

**Award No. 10878**

**Docket No. CL-13034**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Levi M. Hall, Referee**

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**PARTIES TO DISPUTE:**

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

**THE LONG ISLAND RAIL ROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL15093) that:

1. Dismissal of Stenographer E. A. White on April 28, 1961 was improper, unjustifiable, unreasonable and unwarranted.
2. Carrier be required to restore E. A. White to his position of Stenographer with seniority rights unimpaired and he be paid for all time lost beginning April 28, 1961 and each day thereafter until such time as he is restored to his position.

**OPINION OF BOARD:** Petitioners claim that the dismissal of Stenographer E. A. White was improper, unjustifiable, unreasonable and unwarranted, and urge that he be restored to his position of Stenographer with seniority rights unimpaired and that he be paid for all time lost beginning April 28, 1961, until such time as he is restored to his position.

Carrier contends that the Claimant was guilty of insubordination, that an investigation and a complete hearing were held, that the Claimant was given a fair and full opportunity to cross examine all witnesses; that the evidence adduced at the hearing established conclusively that he was guilty of insubordination in refusing to perform clerical duties as directed.

We must recognize, at the outset, the primary responsibility for the direction of the work force lies with the management and the Carrier has a right to insist on strict obedience from its employees.

We must further be mindful of the rule that in the hearing of an employee on charges preferred against him by the Carrier, the officer conducting the hearing is the sole judge of the credibility of the witnesses and has a right to determine what the facts are where the testimony is conflicting. The Board, however, does have a right to inquire whether or not there is substantial evidence to support the charges made. We have no right to substitute our judgment for that of the Carrier in the determination of what punishment is meted out

unless it appears that the action of the Carrier was arbitrary and capricious, unreasonable and unwarranted.

Bearing these general propositions in mind, let us then examine, briefly, the testimony offered by witnesses at the hearing held. Most of the testimony is not in conflict, as appears from the following: E. A. White, Claimant, was a Stenographer in the Property and Purchase Department. It was customary for him to work as directed by various real estate agents employed in the department though it sometimes became necessary for him to determine which work submitted should be given priority. On the morning of April 28, 1961, he had taken two hours of dictation from Cummings, one of the real estate agents, Cummings having asked Claimant to get right at the work dictated; the work could not have been completed that day.

In the afternoon of April 28, 1961, Nolte, another real estate agent, asked the Claimant to type two forms for him. Claimant informed him he had quite a bit of work to do for Cummings. Nolte then turned to Mrs. Day, another Stenographer, who was seated at an adjoining desk and asked her if she would do the work, that it was not a rush job and did not have to be done that day. Mrs. Day accepted the work. A little later in the afternoon, Nolte gave the Claimant White four more accounts and instructed him to type the same in the usual manner and there was no comment from him. Nolte had in meantime reported the former incident to the Chief Clerk. The Chief Clerk in turn reported it to the Manager of the Department; the Manager then instructed the Chief Clerk to direct the Claimant White to do the work that was requested by Nolte. The Chief Clerk instead of himself directing White to do the work told Nolte to convey the message to him—that the Manager had directed Claimant to do the work Nolte had originally requested.

Nolte then took the papers which had been placed on Mrs. Days' desk by him from that desk and returned them to Claimant's desk. Nolte told him it was the same work he had asked him previously to do but that it didn't have to be done that day. Claimant, then stated: "I will have to tell Tom Cummings so that he can stand up for his rights". Nolte then returned to his own desk. White immediately carried the papers over to Nolte's desk and put them down on his desk. The matter was again reported to the Chief Clerk and within a half an hour or less notification was given the Claimant that he was being held out of service beginning April 28, 1961, pending trial and decision, in connection with:

"Insubordination—refusing to perform clerical duties as directed  
Jamaica, N.Y., April 28, 1961."

Prior to holding him out of service the Claimant was afforded no opportunity to explain his conduct. There had been no prior discipline of the Claimant. He had appeared bored and indifferent to his work though it was testified that his work was satisfactory and had been done promptly and directly. Nolte admitted that prior to April 28, 1961, the Claimant had done the work he had given him

There is some conflict in the testimony, as Carrier contends that when the Claimant returned the papers to Nolte's desk, he angrily threw the papers on the desk and said that he did not want to do someone else's work; that Nolte attempted to discuss the matter with him but White walked away.

On the other hand the Claimant consistently insisted that he did not reject any work; that he merely returned it for clarification; that he does not believe that he threw the papers down; that he told Nolte that he had wanted to discuss the matter with Cummings and he, Cummings, was not in the office and he had

no opportunity to do so; that he did not do the work at the time as it was his understanding it was not to be performed until the following week.

Considering all of the testimony in its most favorable light to the Carrier it is most difficult to conclude that an act of insubordination has been established; at most only an inference can be drawn that he refused to do the work as there is nowhere in the records any evidence of a direct refusal on his part to do it—he couldn't have done it on April 28, 1961 because of the direction from Cummings. As, originally, Mrs. Day had accepted the work from Nolte, it is hard to understand why Nolte reported the original incident to the Chief Clerk. Had he not done so, the work would have been completed by Mrs. Day and none of this would have happened. At most White's conduct could be characterized as either discourteous, a lack of good judgment or a misunderstanding.

Dismissal is a severe junishment. The discipline invoked here was not commensurate with the facts proven. The discipline is so out of proportion to the offense as to amount to an arbitrary or capricious action. This does not mean we are substituting our judgment for that of the Carrier's, nor that we are usurping managerial authority.

It appears from the record that an offer to restore E. A. White to service was made by the Carrier on the property but this offer was rejected by the Claimant and Petitioners. This was in the nature of an offer of settlement and need be given no further consideration here.

As was suggested in Award 4907 (Begley), the Claimant should be reinstated with full seniority rights and be compensated for the difference between the amount earned while out of service or while otherwise employed and the amount he would have earned had he not been held out of service.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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's assessment of discipline imposed was arbitrary and unreasonable and without just cause.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1962.

**DISSENT TO AWARD NO. 10878, DOCKET NO. CL-13034**

After correctly holding that the Board “\* \* \* must recognize, at the outset, the primary responsibility for the direction of the work force lies with the management and the Carrier has a right to insist on strict obedience from its employees.” and that “\* \* \* the officer conducting the hearing is the sole judge of the credibility of the witnesses and has a right to determine what the facts are where the testimony is conflicting.”, the majority failed to apply these well precedented Management prerogatives to the facts at hand and came up with an erroneous award.

Claimant's act of returning his assigned work to a superior by throwing same on his [superior's] desk saying “I'm not doing anybody else's work” is gross insubordination and not, as the majority states “\* \* \* at most only an inference can be drawn that he refused to do the work as there is nowhere in the records any evidence of a direct refusal on his part to do it \* \* \*”. Claimant's actions were attested to by at least two (2) supervisors and a fellow stenographer. Claimant denied throwing the work by saying “\* \* \* Some say I slammed it. Some say I threw it. But, in my view, I placed it on his desk.” This denial is uncorroborated, and Claimant failed to challenge his fellow-stenographer's statement at the hearing when he was cross-examining her.

It is fundamental that insubordination can be cloaked in various ways, and by failing to recognize Claimant's actions in this case as such the majority is in gross error.

For these and other reasons we dissent.

/s/ R. A. Carroll  
/s/ P. C. Carter  
/s/ W. H. Castle  
/s/ W. H. Castle  
/s/ D. S. Dugan  
/s/ T. F. Strunck

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS DISSENT  
TO AWARD 10878, DOCKET CL-13034**

The record in this dispute clearly sustains the conclusions reached in Award 10878 and the Employees' claim was properly sustained. That Carrier's Representatives were biased and prejudiced against the Claimant is clearly evidenced by the fact that he was impetuously held out of service without investigation of the circumstances, or giving Claimant an opportunity to explain his conduct. Such hasty action further violated Rule 6 (b), as no “major offense” had been committed. This Rule reads:

“When a major offense has been committed an employe suspected by the Management to be guilty thereof may, after the occurrence of the offense, be held out of service pending trial and decision.”

A review of the transcript of the trial held May 3, 1961, will further show the bias and prejudice of the Carrier's Officer who conducted it, by attempting to prove the charge of insubordination by introducing statements of supervisors, who were not present, and cross-examining Claimant on the contents

thereof by asking leading questions. Claimant was also denied his substantive right of cross-examination. It is clearly evident that the conducting officer was not interested in arriving at the truth, but rather, to sustain Carrier's charge by hearsay evidence, inadmissible statement, conflicting testimony, or by any other means.

It is apparent from the Dissent that the Dissenters either failed to read the entire record in this case, or they are guilty of the same erroneous and unsupported conclusions reached by the Carrier. In the first place, Claimant did not return the "work to the Superior by throwing same on his (Superior's) desk \* \* \*." This so-called Superior was nothing more than an employe without supervisory authority. Furthermore, Carrier failed to prove by competent evidence that Claimant threw the "work" on Nolte's desk, although it tried to do so by presenting, as its witness, the Chief Clerk, who testified that while in the adjoining room he "heard what appeared to be a slamming down of papers on a desk." The Chief Clerk was not only an incompetent witness, but the record shows that he failed to carry out the instructions of his Superior by ordering Claimant to perform the work in question. In fact, he passed his responsibility on to Nolte, who was not a supervisor.

It is interesting to note that the Dissenters, in their usual manner, are attempting to shift Carrier's burden on proving its charges onto the Claimant by stating that Claimant's denial, that he threw the file on Nolte's desk, is uncorroborated. After charging Claimant with "insubordination" the burden was upon the Carrier to prove by a preponderance of the evidence that he was guilty. This it failed to do in this case. There are a lot of Awards on this Board, authored by lawyers and judges, which have shifted the Carrier's burden of proof onto the Employes. It is a fundamental and well established rule of evidence that the burden of proof never shifts. The burden of proving a case (using the word "case" in its broad significance, as a basis of recovery or ground of defense) is naturally upon the person who puts it forward.

This Board, like other government agencies which have been created with judicial powers to determine controversies in special fields of activity, has proceeded on the theory that the ordinary rules of evidence would not apply or at least be not strictly enforced. So essential to the protection of rights of the individual has the usual practice of courts been considered, that in such cases where appellate courts have been called upon to review the proceedings they have held these auxiliary tribunals to the same standards. An outstanding instance of this is found in the case of the National Labor Relations Board. On the question of what evidence would be necessary to support a finding the United States Supreme Court declared that the requirements of "substantial evidence" means relevant evidence acceptable to a reasonable mind as adequate to support the conclusion arrived at. Consolidated Edison Company of New York v. N.L.R.B., 305 U.S. 197. Mere uncorroborated hearsay or rumor does not constitute "substantial evidence". U.S. v. Krumsick, C.C.A. Mass., 111 F. 2d 74.

That there was no proof of "insubordination" is clear from the fact that Claimant did not refuse to perform the work on specific instructions from a supervisor. Therefore, the assertion that: "It is fundamental that insubordination can be cloaked in various ways, \* \* \*," is nothing more than a presumption that disappears in the light of the controlling elements that necessarily must be proven before "insubordination" results. See Labor Member's Answer to Carrier Members' Dissent to Award 10692, Docket CL-9982.

If any "gross error" has been committed here, it is the Dissenter's failure to properly analyze the record and apply the controlling principles in the light thereof. The majority did so and Award 10878 was the result.

/s/ J. B. Haines

J. B. Haines  
Labor Member

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 10878

DOCKET NO. CL-13034

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**NAME OF ORGANIZATION:** Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

**NAME OF CARRIER:** The Long Island Railroad Company.

Upon application of the representatives of the employees involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The submissions presented to the Board by the parties indicate that disagreement exists with respect to the following matters:

- (a) The proper method of computing difference in earnings; and
- (b) The request of the Claimant that he be reimbursed for certain expenditures made by him during the period that he was withheld from service.

The subjects presented will be considered in reverse order: In answer to the request of Claimant as set forth in paragraph (b), this Board has consistently held that the purpose of an interpretation is to define or classify an award that has been made — not to make a new award. The Board has also held that it cannot extend or amend a claim through an interpretation to include something that was not covered by the claim submitted. Neither new matters nor new issues can be disposed of by means of an interpretation. Recognizing these prior holdings of the Board as sound, in accordance with the views expressed herein, we can give no further consideration to the matters referred to in paragraph (b).

Still left for our deliberation is the requested interpretation presented in paragraph (a) of the proper method of computing **difference in earnings**. The Board sustained the instant claim and insofar as is pertinent here expressed the following Opinion:

"As was suggested in Award 4907 (Begley), the Claimant should be reinstated with full seniority rights and be compensated for the difference between the amount earned while out of service or while otherwise employed and the amount he would have earned had he not been held out of service."

The claim presented was based on Rule 7-A (d) of the Agreement which reads, as follows:

"(d). When an employe is held out of service in connection with an offense and thereafter is exonerated, the charge shall be stricken from his record, he shall be reinstated with his seniority unimpaired and shall be compensated for the amount he would have earned had he not been held out of service."

It is Claimant's contention that the difference in earnings be considered on a weekly basis between what he actually earned weekly, and what he would have earned weekly had he not been held out of service, according to the award, while Carrier, conversely, maintains that it is the total gross wage earned by Claimant while outside of his employment as against the total gross amount he would have earned had he not been held out of service that controls.

No request was made by Claimant for a ruling that this difference in earnings be calculated on a weekly basis prior to the presentation here. The Opinion in Award 10878 provides that Claimant be compensated for the difference between the **amount** earned while out of service and the **amount** he would have earned had he been held in service. It is quite evident, consequently, that it was the intention of the Board to award Claimant the difference between the sum total of what he earned in other employment while out of service and the sum total of what he would have earned had he not been withheld from service from April 28, 1961, until the date he was reinstated.

Referee Levi M. Hall, who sat with the Division as a neutral member when Award 10878 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.