

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29737
Docket No. MW-30300
93-3-92-3-22

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Trackman G. W. Brannon for conduct unbecoming a Conrail employe when he allegedly obtained/charged food to Conrail on November 8, 15, 1989, December 11, 1989 and January 25, 1990 was arbitrary, capricious on the basis of unproven charges and in violation of the Agreement (System Docket MW-1740).
- (2) The Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage and benefit loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively Carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was charged with conduct unbecoming an employee when he allegedly obtained meals on four specific dates from Bob's Big Boy Restaurant and improperly signed the name of an employee who was entitled to secure meals at the restaurant by charging them to the Carrier.

The testimony adduced at the Investigation consisted of two Carrier witnesses who presented their version of interviews with an employee and a non-employee (Claimant's cousin) and the written statement of the employee. The written statement was introduced over the objection of Claimant's representative and simply says that he (Claimant) showed his cousin how to get meals from places and that the employee knew only the first name of the cousin, which was George.

Further testimony developed that the Restaurant Manager identified "George's" picture from some 46 photos. Claimant was not identified.

The employees argue that Claimant was never identified as being in the restaurant on the dates specified; that Claimant's accuser, the employee who wrote the statement about Claimant teaching his cousin George, was not present to be cross-examined.

Claimant, himself, denied showing his cousin how to obtain meals and had no recollection of being in the restaurant on the dates charged. Claimant further denied that he had obtained meals at the restaurant and improperly charged same to the Carrier.

Following a careful and thorough review of the record, the Board finds that Claimant was not afforded a fair and impartial hearing as contemplated by Rule 27. Among the due process rights provided is the right to confront and cross-examine witnesses. See Third Division Awards 12812, 20092, 20792. The accusatory statement from the employee was not corroborated, nor was the employee who wrote the statement available at the Investigation for cross-examination. Several Awards have enunciated this right. See Third Division Awards 8713 and 12090.

Moreover, Claimant was never identified as ever being in the restaurant by the Restaurant Manager. Claimant was not identified with being in the restaurant on the days specified in the Statement of Claim. Claimant has never been identified as securing meals on the specific dates charged and improperly charging them to the Carrier. In Third Division Award 23976, the Board held:

"There is little debate that theft or misappropriation of property is an offense warranting dismissal. However, the quantum of evidence to substantiate such a charge is of a

considerably higher nature than that required in other types of discipline cases. In addition, this burden of proof rests with the Carrier. In the instant matter, the Carrier failed to meet its burden of proof. Carrier's entire case rested upon testimony of their Special Agents wherein statements of Mallory and Robinson were read into the record. The Board further concludes that the introduction of such hearsay statements of witnesses is not sufficient evidence to support a finding of theft."

Therefore, this claim must be sustained and the Claimant allowed the remedy requested in Part (2) of the Statement of Claim consistent with the Rules in effect on the property.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.