

Award No. 8432
Docket No. CL-8921

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

CHICAGO UNION STATION COMPANY

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

A. A. Barroso be returned to service as a Redcap with all rights unimpaired, and that he be compensated for each and every day held out of service from June 20, 1955 until adjusted.

OPINION OF BOARD: On June 18, 1955, a passenger on Pennsylvania Railroad train No. 215 upon arrival at Chicago Union Station gave her luggage to Claimant redcap Barroso for transport in hand truck to the taxicab stand. Coming to said stand, she found her bag badly damaged. She came then to the Office of Station Master's Chief Clerk, where in the course of asking for reparation she presented, for identifying the redcap, the check that Claimant had placed on her bag. The check had been removed by separating the male and female elements of the clamp fastener; that is, the cardboard and paper portions of the check had not been torn.

It appears from the record that the brass clamp fasteners of such a check are supposed to be made in such a way that, once snapped properly together, the elements cannot be disengaged. An effort to separate them, thus snapped together, is supposed to result in tearing or destroying the check. This is supposed to have at least two results: (1) It keeps the check securely on the handle of a piece of luggage. (2) It prevents a redcap from removing the check for reuse, whereunder he could pocket the fee paid by a passenger instead of turning it over to the Station (the redcap's number is stamped on each check when he receives a packet of them from the Station.) Apparently it is possible to make the snap elements separable by pressing some metal object into the female element so as to push the locking teeth flat against the cylindrical sides of said element.

It appears further from the record that on June 20, 1955, Claimant was called to the Office of the Station Master Carlson, was taxed with tampering with his checks, was asked to surrender two packets of checks in his possession, and was told he was being held out of service pending investigation.

On June 21, 1955, written notice was sent to Claimant of an investigation to be held on June 25 of the charge of mishandling the baggage of the above-mentioned passenger. After and as a result of the investigation so held, Claimant was found guilty and given a disciplinary suspension of two weeks without pay (June 21, 1955, to July 4, 1955). The manner and result of this hearing are not at issue before this Board.

On July 1, 1955, a second notice of investigation was sent to Claimant. The charge now was "failure to attach securely by fastener check G500615 to bag handled" for above-mentioned passenger. The investigation was held on July 7, 1955, and resulted in the discharge of Claimant on July 13, 1955. Appeal produced no change in the decision.

The Organization contends that (1) the evidence in the second investigation failed to substantiate Carrier's charge; (2) said investigation revealed that the charge really was that of tampering with checks with intent to defraud Carrier, thus showing that the charge was not specific, as required by Rule 25(a) of the Parties' Agreement, and (3) the second investigation (July 7) was not timely held, inasmuch as Rule 25(a) of Parties' Agreement requires investigation within seven days of date an employee is held out of service, and Barroso was held out of service beginning June 20.

Carrier's Rule 23(d), violation of which was charged in the second investigation, says that "when baggage is accepted for handling, a tag will be securely attached by fastener to each piece handled. . . .". The evidence of record establishes that Claimant received a copy of Carrier's rules and should have been familiar with them.

Applying to these and other facts of record and to the Organization's arguments the principles governing the determination of discipline cases (see our Award No. 8431), the Board rules as follows: (1) Carrier's Rule 23(d) is reasonably related to the orderly and efficient operation of its business. It is necessary that redcap checks be securely fastened to passengers' bags so that the luggage may not be lost and may be easily identified. It is wholly proper also that the checks be so made as to minimize the possibility of Carrier not receiving the fees paid by passengers. (2) Claimant knew or should have known of the existence of said Rule and of possible penalties for non-observance. Carrier showed that Claimant had received its book of Rules. (3) There is no persuasive evidence that Carrier's Rule 23(d) had not been enforced even-handedly by Carrier in respect to all employees. (4) As to the charge on which the second investigation was based, Rule 25(a) of the Parties' effective Agreement requires that a charge against an employee be written and precise. The charge in the instant case was made in writing. It was also precise in respect to the allegation that Barroso had not snapped the fastener of his check No. G500615 securely. However, in the light of Claimant's testimony, not successfully controverted by Carrier, that he was originally charged orally with tampering with his checks; in the light of the fact that tampering was mentioned at least twice at the investigation by Station Master Carlson, the Carrier official who preferred the charge and who conducted the hearing; and in the light of the general tenor of the questioning of witnesses (such as the representatives of the manufacturer of the redcap checks) by Carlson, we are forced to conclude that (a) the actual purpose of the investigation was to discover whether redcap checks, such as No. G500615, could, after being snapped on to luggage, come apart without destruction unless previously tampered with, and thus to discover indirectly whether Claimant had done such tampering; (b) the charge as made failed to reveal this purpose; and (c) the charge was not really specific in these terms. (5) As to the timeliness of the investigation, Rule 25(a) of the Agreement

requires that the investigation must be held within seven days of date when charge is made or when the employe is held out of service. In view of Claimant's testimony, not successfully controverted by Carrier, that he was told orally by Station Master Carlson on June 20, 1955, that he was then being held out of service pending investigation of alleged check-tampering, we are forced to conclude that the investigation held on July 7, 1955, was not timely held, being 16 days after date Claimant was held out of service. (6) In view of the two procedural defects above found, it is not necessary here to go into the questions of whether substantial evidence adduced at the hearing supported Carrier's finding of guilt and whether Carrier properly "fitted the punishment to the crime" it found—except to say that (a) the mere fact that the passenger was able to separate Check No. G500615 at the fasteners incontrovertibly establishes that said check was not securely fastened in the manner intended by Carrier and manufacturer; (b) under Carrier's Rule 23(d) a redcap is obligated to make sure that a luggage check is fastened securely in said manner; (c) Claimant failed to do this; (d) Claimant was thus guilty of the charge as made, i.e., the ostensible charge; but (e) substantial evidence did not show that Claimant was guilty of the underlying charge, i.e., that any tampering by him was the cause of the insecure fastening of Check No. G500615, and (f) if such tampering had been established by substantial evidence, discharge would have been a penalty well within Carrier's discretion.

The Board holds that, insofar as the charge was not really specific and the investigation was not really timely, Carrier's action in this case contained elements of arbitrariness and unreasonableness and must therefore be overturned. Carrier is accordingly directed to reinstate Claimant as of June 21, 1955, with seniority rights unimpaired, and to compensate him for actual wage loss incurred. In computing wage loss Carrier shall not include days which Claimant would not have worked because of attendance at school or while serving the two weeks' suspension on the charge of mishandling baggage; and Carrier shall deduct from the gross wages thus properly computed any wages earned in other employment during the days when he would, if not discharged, have worked for Carrier.

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 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

That Rule 25(a) of the Agreement was violated to extent set forth in Opinion.

AWARD

Claim sustained as set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of September, 1958.

DISSENT TO AWARD NO. 8432, DOCKET NO. CL-8921

The majority states that Award 8432 is based upon applying to the facts of record in the instant case principles developed and applied by this Board since its inception governing the determination of discipline cases, as set forth in Award 8431 in which the same Referee participated as in the instant case.

In the first place, while many of the principles set forth in Award 8431 were not cited or relied upon by either side in the instant case and are not applicable to the facts of record in this case, other important principles developed and applied by this Board since its inception, which were cited and relied upon in behalf of the Carrier in the instant case, were either disregarded or ignored by the majority herein. For illustration:

The majority herein correctly recognizes the following facts:

"On July 1, 1955, a second notice of investigation was sent to Claimant. The charge now was 'failure to attach securely by fastener check G500615 to bag handled' for above-mentioned passenger. The investigation was held on July 7, 1955, and resulted in the discharge of Claimant on July 13, 1955. Appeal produced no change in the decision."

In respect thereof, the majority herein correctly recognizes as follows:

"* * * (4) As to the charge on which the second investigation was based, Rule 25 (a) of the Parties' effective Agreement requires that a charge against an employe be written and precise. The charge in the instant case was made in writing. It was also precise in respect to the allegation that Barroso had not snapped the fastener of his check No. G500615 securely. * * * (5) As to the timeliness of the investigation Rule 25(a) of the Agreement requires that the investigation must be held within seven days of date when charge is made or when the employe is held out of service."

But then the majority erred in concluding:

"* * * In view of Claimant's testimony, not successfully controverted by Carrier, that he was told orally by Station Master Carlson on June 20, 1955, that he was then being held out of service pending investigation of alleged check-tampering, we are forced to conclude that the investigation held on July 7, 1955, was not timely held, being 16 days after date Claimant was held out of service."

The majority's conclusion, supra, disregards, ignores and is in conflict with the following principles developed and applied by this Board since its inception:

1. That the Board will not reconcile conflicting evidence,

2. That the burden of proof is upon the Claimant who alleges that the Agreement has been violated; mere words that a violation has occurred are not sufficient without positive evidence to substantiate allegations as made,

3. That issues not raised at investigations are barred, and

4. That technical defects in the record, if any, are waived when Claimant, the real party in interest, expresses satisfaction with the investigation.

While Claimant alleged that, on June 20, 1955, he was accused of having tampered with baggage checks and held out of service therefor, his statement to that effect was not supported by positive or other evidence. On the other hand, the record shows that the Carrier denied that it had ever so charged Claimant, and in its submission the Organization itself repudiated such an allegation by admitting as follows:

"* * * There have been suspicions that some redcaps have in some way damaged the fasteners on their checks so that they might be removed and used the second time, but so far as we know no specific charge against any particular redcap has ever been made, in that respect."

The majority erred in accepting Claimant's unsupported allegation in preference to this other evidence, in view of Principles 1 and 2, *supra*, and particularly because the record showed that Claimant's testimony was contradictory and evasive, and in at least one respect was in conflict with testimony which was confirmed in the record.

In addition, the issue of whether the investigation was timely held, computed from the time Claimant alleged he was held out of service, was not raised at the investigation; consequently, it was barred under Principle 3, *supra*. There is no dispute but that the investigation was timely held in respect of the specific offense with which Claimant admittedly was charged.

Furthermore, under Principle 4, *supra*, Claimant waived any and all technical objections at the completion of the investigation when he testified that the investigation had been conducted in a fair and impartial manner. Many of our Awards so hold. For illustration, the following from Award 5076:

"* * * Whatever defect, if any, exists in the record cannot now be taken advantage of by or on behalf of one who actively participated in the hearing and assisted in making the record. Particularly is this true where the real party in interest, whose expressions of record testify to his satisfaction with the proceedings, had thereby waived any defects in the record."

In addition, certain principles set forth in Award 8431 were disregarded or ignored by the majority herein. For illustration:

The majority herein correctly found that Claimant was guilty of the charge as made; consequently, in sustaining the claim for pay, the majority disregarded and ignored Principle No. 8 of its Award 8431, which provided:

"* * * (8) If for any of the proper reasons stated above under (3) the Carrier's disciplinary action is deemed not supportable but if at the same time the record of the case shows that in the circumstances directly leading up to the Carrier's action the employee himself

was not free of improper behavior, the employe may be required to suffer some penalty such as no pay for time lost, upon reinstatement."

For the foregoing reasons, among others, Award 8432 is in error and we dissent.

W. H. Castle

J. F. Mullen

R. M. Butler

C. P. Dugan

J. E. Kemp