

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5218) that:

(1) Carrier violated the current Clerks' Agreement at Springfield, Missouri when it arbitrarily and discriminately withheld Steve-dore K. A. Levitt from service and subsequently suspended him from service during the period extending from July 6, 1961 to and including July 21, 1961, without advice of precise charge or charges and without proper justification.

(2) Carrier shall clear the record of K. A. Levitt of discipline administered following investigation held on July 12, 1961.

(3) Carrier shall compensate Mr. K. A. Levitt a day's pay at the established stevedore rate of pay for each work day in the period July 6 to 21, 1961, inclusive.

OPINION OF BOARD: This is a discipline case.

Though it was not presented on the property it was urged at the panel discussion that there was a fatal omission in the record, arising from the following circumstances:

Claimant was served with a notice to report for an investigation for a reported violation of Rules by the Superintendent Terminal, H. A. Linderer, for a hearing at his office. The hearing was conducted by F. C. Carner, Terminal Trainmaster, without Superintendent Linderer being present. After the hearing Claimant received no notice of decision by the Terminal Trainmaster, who conducted the hearing, but was notified by the Superintendent Terminal that as a result of the hearing, he, the Claimant Levitt, was suspended.

It is urged by Petitioner that the testimony is in some respect conflicting, that only the hearing officer who presided at the hearing was qualified to make findings as to credibility and that he did not do so, consequently it cannot be determined whether there is evidence to support the act of suspension by the Superintendent Terminal and as a result Carrier failed to award Claimant a fair and impartial hearing. Award 13180 (Dorsey) is offered in support of this position.

As applied to the record and facts in this case we cannot concur in the decision arrived at in Award 13180. We must, necessarily, start out with the premise, that in the absence of an Agreement restricting the powers of management, the Carrier would have an inherent right to dismiss or discharge an employe without a hearing. On this property, however, Carrier has restricted itself by Agreement in the matter of discipline of its employes as contained in Rules 26 to Rule 31, inclusive, of the Agreement. Having examined these Rules we can find nothing that prescribes who shall prefer the charges, conduct the hearings nor that the officer conducting the hearings must render the decision or assess the discipline.

We have held in many awards that the Carrier could not be held to the same degree of perfection in the conduct of discipline cases as would be expected at a trial in a court of law. It is a matter of common knowledge that in court of law, trial and appellate judges frequently delegate to referees the sole and primary duty of taking testimony, this procedure including matters concerning discipline — such as, in contempt proceedings wherein domestic relations are involved, juvenile court hearings, disbarment proceedings involving the discipline of lawyers, and in many other proceedings. In all of these instances just referred to the trial or assigning judge renders the ultimate decision.

In the instant case we cannot assume there has been a complete lack of co-operation between the Terminal Trainmaster and the Superintendent in arriving at a determination of the disposition of it. If that were to be the claim such an issue should properly have been raised on the property so as to have afforded the Carrier an opportunity of rebutting it. It could not be raised for the first time here. Petitioners position in all of the foregoing respects is without merit. See Award 10015 — Weston; Award 2608.

In the progress of the claim on the property, it appears that on July 10, 1961, Claimant Levitt was notified to report at the office of the Superintendent which notice, with consent, was amended to read as follows:

“Springfield, July 12, 1961

“Mr. K. A. Levitt:

“Please arrange report my office 9:45 AM Wednesday, July 12, 1961, for investigation for your reported violation of Rules 702 and 772 of the Rules of the Transportation Department, freight platform, south Springfield, about 10:00 AM, July 6, 1961.

“You may have representative as prescribed by agreement rules if you so desire.

“Signed — H. A. Linder

“This will acknowledge above letter of receipt.

“Signed — K. A. Levitt”

A hearing was held and was conducted by L. C. Carner, Terminal Trainmaster; the only objection raised at the hearing was as to the preciseness of the charge, it being contended by the Claimant that it was too general in form to give him any notice as to what he was charged with as the charge merely charged violations of company Rules 702 and 772.

Rule 702 is a general rule governing the conduct of Carrier's employes and had the charge been confined to Rule 702 alone there might have been just cause for Claimant to complain that notice did not give him sufficient information as to the precise offense of which he was accused. He was also charged, however, with a violation of Rule 772 which provides, as follows:

"Rule 772. In areas where smoking is prohibited, 'NO SMOKING' signs will be conspicuously displayed and the rule enforced. Employes will bring the 'NO SMOKING' rule to the attention of visitors, and see that the rule is not violated in prohibited places.

"SMOKING IS PROHIBITED:

"In storehouses, material storage yards, sheds, and mill shops,

"In freight houses, sheds, warehouses, and on freight platforms, except in offices.

"In oil houses and other places used for storage of flammable liquids such as gasoline, paint, paint thinners, kerosene, etc.

"In engine room of diesel engines.

"In attics, file storage rooms and record rooms.

"On piers and other waterfront properties.

"In cars being loaded or unloaded at any of the above properties.

"In supply or camp cars containing flammable liquids.

"In parts washing rooms.

"In fuel oil pump houses and on fuel oil servicing tracks.

"In spray painting areas, rooms or buildings.

"Matches or discarded smoking materials should not be discarded on wooden floors, or in rubbish and waste receptacles or other unauthorized places, and should not be thrown from engine or caboose windows. Where possible in areas where smoking is permitted, an adequate number of non-combustible ash trays or receptacles partly filled with sand or water must be provided and used."

Claimant Levitt, though he had been in Carrier's employ for twenty years, denied that he had any knowledge of this rule or that it ever had been called to his attention. He asserts that he had never been furnished with a copy of the Rules — Transportation Department. He admits that there were "No Smoking" signs posted on the Mill Street platform at Springfield where he was employed. He further admits that there was a bulletin board at

the Freight House and that there might have been a bulletin on the board calling attention to these Rules but stated that he had made no effort to supply himself with a copy of the Book of Rules. He also concedes that on July 5, 1961 he had been cautioned about smoking on the Mill Street platform. All of this would indicate that Claimant should have had precise knowledge of what he was being charged with.

At the hearing there were two witnesses who testified that on the platform Claimant had a lighted cigarette in his hand both on July 5 and July 6. Claimant admitted that on each occasion cited he had a cigarette in his hand but denied that it was lighted. A witness who testified in Claimant's behalf testified that he, Levitt, had been smoking before he got onto the platform but flipped the fire off the cigarette as he was stepping off from the cars but didn't know what was said from thereon.

We have no right to substitute our judgment for that of Carriers; there was sufficient evidence to support Carrier's charge that there had been a violation of Rule 772. The discipline assessed was not so excessive as to indicate Claimant had not had a fair and impartial trial. The Agreement was not violated.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.