

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
THE PENNSYLVANIA RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5510) that:

(a) Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the discipline rules, when it imposed discipline of dismissal from service upon Mr. R. J. Kulikowski, Extra Tallyman, Fairhill Freight Station, Philadelphia, Pennsylvania, Philadelphia Region, effective May 8, 1962.

(b) R. J. Kulikowski should be restored to service of Carrier with seniority and all other rights unimpaired and his record cleared.

(c) R. J. Kulikowski should be reimbursed for all wage loss sustained as a result of the Carrier's action, as provided in Rule 7-A-1(d), commencing May 8, 1962, and continuing until adjusted. (Docket 1375)

OPINION OF BOARD: Claimant was discharged, effective May 8, 1962, for "Failure to properly handle delivery of records at Fairhill Freight Station, Philadelphia, Pa. on April 3, 1962." He was employed as an Extra Tallyman and had been on the seniority roster of the Carrier since November 5, 1943. On the date of the charged incident his services were being used as an R & D Clerk. Petitioner protests the discharge because (1) he was not accorded a fair and impartial trial, (2) his guilt of the offense charged was not proven by substantial evidence, and (3) the extreme discipline imposed was excessive.

(1) The evidentiary arguments aside, Petitioner first contests the fairness of the trial on the property on the ground that the Hearing Officer, at the outset, "made a deliberate attempt to silence two of the three representatives of the Claimant". Apparently Claimant was accompanied at the trial by three regional and local officials of the Petitioner. The transcript of the hearing shows that the Hearing Officer, in the interest of "decorum", requested that Claimant have but "one of these representatives act as your spokesman in your behalf". He added, however, that the others could nonetheless "cross examine witnesses or speak at the conclusion of the trial".

Petitioner contends that this ruling, without more, violated Rule 6-C-1 (b) of the Agreement which provides that at disciplinary trials the accused employee "may be accompanied by the 'duly accredited representative' as that term is defined in this Agreement", and who "shall be permitted to question witnesses insofar as the interest of the accused employee are con-

cerned". Rule 3-A-2 defines the term "duly accredited representative" to mean "the regular constituted committee (or any member or members thereof)" of Petitioner "or the officers of the organization of which the committee is a part."

Under the quoted language of the Agreement there would appear to be no categorical imperative that where an aggrieved employee appears at a trial by more than one such representative all must be given an equal voice in the presentation and conduct of the employee's case. In any event the transcript of the trial record shows that none of the three representatives were denied the right to question the witnesses and, indeed, at the conclusion of the trial all three were individually asked whether they had "anything further to say".

In the circumstances there would appear to be no basis in fact or in law for this contention of the Petitioner and it is, therefore, overruled.

(2) As to the merits, the Claimant, some 20 minutes before his regular quitting time at 6:00 P. M., was said to have abruptly left in the midst of checking a shipment from a patron of the Carrier, forcing the task to be completed by a fellow employee by 6:00 P. M., and, most importantly, leaving unattended or unprotected the master sheets or bills of lading for the shipment in question.

The charges were inspired by a strong letter of complaint to the Carrier the next day from the manager of the shipper involved. The writer was not called as a witness although the representatives of the Claimant objected to his non-presence. The only witness called by the Carrier was the Assistant Agent in charge of the platform work on the day in question. He knew the particular shipment had been assigned to Claimant, but admittedly had left the premises at 5:00 P. M., before the incident was said to have occurred. However, all the bills of lading for the shipment in question were introduced into evidence, showing the items checked off by the Claimant and those handled by his fellow employee. Moreover, in its finding of guilt Carrier also relied on the Claimant's own testimony at the trial as to how he disposed of the subject bills of lading before quitting that day.

Petitioner argues that the evidence upon which the Carrier's decision was based is grossly deficient both in substance and competency. It emphasizes that the sole witness called by the Carrier testified strictly from hearsay; that the Carrier never bothered to call the only witnesses who were really present at the time of the alleged occurrence, including the author of the letter of complaint; and that the Carrier's case was wholly uncorroborated and lacking in probative effect.

It is true that the Carrier's only witness was testifying from hearsay and if this were the only affirmative proof in the record Petitioner's claim should be sustained. But the fact is that there is also documentary evidence in the record, especially in the form of the bills of lading for the shipment, which is very revealing, and there is also what appears to be a damaging admission in the testimony of the Claimant himself. The bills of lading are documents which are kept in the regular course of the Carrier's business and as such are admissible, as a matter of law, as a uniformly recognized exception to the rule against hearsay evidence. These documents and the markings and employee's initials thereon show that the Claimant started the assignment that afternoon but that it was finished by another Tallyman. The time record of this other Tallyman, also in evidence, show that he was relieved from duty at 6:00 P. M. that day. And the Claimant himself admitted that he did not finish the assigned shipment that day because, as he testified, "I gave the bills

to the driver personally, and I told the driver that he would have a relief man take me over".

While the Claimant testified that this did not occur until 6 o'clock, "My time to go home", it remains that he admittedly released these important bills of lading to a stranger to the Carrier, conduct which normally is regarded as irresponsible and inconsistent with proper procedure. Moreover, it is plain that Claimant left it to the shipper's driver to secure relief when he stopped working, rather than to notify the relief man himself or to apprise his Foreman or anyone else in authority of his leave-taking in the face of an uncompleted shipment.

The Board's proper area of inquiry in disciplinary cases is that of determining whether there is substantial evidence to support the Carrier's decision. See, e. g., Awards 13168 (Ables), 10791 (Ray), 6108 (Messmore). A careful review of this record in its entirety show that there is substantial evidence to establish the Claimant's guilt, bearing in mind that the offense charged is "Failure to properly handle delivery records".

(3) The remaining contention of the Petitioner is that even if Claimant were guilty of the violation charged his dismissal was an "excessive and severe" penalty. Moreover, Petitioner claims that the Carrier used the past discipline record of the Claimant in determining his guilt of the instant charges rather than in merely assessing the measure of discipline to be imposed.

The record does not support this contention. On the contrary, the Carrier was careful to point out at the trial that it was offering the Claimant's previous discipline record only for the purpose of "determining the degree of discipline to be imposed". It has been repeatedly held by this Board that for such a limited purpose the past record of a Claimant can be appropriately considered. See e. g. Awards 5821 (Guthrie), 9511 (Elkouri), 12127 (Dolnick), 13063 (Engelstein).

The record shows that Claimant was involved in disciplinary proceedings on ten previous occasions, two of which were dismissals for being A.W.O.L. and later reduced to substantial suspensions without pay.

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 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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February, 1965.