

Award No. 7205
Docket No. CL-7156

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN
RR. CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY. CO.;
THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.; SAN
ANTONIO, UVALDE & GULF RR. CO.; THE ORANGE & NORTH-
WESTERN RR. CO.; IBERIA, ST. MARY & EASTERN RR. CO.;
SAN BENITO & RIO GRANDE VALLEY RY. CO.; NEW ORLEANS,
TEXAS & MEXICO RY. CO.; NEW IBERIA & NORTHERN RR.
CO.; SAN ANTONIO SOUTHERN RY. CO.; HOUSTON & BRAZOS
VALLEY RY. CO.; HOUSTON NORTH SHORE RY. CO.; ASHER-
TON & GULF RY. CO.; RIO GRANDE CITY RY. CO.; ASPHALT
BELT RY. CO.; SUGARLAND RY. CO.**

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that—

- (a) The Carrier violated the Clerks' Agreement when it discharged Mr. H. R. Garrett on charges that were unproven. Also
- (b) Claim that Carrier's action was arbitrary, harsh and an abuse of discretion. Also
- (c) Claim that Mr. Garrett be reinstated with all rights unimpaired and compensated for all losses sustained.

OPINION OF BOARD: Claimant was dismissed upon a charge that investigation would be held

"to develop facts, place responsibility in connection with H. R. Garrett, Transfer Clerk, improperly claiming time for work not actually performed October 13, 1953."

Rule 26 provides:

“(a) An employe charged with an offense shall be furnished with a letter, stating in full the precise charge, at the time the charge is made.

“(b) No charge shall be made that involves any matters of which the Carrier has had knowledge for ninety (90) days or more.”

Claimant was heard October 27, 1953, and discharged. On November 4, 1953, an appeal was taken to the Superintendent and denied. Further appeal was taken to the Assistant General Manager and denied on February 3, 1954. Further appeal was taken to the Chief Personnel Officer and denied on April 28, 1954.

On May 26, 1954, Claimant's wife addressed a letter under personal cover to the Carrier's President requesting his consideration in the reinstatement of Claimant on a leniency basis. This request was denied June 7, 1954. It does not appear that either Claimant or the Organization participated in this request.

These various appeals were taken pursuant to Rule 28 which reads:

“APPEAL AND FURTHER HEARING

“The right of appeal by the individual employe or the 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 is hereby established. If appeal is taken, hearing shall be granted if requested of the officer to whom appeal is made. Appeals will be registered as soon as possible after decision is given and a copy furnished the officer whose decision is appealed. Hearings and decisions on appeals will be given within a reasonable time.”

In deciding the final appeal, the highest officer designated by the Carrier to whom appeals may be made received and considered, in addition to the Investigation Record, a letter addressed to the Assistant Chief Personnel Officer dated April 27, 1954, by a successor Superintendent which read:

“With regard to your letter of April 6 file 953-9 concerning the appeal of General Chairman Dyer for the reinstatement of Mr. H. R. Garrett, Transfer Clerk, San Antonio.

“My investigation develops that this employe was arrogant, kept the entire force in a turmoil which adversely affected the entire operation of the freight room. He is a trouble maker, deliberately slows down work, advising truckers and other employes to slow down, was repeatedly warned for smoking in the warehouse and leaving five man gang to walk out into the street to smoke, and whenever spoken to regarding his action he was very arrogant and even at times telling the Agent ‘Crack your whip whenever you are ready’.

“In view of the past performance of this employe I am not in favor of his reinstatement under any circumstances.”

It does not appear that either Claimant or the Organization ever received a copy of this letter until the case got here.

First. Rule 28 establishes the right of appeal to the highest officer designated by the Carrier to whom appeals may be made. What this Rule means and requires is independent consideration and decision on “the precise charge” (Rule 26 (a)) at each successive appellate step (Award 7021).

Second. For the purpose of determining the extent of the penalty to be assessed or for the purpose of acting upon a request for reinstatement on a

leniency basis, the Carrier may take into consideration convictions of crime, commendations, prior disciplinary actions taken and other such entries on a personnel record, which may not appear in the Investigation Record.

But the letter of April 27, 1954, above quoted transgressed such considerations and introduced new charges against Claimant, including insubordination among other things. As it states, it was addressed to the highest officer designated by the Carrier to whom appeals may be made "concerning the appeal" of the General Chairman. These new charges were made for the first time on the final appeal; and Claimant never was confronted with them and was afforded no opportunity to meet the new evidence produced against him.

The disciplinary action finally taken must stand or fall upon a full statement of the precise charge at the time the charge is made. This record, thus, discloses a palpable violation of Rule 26.

It follows that Claimant was not accorded a fair and impartial hearing.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the record and all the evidence, finds and holds:

That the Carrier and the Employees 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

Claimant was not accorded a fair and impartial hearing and the disciplinary action should not stand.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of December, 1955.

DISSENT TO AWARD NO. 7205—DOCKET CL-7156

This award is in serious error.

The claim before the Board was: that the Carrier violated the Agreement at the time it discharged Claimant Garrett on charges that were unproven; that the Carrier's action (at that time) was arbitrary, harsh and an abuse of discretion.

The sole question before the Board for consideration in this dispute was a specific charge by Employees that Carrier failed to comply with the provisions of Rules 27, 45 and 46 at the time it discharged Claimant Garrett. The Record contains no charge by Employees that Carrier failed to comply with the provisions of Rule 26.

The Opinion resorts to the Respondent's inter-office correspondence and mental processes of its appeal officers. It classifies the former as "new evidence" produced against the Claimant when, as a matter of practice and fact, such consultations between various officers are merely post hearing practices relating only to the question of whether there are sufficient mitigating circum-

stances to overcome the precise charges upon which the specific action was taken.

We are confined to the evidence adduced in the transcript of a hearing and that evidence does not indicate a violation of Rule 26. Hence, this Award's appraisal of the Carrier's efforts to investigate the Claimant's background in order to determine whether the action taken against him on the precise charge could be set aside is our error. Only the Carrier, not this Board, can go outside the transcript evidence in a search for factors that would justify rescinding or modifying its original action.

Rule 26 was not violated and the Award is no authority for mending the Claimant's hold by going outside the record of his conviction.

The validity of the precise charge is untouched by this Award and we must, therefore, dissent to its improper holding.

/s/ J. E. Kemp
/s/ E. T. Horsley
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan