



Award No. 17156

Docket No. CL-17820

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY-EASTERN DISTRICT

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6454) that:

- (1) Carrier violated the Rules Agreement, effective May 1, 1955, except as amended, particularly the discipline rules, when it imposed discipline of dismissal from service upon Mr. Daniel Webster Dofner, Mail Handler, Omaha Union Station Mail Facility, Omaha, Nebraska, Nebraska Division Roster 63-2, on March 2, 1967.
- (2) Mr. Daniel Webster Dofner should be restored to service of Carrier with seniority and all other rights unimpaired and his record cleared.
- (3) Mr. Daniel Webster Dofner should be reimbursed for all wage loss sustained as a result of the Carrier's action, as provided in Rule 45 (c), commencing February 16, 1967, and continuing until adjusted.

OPINION OF BOARD: Claimant, Daniel Webster Dofner, an employee of Carrier's for seven (7) years was charged with reporting for work some three (3) hours and twenty-five (25) minutes late on February 16, 1967, and with involving himself in an "altercation" with his supervisor over this lateness and what was to be done about it.

Claimant was properly notified that an investigation of the above charges would be had and on February 23, 1967, a hearing was conducted by the Terminal Superintendent, the proper Carrier official. The Organization took objection several times during the hearing, alleging Claimant's right to a fair hearing was violated.

On March 2, 1967, Claimant was notified by the Superintendent of the Transportation Division that he had considered the evidence, found the charges sustained, and that Claimant was therefore "dismissed from the service."

There followed an exchange of correspondence in the review procedure, the relevant letters being (a) the one from the Superintendent of Union

Station affirming the decision of the Transportation Division Superintendent and (b) the next one from the same Transportation Division Superintendent declining a request for reinstatement. The Organization objected to a review being taken by the same officer who had rendered the opinion and decided the discipline from the transcript, but who had not been present at the hearing.

The case was then properly advanced to this Board.

The Organization alleges that Carrier violated their Agreement with respect to Claimant. Set forth below are the pertinent sections of Rule 45, which we find controlling:

"RULE 45. ADJUSTMENT PROCEDURE:

"(a) No employe will be disciplined or dismissed without a fair hearing by his supervising officer.

* * * * *

"(b) Right of appeal to the next highest officer up to and including the highest official designated by the railroad company is conceded."

This Board has said and repeated innumerable times that it will not disturb the findings of the hearing nor interfere with the discipline meted out by Carrier where it is apparent that Claimant received a fair and impartial trial and that none of his rights were capriciously or arbitrarily violated.

In the instant case, this Board finds that Claimant received neither a fair trial nor a meaningful review.

We find the hearing officer erred in the manner of certain of his questions and rulings in the Record.

The hearing officer further erred when he introduced Claimant's past discipline record into the transcript. It has long been settled that although the past record may be considered in assessing discipline, a review of that record at the hearing precludes Claimant from being accorded a fair and impartial investigation of the current charges. (Awards 11130, 11308, and 13758).

Inclusion of Claimant's past record is compounded in the instant case where the opinion and decision for dismissal is issued, and, we must assume, arrived at by one other than he who heard the testimony. The official who conducts the investigation, hears the evidence and see the witnesses should evaluate the evidence and decide whether the charges will lie against the employe. Although the Agreement here is silent as to specifics, it calls for a fair and impartial hearing, and we fail to see how this can occur under the above circumstances. (Awards 7088, 8020, 10015 and 13180).

This becomes especially critical in the instant case where the one who rendered the decision and decided the discipline was also the next "higher officer" to whom appeal here had to be taken, denying Claimant his right to a fair review. (Award 10015). Again, although lacking in specificity, the Agreement concedes the right to appeal to the next highest officer and this can not be embodied one in the same person.

The Carrier has complete control of the mechanism from investigation, appeal and discipline. Control carries the commensurate duty of impartiality and fairness. In the instant case Carrier violated its agreement and the Claimant's rights to a fair trial and an impartial review.

There is reversible error.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May 1969.