

Award No. 16154
Docket No. CL-16817

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, 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 (GI-6137) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 6-A-1 to 7-A-1, inc. when it dismissed from service Howard G. Edsall, Extra Clerk, under the jurisdiction of the Train Master, Kinsman Street Yard, Cleveland, Ohio, Central Region, Lake Division, on December 2, 1965.

(b) Howard G. Edsall should be restored to service with seniority and all rights unimpaired and his record cleared.

(c) Howard G. Edsall should be reimbursed for all wage loss sustained as a result of the Carrier's action.

OPINION OF BOARD: This is a discipline case arising out of the dismissal of Claimant from the service of Carrier for "receiving wages from the company by improper means through unauthorized entry of your name on work assignment sheets or submission of improper time cards or both . . ." for specified dates during the months of August and September, 1964. Petitioner seeks reinstatement of Claimant with all rights unimpaired as well as full exoneration and reimbursement for all wage loss sustained as a result of Carrier's action.

Carrier avers that Claimant received proper notice of the precise charges against him; that he received a fair and impartial trial, and that the punishment imposed was commensurate with the major offense charged and established through probative evidence introduced at the trial, which was held approximately fifteen months after the disputed conduct of Claimant.

Claimant originally was notified to attend trial at 10:00 A.M., D.S.T., Tuesday, September 14, 1965 by notice dated September 8, 1965, which contained the following charge:

"Receiving wages from the company by improper means through unauthorized entry of your name on work assignment sheets or sub-

mission of improper time cards or both for July 17, 19, 22, 23, 26, 29, 30, 31, August 6, 7, 9, 16, 18, 19, 20, 24, 25, 26, 31 and September 22, 1964."

The trial was postponed until September 28, 1965 and finally concluded on November 6, 1965, after several continuances and postponements. On December 2, 1965, Claimant received a dismissal notice which was appealed and ultimately denied on January 10, 1966.

Examination of Carrier's notice of Discipline reveals that all July dates contained in the original charge against Claimant had been deleted, and that the disciplinary action imposed was based entirely on Carrier's charges concerning specified dates in August and September 1964.

Initially, Petitioner contends that the original charge received by Claimant was not clear as he had no knowledge of ever entering his name on the clerical assignment sheet without authority and had no knowledge of ever submitting an improper time card. The trial record reveals Petitioner's repeated efforts to obtain further clarification of the precise charges against Claimant at the inception of the hearing. Carrier's position throughout the proceeding has been that the original charge was clear and precise as to the nature of the Claimant's wrongful conduct and the specific dates in issue. Furthermore, the trial record reveals that Petitioner considered Claimant fully apprised of the charges against him during the second day of the trial, which continued thereafter for seven additional days during October and November, 1965. Rule 6-C-1 of the applicable Agreement provides that "an employee who is accused of an offense and who is directed to report for a trial therefor, will be given reasonable advance notice in writing of the exact charge for which he is to be tried and the time and place of the trial." It is well established that the fundamental purpose of the notice is to provide an employee with an opportunity to prepare his defense against the accusations of his employer. Awards 11170, 11783, 13969 and others. In the instant case, there is no probative evidence that Claimant was prejudiced in any way by the form of notice and charge made by the Carrier. Therefore, we must conclude that said notice was comprehensive enough to place Claimant on notice as to the matters under investigation and was not in error as alleged by Petitioner. Awards 13969, 12898, and 10355.

Petitioner further contends that Claimant did not receive a fair and impartial trial because Claimant was not allowed to retain in his possession throughout the trial copies of various documents and records introduced in evidence by Carrier during the trial, as well as copies of daily stenographic transcripts of the trial. The record reveals that copies of all documents and records introduced by Carrier, as well as transcripts of the trial, actually were made available to Petitioner and Claimant while the trial was in progress, but that such documents had to be returned to Carrier at the close of each session of the trial. Although such a requirement on the part of the trial officer may have inconvenienced the Petitioner in the preparation of Claimant's defense as the trial progressed, it does not constitute reversible error in the absence of any probative evidence of bias or prejudice on the part of such officer. Furthermore, there is no evidence that Claimant was not offered every opportunity to present witnesses in his own behalf and exhaustively cross-examine Carrier's witnesses. Careful analysis of the trial record, clearly establishes that Carrier's conduct of the trial was neither vindictive nor

prejudicial and that none of Claimant's procedural or substantive rights were abrogated. Awards 6108, 14069 and 15735. Therefore, we must conclude that Claimant received a fair and impartial trial despite minor inconveniences resulting from the impounding of records and documents by the trial officer at the conclusion of each session of the trial. Hence, we find no violation of Rule 6-A-1 of the applicable Agreement as alleged by Petitioner.

Petitioner also avers that Claimant was prevented from perfecting his appeal by Carrier's failure to disclose reasons for deleting July dates from the notice of dismissal until January 11, 1966, when Claimant was advised that his appeal had been denied. We cannot agree with Petitioner that Carrier's failure to reveal reasons for deleting July dates from original charges against Claimant constitutes reversible error as the failure to prove all charges contained in a notice of investigation does not necessarily invalidate the entire proceeding. Awards 14021, 9049, 8821 and others.

As to the merits of the instant dispute, the record reflects that Claimant served in a position of Extra Clerk from June 15, 1964 until December 2, 1965 under the jurisdiction of the Trainmaster at Kinsman Street Yard, Cleveland, Ohio. On or about July 13, 1964, Claimant was instructed by the Acting Trainmaster to post and learn the duties of position, G-2, so that he could relieve the incumbent of this position (Mrs. Debelak) during her scheduled vacation between August 7, 1964 and September 8, 1964. The regular assigned duties of position G-2 are as follows:

"Assign Clerks and Yardmaster, Extra Clerks and Extra Yardmasters; prepare and submit the AD 2500-W payroll time cards for the clerks and the Yardmasters. Perform all stenographic work for the Trainmaster and the Assistant Trainmaster; take Trials and Investigations for the Trainmaster and the Assistant Trainmaster; maintain files and other clerical duties in the office of the Trainmaster."

From June 21, 1965 through June 28, 1965 Claimant again relieved the present incumbent of position G-2, Mrs. Ella Ayers, while she was on vacation.

Carrier's Supervisor of General Accounting, who is responsible for recording and reporting the operating expenses of Carrier's Central Region, conducted an investigation of payroll practices and procedures in the Cleveland District in 1965 because of rather heavy charges, particularly in the Kinsman Street area of the Cleveland District. During the course of the investigation various records prepared by personnel in the Trainmaster's office at Kinsman Street were reviewed as well as other records available in the office of the Carrier's Division Superintendent in Cleveland, Ohio. Particular findings of said investigation disclosed variances between time cards (AD-2500-W reports) submitted by or on behalf of the Claimant on the various dates specified in the original notice of investigation in this dispute and "supporting" documents such as the Yard Crew Assignment Lists, Employee Time Reports, Clerical Assignment Sheets and the Trainmen Extra Assignment Records. Detailed and explicit evidence was offered by both parties concerning each specific date found in the original charge of Carrier against the Claimant.

Although much of the voluminous record in this case is devoted to whether or not Claimant was authorized to enter his name or other names on clerical

assignment sheets or to prepare and submit time cards (AD 2500-W) for himself and other clerks under the jurisdiction of the Trainmaster on the disputed dates involved herein, the essence of the Carrier's charge against the Claimant is an accusation of dishonesty and not merely unauthorized preparation and execution of various documents. Consequently, Carrier must support such an accusation of dishonesty with clear and convincing evidence of alleged misconduct as the offense charged implies an element of moral turpitude if not criminal liability. **How Arbitration Works, Revised Edition** by Elkouri and Elkouri pp. 416-8.

The record shows that the investigation conducted by Carrier's Supervisor of General Accounting was primarily carried out in Pittsburgh, Pa., and that neither Claimant nor his supervisors at the Kinsman Street Yard were questioned at any length prior to the trial. In fact, the Trainmaster in charge during the period in dispute had no knowledge of the charges against Claimant until the trial and offered no evidence in support of such charges.

Rebuttal witness called by Petitioner during the trial on behalf of Claimant testified that none of the so-called supporting documents relied on by Carrier accurately reflected the actual positions filled by Claimant and others on specified dates, and that the only accurate records of work performed by Claimant are time cards, either submitted by Mrs. Debelak or himself during the period in question. The trial record is replete with testimony concerning lack of proper controls at the Kinsman Street Yard and the board delegation of duties given to the incumbent of the G-2 position by the Trainmaster in charge. The record further reveals that some controls were belatedly instituted by Carrier subsequent to this dispute, but such action has no bearing on this case.

Petitioner offered rebuttal evidence to support Claimant's contention that he actually worked during every shift for which time cards were submitted on all of the disputed dates in August and September 1964, except for two specific overtime shifts, one on August 6, 1964 and the other on August 26, 1964, as to which Claimant admitted error.

Carrier's basic charge against Claimant is bottomed upon the patent variance between certain time cards submitted on behalf of Claimant and time actually worked by Claimant as shown on supporting documents such as individual time reports, clerical assignment sheets and other reports required by Carrier.

An indispensable element of Carrier's position, is a finding that such supporting documents, either separately or collectively, accurately reflect the corresponding time and assignments reported on employees' time cards, which Petitioner vehemently denies. Moreover, Petitioner has offered probative evidence which specifically refutes the evidentiary significance of such documents, and supports Petitioner's averment that only the time cards of employees accurately reflect work performed by them during the period in dispute.

Thus, we are confronted with conflicting evidence concerning the validity of a basic premise advanced by the Carrier in support of the disputed disciplinary action against Claimant. Were we presently concerned with determining whether the Claimant was entitled to payment for various assignments during the period in question based upon the evidence before us, a motion to dismiss such a claim might be timely. However, the instant claim arises out of

extreme penalty imposed by Carrier and the burden of proving the serious accusation involved through clear and convincing evidence rests with the Carrier.

After thorough examination of the entire record in this case, we find the evidence not sufficiently convincing to satisfy the Board that the requisite degree of proof has been met by the Carrier to support the disciplinary action invoked. Accordingly, the Claimant shall be reinstated with all rights unimpaired and be reimbursed for any loss of earnings sustained as a result of Carrier's action.

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 violated.

AWARD

Claim sustained.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1968.