

**Award No. 13482**  
**Docket No. CL-14909**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DMSION**

Daniel **Kornblum**, Referee

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**PARTIES TO DISPUTE:**

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

**THE PENNSYLVANIA RAILROAD—NEW YORK REGION**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-652'2) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly **Rule 7-A-1**, when it held Mr. Cleo Richardson, Baggageman, Pennsylvania Station, New York, New York, New York Region, out of service commencing October 6, 1962, and subsequently imposed discipline of dismissal from service.

(b) **Cleo** Richardson should be restored to service with seniority and all rights unimpaired and his record cleared.

(c) Cleo Richardson should be reimbursed for all wage **loss** sustained as a result of the Carrier's action. (Docket 1456)

OPINION OF BOARD: **This** is a discipline case. Claimant had been employed by the Carrier since September 23, 1967. On October 5, 1962 he was assigned as an Extra Station Baggageman at Pennsylvania Station, New York City. On the morning of that day he is charged with having committed acts of insubordination against the Baggage Agent in charge of the Baggage Department, Pennsylvania Station, New York, New York. Investigatory hearing of the charges was initially scheduled for October 10, 1962. Claimant asked for an adjournment of the hearing for one week. He was granted an adjournment of six days, until the afternoon of October 16, 1962.

The hearing was held on October 16, 1962. The **agent of** the Carrier assigned to conduct this hearing was the Supervisor of Baggage and Mail of **the** Baggage Department of the Pennsylvania Station in New York City. The Organization points out this **employee was** immediately subordinate in authority to the Baggage Agent who preferred the charges and who was directly **involved** in the insubordination incident charged.

The testimony developed at the hearing is clear. It came from the Baggage Agent, the **sole** witness who appeared and testified at **the** hearing. In brief it is that the Claimant was due to report for work at 7:59 A.M. on October 5, 1962. Instead he did not show up until 8:15 A. M. He was **nevertheless** permitted to go to work and was directed by the Baggage Agent to report "**along-side** of Table B, to help work the **P.As.**" Claimant was **not** seen again until 8:50 A.M. at which time he was again directed "to go and assist with the

**P.As.**" Instead of going to work as directed Claimant paused alongside a skid at the work table **and** uttered an **extremely** abusive, vulgar and personal remark directed to the Baggage Agent. Because of his repeated refusal to comply with the order as well as **the** gross contumely of his utterance, Claimant was told to leave the premises **immediately**. He left and was thereafter dismissed in consequence of the investigation held on **October 16, 1962**.

Claimant pleaded "not guilty" to the charge. **However**, he refused to answer auestions directed to him by the **Hearing** Officer on the around, among others, **that** "when I am allowed to present three witnesses in my behalf then **I** will answer **all** **questions** to the charge". The **reference** to the three witnesses came about when the Baggage Agent in his testimony **referred** to the fact that Baggage men Skinner, Medina and Flynn were present in the room when and where the **occurrence** took place. At that point, Claimant's spokesman had asked that the three named **employees** be produced as witnesses or else that a continuance be granted to Claimant so that he could summon them himself. The request was denied, as had other **like** requests on behalf of the Claimant for postponement of the investigation made **earlier** in the hearing. The reasons stated for this refusal will be considered later in this opinion. Suffice it to say here that this is one of the grounds **why** the Organization contends that Claimant was denied a fair and impartial hearing.

**There** is nothing in the record to discredit the testimony of the Baggage Agent and thus there is no question but that if **one** accepts this testimony there was **ample** cause for dismissal of the Claimant. And, despite the citation by the Organization of Award No. 39, Special Board of Adjustment No. 374 (Lynch), the mere fact that this testimony was uncorroborated by other witnesses or else that a continuance be granted to Claimant so that he could summon them himself. The request was denied, as had other **like** requests on behalf of the Claimant for postponement of the investigation made **earlier** in the hearing. The reasons stated for this refusal will be considered later in this opinion. Suffice it to say here that this is one of the grounds **why** the Organization contends that Claimant was denied a fair and impartial hearing.

What does give us pause for serious concern is the Organization's contention that the Claimant was not accorded "**a** fair and impartial **trial**" **as** required by Rule 6-A-1 of the parties' Agreement. In this regard the two areas of principal concern are both related strictly and narrowly to the nature of the charges in this case; the one is the failure **to** grant a continuance to permit the calling of the three baggagemen who admittedly were present when the ugly remarks in question were said to have been made; the other and related one is that the **Hearing** Officer at the investigation on the property was a subaltern of the Baggage Agent against whom the insubordination was directed.

In connection with the first point, the three baggagemen who were potential witnesses to the event were all very forthrightly named in the **testimony** of Mr. Aicher, **the** Baggage Agent. **When** this occurred the following **colloquy** appears in the record:

**"Q.** You want to call in witnesses now ?

A. Yes.

**Q.** What **witnesses** did you have in mind?

A. In as **much** as Mr. Aicher has named these **witnesses**, I would **like to call them**. I would like **to** withdraw the request I made earlier

in regards to the earlier witnesses. In as much as the testimony of Mr. Aicher **has** brought to light three witnesses to this alleged **incident**, I hereby request that management call Baggage man Skinner, Baggage man Flynn and **Baggage man** Medina to present themselves here **for** testimony to prove that this gentleman did perform some work on that date and to point out that no such incident took place on **the** date in question.

STATEMENT **BY MR. KANE:** ~~{The Hearing~~ Officer]

S. Mr. Harris, **as** you stated earlier **Baggage man** Skinner was not available. The time is now **4:43** P.M., D.S.T. and Baggage men Medina and Flynn are relieved from duty and are **enroute** home and as testified by Mr. Aicher; employees of the same class or craft do not want to get involved in insubordination cases involving an **employee**, therefore your request will have to be denied.

MR. HARRIS **TO** MR. KANE:

**Q.** It is my understanding that you definitely refuse to call the **three** witnesses, Baggage men Skinner, Flynn and Medina, and that they will not be called **today nor any day** in regards to the trial?

A. The witnesses named, their stand **has** been **already** outlined by the principle **witness** in **this** case, Mr. **Aicher**, and **it is** a known **fact that they** would have nothing for or against to contribute to **this trial record**.

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**"MR. KANE TO MR. RICHARDSON:** [Claimant]

**Q.** Where were you at **8:53** A.M., **D.S.T.** on October **5th, 1962** ?

A. When I am allowed to present three witnesses in **my** behalf I till answer the questions.

**Q.** Your representative just said that **you** will answer all questions pertaining to **8:53** A. M., **D.S.T.** on October **5th, 1962** ?

A. When the management grants me the right to have present **here** three **witnesses** in my defense, then I will answer all questions to the charge.

**Q.** Your representative withdrew the **witnesses** for your defense and requested the three witnesses from **the** management?

A. That was outlined in the testimony of the Baggage Agent.

**Q.** His testimony stated that they **either** did not hear, were too busy or did not want to get involved, therefore they are neither rebuttal **or** corroborating witnesses.

A. I do not agree with **his** thesis in regards to this incident."

**While** it may very well be, as Mr. Aicher testified, that these three named **witnesses** could or would contribute nothing. to the Claimant's defense, it **re-**

mains that **unless** and until they were called what they would or would not **say as to the incident** resides strictly in the realm of hearsay. And the significant fact is that in denying the Claimant's **request for a continuance**, the Hearing Officer was accepting this hearsay by Mr. Aicher **as** though it had been established in fact.

This leads to the second area of concern in **this** case: the Hearing Officer **was an** immediate subordinate of Mr. Aicher. The charges involved were that **Mr.** Aicher had been insubordinated by Claimant. One may assume that a Hearing Officer in such a position would hardly reject the word of his **superior**, even to the extent of the **hearsay** the latter placed in the **record** concerning the indisposition of the three named witnesses to **testify**.

It is not the duty or obligation of the **Carrier** to produce witnesses in the Claimant's behalf; it has been repeatedly held that this burden **is** upon **the** Claimant and the Carrier cannot be required to assume this **responsibility**. See, among others, **Awards** 6067 (Wenke), 10394 (Mitchell). But that is not the same as holding that a Claimant must be denied a reasonable continuance of the **hearing** and **thus** denied the **opportunity** to produce the **witnesses** on **his** own.

In **all** the circumstances and in the **interest** of justice this seems to be **a** case for a remand of the claim to complete the investigation, rather than **to** affirm on the basis of something less than a full hearing in the first **instance**. See Awards 8346 (**Tipton**); 4634 (Carmody); see also **Awards** 862.2637, **2728** and 10439. Accordingly, the claim will be remanded and **a new date set** for the investigation in accordance with this Opinion.

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 **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 claim be remanded and **a** new date set for the investigation **in** accordance with the Opinion.

#### AWARD

That the Claim be remanded and a new date set for the investigation **in** accordance with the Opinion and **Findings**.

NATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
**Executive** Secretary

Dated at Chicago, Illinois, this 16th day of April 1966.