# Award No. 5076

# Docket No. CL-5062

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

A. Langley Coffey, Referee

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## PARTIES TO DISPUTE:

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

## GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Clerks' Agreement.

1. When on or about June 2, 1948, after an investigation, they removed Gottlieb Markel, Caller, from service in the Freight House at Minot, North Dakota, claiming he was physically unfit to perform service, which fact was not proven in the investigation held at 9:00 A.M. on June 2, 1948.

2. That Gottlieb Markel be reinstated to service as of June 2, 1948, and compensated for each and every day thereafter for all wage losses sustained, until such time as he is reinstated to his former position as Caller in the Freight House at Minot, North Dakota.

OPINION OF BOARD: The sole question for Board determination is whether or not the investigation in question was fair and impartial, and whether the Carrier violated the rules of its Agreement with this Organization. While the parties burden the record with extraneous evidence and argument, they expressly narrow the issue to this one question.

The Board looks with a critical and nicely judicious eye on proceedings under the "investigation" rules of an agreement, because the Carrier, ordinarily, occupies the dual position of an interested party and also a "fair and impartial judge." But even so, if the employe has enjoyed due process and there is substantial evidence to support the action taken, the Board will be prudently attentive to examine probable effects and consequences of its acts, so as to avoid danger of overriding managerial judgment properly exercised. That judgment will not be disturbed unless it appears that the Carrier acted in bad faith, arbitrarily, capriciously or upon a fundamentally wrong basis. See Award 2866.

A careful examination of this record reveals that the employe had due notice and was given the early hearing contemplated by the rules. He was apprised of his rights to have witnesses present and to be represented at all stages of the hearing. He voluntarily waived both. By his own testimony he acknowledged that a physical examination had been given him; that he was

familiar with the results, and that he had failed to pass the examination. He expressed complete satisfaction with the investigation and the manner with which the hearing had been conducted.

The record is conclusive that the employe was afforded the due processes of the contract rules. By his own admission that he was given a physical examination with which he was familiar and his acceptance of the results, it only could have served to encumber the record to introduce and make a part thereof the physician's report. There existing no controverted question of fact, the introduction of evidence was not necessary. Whatever defect, if any, exists in the record cannot now be taken advantage of by or on behalf of one who actively participated in the hearing and assisted in making the record. Particularly is this true where the real party in interest, whose expressions of record testify to his satisfaction with the proceedings, had thereby waived any defects in the record.

The Organization charges, in effect, that the employe was overreached and an unfair advantage taken. This is a serious charge and one with which we are unsympathetic in the absence of positive proof. It is founded on bad faith, something which will never be implied, and requiring strict proof to sustain. The basis in this record for such a charge is that the hearing would have been conducted differently had the employe been represented. Possibly that is true, but the employe made an election not to be represented, which was his to make under the Agreement, and there is no evidence that the Carrier in any way was responsible for or influenced that decision in any way.

There is nothing in the record to show that the employe was not able or capable of taking care of himself, so Award 4745, to which our attention has been called, is not in point. Attention also has been called to Awards 2144, 2880, 3288, 4524, 4590, 4595.

Award 2144 is authority for holding that an employe must be given a hearing to present his evidence as to his physical condition if he desires it, and the requirements of a hearing are not met if reasonable consideration is not given to the evidence adduced by the employe. In 2880 it was found "not necessary to determine whether the proceeding * * * * were properly initiated or conducted." Award 3288 involved rules substantially different from those in question. There it was expressly provided by rule that in advance of the hearing the employe representative should be furnished with all information "on the matter as the Company may have." Award 4590 does not involve a charge that the investigation or hearing was unfair or improper, and there the decision was on a controverted fact question. In Award 4524 the Board found that the notice of hearing was improper and further overruled the Carrier's contention that rules similar to those in question did not apply to the facts of that case. Award 4595, between the same parties and involving the same rule, is misconstrued by the Organization and a careful reading of the Award reveals it more damaging than sustaining to the Organization's case. The Board there held that the subject rule does not apply to an employe who was out of service, by his own request, but that his reinstatement was governed by another rule. (In the instant case it has been noted that the employe was disqualified on a particular job as a result of the hearing but took himself out of service by obtaining a leave). The gist of the Award is that an employe on disability leave may be considered by the Carrier to be under continuing disability until evidence is adduced to the contrary.

The obvious points of distinction between cases makes further comment unnecessary. As held in Award 4840, it being "acknowledged that the hearing had been held in accordance with the agreement," charges of unfair conduct in making investigations and holding hearings, will not be upheld.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.