Award No. 8020
Docket No. CLX-7565

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that:

(a) The agreement governing hours of service and working conditions between Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949 was violated at the Los Angeles, California Agency operations in the treatment accorded Employe H. G. Houghtaling, as a result of an alleged investigation conducted January 21, 1954; and

(b) His record shall now be cleared of the alleged charge against him; his disqualification as Chief Money Clerk rescinded; restored to his position and compensated for difference in salary loss sustained retroactive to and including January 27, 1954.

OPINION OF BOARD: This is a discipline case involving H. G. Houghtaling, seniority date of December 11, 1927, who was regularly assigned as Chief Money Clerk in Carrier's Money Department at Los Angeles. Under date of January 18, 1954 Terminal Agent C. L. Johnson sent Claimant a notice of an investigation to be held on the latter's alleged violation of Rule 827 of Carrier's General Rules and Instructions. The investigation was conducted before Supervisor V. V. Fansler, the Claimant appearing and certain testimony being adduced. Terminal Agent Johnson was not present at the investigation but following the conclusion thereof he issued a finding of the Claimant's guilt and assessed discipline. Johnson's determination of guilt was based upon his review of the "minute of investigation."

Rule 29 of the Agreement provides that employes similarly situated to Claimant "shall not be disciplined or dismissed without investigation" and that "a written decision will be rendered within seven (7) days after completion of investigation."

In Award 7088 we considered a rule similar in all material respects to the provision now before us. In that Award we said:

"The plain meaning of such a rule is that the official who conducted the investigation, heard the evidence and saw the witnesses

will evaluate the evidence and decide whether the employe was guilty or innocent of the charge against him."

See Also Award 6087.

We note that in response to the Organization's attempt to discredit the testimony of certain witnesses produced by Management at the investigation, Carrier states: "The credibility of witnesses is a matter to be determined by the officer who conducts the investigation. He has the opportunity to note the demeanor of the witness and the manner in which testimony is presented." (P. 94 of record, p. 4 of Carrier's answer to Organization's ex parte submission.) The Carrier goes on to say that "the one conducting the investigation determined that the tetstimony (of the witnesses in question) was credible." (Insert supplied.) Supervisor Fansler did not decide the guilt or innocence of the Claimant, however, although as the Carrier must concede, he was in a far better position to evaluate the testimony than was Terminal Agent Johnson.

We conclude that the Carrier failed to comply with Rule 29, that such failure represents a fatal procedural defect prejudicial to the rights of the Claimant, and that in consequence the disciplinary action taken must be revoked.

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

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of July, 1957.

DISSENT TO AWARD 8020, DOCKET NUMBER CLX-7565

In this Award the majority has ignored the issue of whether Carrier was justified in disqualifying Claimant as Chief Money Clerk account of an altercation between him and an employe under his supervision. Instead, they have chosen to revoke the discipline assessed against Claimant on an unwarranted finding that Rule 29 requires the official who conducts an investigation to also decide the guilt or innocence of the employe charged.

The majority's finding makes a mockery of the jurisdictional limitation prescribed on this Division by the Railway Labor Act. Rule 29 simply states that employes "shall not be disciplined or dismissed without investigation." It does not define who should prefer the charges, or conduct the hearings, or issue the decision. It is obvious that this Division has no jurisdiction to prescribe that which the parties have not supplied through negotiation. In **Award 2608** the Division, without the assistance of a referee, stated:

"The Board finds nothing in the rules of the controlling Agreement defining who shall prefer charges or conduct hearings. There being no such definition in the rules, the Board cannot supply same."

Anyone at all familiar with the handling of discipline in the railroad industry takes for granted that any official may be delegated to conduct an investigation, and accepts as a matter of common sense that if another officer reviews the proceedings and notifies the employe charged of his innocence or guilt and/or the discipline assessed—that such second officer makes the determination after thorough discussion of the dispute with and/or upon the recommendation of the officer who conducted the investigation.

The foregoing is so clearly understood, that here, the Carrier freely conceded that Supervisor V. V. Fansler who conducted the invstigation, and who saw the demeanor of the witnesses, determined that the testimony of such witnesses was credible. Obviously, this determination was made to Terminal Agent C. L. Johnson prior to his issuance of finding as to Claimant's guilt and assessed discipline.

The majority has also breached the Carrier's right to be apprized of the Employe's position. In handling this dispute upon the property and in their submission to this Division, the Employes at no time questioned the Terminal Agent's right to decide Claimant's guilt or innocence and/or to assess the discipline. If they had done so, Carrier could have undoubtedly shown that Supervisor Fansler made such a determination and transmitted same to his superior. Rather, the majority's opinion is based upon the opportunist argument, made for the first time in the Labor Member's Brief, that the officer who rendered the decision was not present at the investigation and "therefore could not have been in a position to render a fair and unbiased decision." The absurdity of this argument is made manifest by the fact that the Superintendent and General Manager who affirmed the decision on appeal were certainly not present at the investigation. To carry the majority's finding to its ultimate conclusion would impose so much sagacity to the hearing officer's decision that no higher officer—or this Division could dare reverse it—for after all, he was present.

The absurd conclusion reached in this Award was based in part on the loose language of dicta contained in **Awards 6087 and 7088.** In **Award 6087** the decision as to guilt and the assessment of discipline was rendered by the "chief complaining witness at the investigation." In **Award 7088** such decision was not made within the time limit prescribed by the Agreement, and the decision when finally made was rendered by an officer to whom Claimant had to go on appeal. Under the foregoing circumstances there was no occasion for the Division to make the gratuitous comments to which the majority has ascribed so much weight.

In early **Award 232** we recognized that the language of the investigation rule clearly intends that the decision as to whether or not the charge was sustained was to be made by the management, and that one of the safeguards against hasty and unjust action on the part of subordinates is the employe's right to have the final judgment rendered by an official not personally involved in the dispute and detached by distance as well as authority from any local feelings or prejudices which might tend to color the action of subordinates on the scene.

We do not believe that the Labor Organizations even want the policy expounded in this Award. See Interpretation No. 1 to Award No. 6087. However, if they do, the proper means for achieving it is through negotiations under the Railway Labor Act, not under erroneous awards made outside the jurisdiction of this Division.

Due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. **American**

Jurisprudence, Sec. 141, pp. 485, 486. Also see **United States** v. **Morgan**, 313 U.S., 409.

This Award is in error, and for the foregoing reasons we dissent.

/s/ R. M. Butler
/s/ J. F. Mullen
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ W. H. Castle