

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

(a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective October 1, 1940 and the Memorandum of Understanding between the parties dated August 6, 1942 were violated at the Boston, Massachusetts Agency in dismissing John H. Kane from Service April 29, 1948;

(b) He shall be returned to service with seniority rights unimpaired and compensated for wage loss sustained retroactive to and including April 21, 1948 on which date he was removed from service and subsequently dismissed; and

(c) He shall be allowed interest at the rate of one-half of one per cent per month on all monies withheld, through loss of wages resulting from the action of the carrier in dismissing him from service.

OPINION OF BOARD: Claimant was dismissed for giving a false answer to the question: "Have you ever been charged with any crime?"

Claimant entered the service of the Carrier in 1943. He was in military service from 1944 until 1948 when he was honorably discharged and resumed service with the Carrier.

While in military service in 1947 Claimant was arrested on a charge of larceny of an automobile. He pleaded not guilty, was tried, found guilty and given a six months' suspended sentence.

Paramount to the Memorandum of Understanding of August 6, 1942 and the Selective Training and Service Act of 1940, Claimant's status as an employee was not interrupted by his military service. Before his restoration to service with the Carrier, however, he was handed and he signed an application for employment in which he certified falsely that he had never been arrested.

About a month later he was charged with the falsification and upon investigation and hearing was dismissed.

FIRST. The Organization maintains that Claimant was not given a fair and impartial hearing because the Assistant Superintendent filed the charge, conducted the investigation and acted as "prosecutor, prosecuting witness and trial judge."

It is true that a number of awards of this Board indicate that such a combination of functions in one man may amount to denial of a fair hearing (Awards 4317 and 5296). But in those cases the officer of the Carrier was the main witness against the employe and so was in the invidious position of having to pass on his own credibility, whereas here the facts were not in dispute and the evidence necessary to support the charge was all a matter of record.

We are unable to conclude that Claimant was denied a fair and impartial hearing.

SECOND. The Organization also maintains that the Agreement requires applications for employment to be made by new employes only; and that to require Claimant to answer the questions put to him, as a condition of his restoration to service, was a violation of the Agreement, the Memorandum of Understanding and the Selective Training and Service Act.

If Claimant had refused to sign the application or to answer any questions and as a consequence had been denied restoration to service, we would have before us for decision the question whether the Carrier could properly impose any such condition upon Claimant's restoration to service. But this the Claimant did not do. He answered and he answered falsely.

The question put to him was upon a subject material to the employment; and when he chose, not to stand mute, but to answer the question, we think the Carrier was entitled to a truthful answer.

THIRD. The application for employment signed by Claimant contained, in addition to the false statement, a stipulation that dismissal from service would ensue if the statement was incorrect.

This stipulation, of course, was invalid and of no binding effect for the reasons stated in Awards 2217 and 2636. The Carrier's discretionary obligations with respect to discipline and dismissal cannot be fixed in advance by private stipulations such as this with individual employes.

Disregarding the stipulation, however, we cannot say that dismissal was unreasonable or an abuse of discretion.

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 Employe involved in this dispute are respectively Carrier and Employe 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. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of February, 1952.