafts of other Conrail employees;

- (2) Unauthorized cashing of the three (3) above mentioned pay drafts;
and
- (3) Unauthorized use of the monies secured from cashing the three
(3) said pay drafts.

Again, on July 29, 1977, Claimant was verbally advised that the date of trial had been changed to August 19, 1977 and Claimant thereafter, on August 4, 1977, was sent a certified letter notifying him the new trial date. The trial was held on the rescheduled date of August 19, 1977, with Claimant in absentia but with union representation, nevertheless, by the local shop steward.

In their submission, the Organization set forth the procedural question as to whether an adverse statement against an employee presented at any hearing, the contents of which cannot be interrogated or cross-examined, could be considered as sufficient or substantial evidence, as that required as necessary for proof, in disciplinary cases. It is the Organization's position that Claimant's dismissal from service was a flagrant exercise of managerial discretion, contending that Carrier failed to comply with Rules 6-A-1 and 6-A-3 as set forth below, in relevant part, as follows:

Rule 6-A-1

"(a) Except during the first 60 days of service, employees shall not be suspended nor dismissed from service without a fair and impartial trial, nor will an unfavorable mark be placed upon their discipline record without written notice thereof."

Rule 6-A-3

"(b) If he desires to be represented at such trial, he may be accompanied by his union representative. The accused employee or the said representative shall be permitted to question witnesses insofar as the interests of the accused employee are concerned. Such employee shall make his own arrangements for the presence of any witnesses appearing in his behalf.

The Organization argues that Carrier discharged Claimant without sufficient evidence at the hearing to prove Claimant guilty. Specifically, the Organization objects to the way in which the trial was conducted. The Organization characterizes the trial as having been a Kangaroo Court proceeding by noting that the Hearing Officer who rendered Claimant guilty based on the trial record, was also the very same person who entered into evidence the written statement of the Carrier's arresting officer, which statement contained a supposed admission of guilt by the Claimant; and too, the Organization observes that the arresting officer was not present at the trial so as to afford Claimant's representative the opportunity for

cross-examination. The Organization makes the point that no statements were presented at the trial by either the Claimant or his representative in any form that shows Claimant confessing to the charges.

In its rebuttal statement, the Organization takes exception to Carrier's sole reliance on the written statement of the patrolmen in assessing the discipline of dismissal. With regard to the right of cross-examination, the Organization cites in pertinent part, Third Division Award 3288, as follows:

"For two centuries in America it has been recognized that the right of testing the truth of any statement by cross examination is a vital feature of any investigation devoted to truth development. No safeguards for testing the value of human statements is comparable to that furnished by cross examination and no statement should be used as testimony until it has been subjected to that test or that test waived."

Finally, in its rebuttal, the Organization contends there exists no positive proof that Claimant received a second notice of trial, referring to the notice informing Claimant the trial date had been changed from August 10, 1977 to August 19, 1977. Such lack of proof, the Organization states, leaves doubt as to whether Claimant received notification of the new trial date. The Organization further maintains that no proof exists either as to the Carrier's position Claimant was verbally notified of the new trial date of August 19, 1977.

The Carrier takes the position in its rebuttal statement, that the procedural questions raised by the Organization in their submission, constitute new argument, as these points were never presented nor discussed on the property. The Carrier argues that the Employees had every opportunity at the trial to present any objections they felt meritorious to the Claimant's position. Never having been advanced during the trial, the Carrier objects to the belated insertion of these procedural issues into the record for the first time.

The Carrier advances the position, that it is a well established principle on the National Railroad Adjustment Board that procedural objections concerning the conduct of a trial must be timely made during the trial proceedings and may not properly be considered at a later date after completion thereof. In support of this position, Carrier cites the following Awards: First Division Award No. 20 052; Second Division Awards Nos. 3668, 3874, and 4035; and Third Division Awards Nos. 9810 and 13040.

Further, the Carrier suggests the Organization has raised these several belated procedural issues, because no where in the record has the Organization ever denied the guilt of the Claimant. Notwithstanding their objections to the belatedly filed procedural questions raised by the Organization, the

Carrier felt compelled to respond to the Organization's position that Carrier had used written statements from Police Officers to find Claimant guilty, while not having those Officers present for cross-examination and thus arriving at the conclusion that such evidence is therefore neither sufficient nor substantial. In reply to this allegation, the Carrier points out that numerous awards of the National Railroad Adjustment Board have upheld the principle that the introduction of written documents constitutes the criteria of substantial evidence necessary to determine a finding of guilt and to assess discipline. This principle is applicable whether or not the person who authored the statement introduced is present at the trial. In support of this position, Carrier cites, in relevant part, Third Division Award No. 16308:

"No prohibition is found against the use of written statements nor is there any requirement that a witness who submits a statement must be available for cross-examination. Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissible in the absence of contractual prohibition."

Thus, the Carrier asserts, Claimant was not prejudiced in any way by the introduction of the written police statements at the trial. Finally, Carrier contends that Claimant's failure to attend the trial in light of being properly notified, was done at his own peril and, as such, cannot be judged to constitute a defect in the trial proceedings.

The Board finds Carrier's position, relative to the belatedness of the procedural issues raised by the Organization, persuasive in the instant case. Simply stated, the Board notes from the record, that none of the several procedural objections raised by the Organization either in its submission or rebuttal statement were raised at the trial. It is a well established principle that the trial proceeding is the proper forum in which such procedural issues should be raised. However, since the Organization failed to assert the procedural issues in question at the trial in the instant case, the Board is left with no alternative other than to rule these several objections as not having been timely filed. Silence on these procedural issues at the trial, the Board concludes, constituted a waiver by the Organization of their right to raise such matters at a later time.

In finding the procedural issues untimely raised, the Board rules this to be dispositive of the instant case, making consideration of the merits unnecessary. However, the Board in so ruling, does not want to leave the impression, either said procedural issues would have been persuasive had they otherwise been ripe for consideration, or that consideration of the merits of the case itself would have led the Board to reach any different conclusions than those previously formed. In fact, the Board would have

rejected most, if not all, of the procedural objections advanced as not applicable in the instant case and would have accepted the merits as being supportive of Carrier's disciplinary action.

Thus, the Board finds nothing in the record contradictory of either Carrier's judgment concerning Claimant's guilt nor the discipline assessed of discharge. Based on the foregoing and the belief of this Board that Claimant received a fair and impartial hearing, the Board hereby sustains Claimant's discharge.

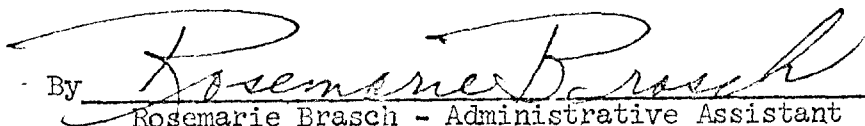
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this