

Award No. 6132
Docket No. CLX-5950

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Paul G. Jasper, 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, was violated at Chester, Pennsylvania Agency April 7, 1948 in the treatment accorded John H. Moreno in dismissing him from service as a result of an alleged investigation conducted April 12, 1948 and a hearing June 2, 1948; and

(b) He shall be restored to service with seniority rights unimpaired and compensated for wage loss sustained retroactive to and including April 7, 1948.

OPINION OF BOARD: This is a discipline case.

The Claimant, John H. Moreno, was employed by the Carrier as an "On Hand Clerk" at the Chester, Pennsylvania, Agency, with a seniority date of March 21, 1941.

On April 6, 1948, the Claimant's accounts were audited by the Agent, and the audit showed a cash shortage of \$154.38. The Claimant, later on the same day, turned over to the Agent cash in the amount of \$154.38.

On April 7, 1948, the Claimant was notified by letter of his temporary suspension from service, and the calling of an investigation on April 12, 1948, in accordance with Rule 29 of the 1940 Agreement. Claimant was charged with the mishandling of funds.

On April 17, 1948, Claimant was notified of his dismissal from the service.

Attached to Rule 29 is a "Note," as follows:

"Note: The management agrees that in its instructions respecting this rule, it will advise that the suspension feature of the rule is premissive and not mandatory, and is not expected to be invoked where trivial offenses or minor infraction of rules are involved."

Under this Note, Claimant contends that this is a "trivial offense or minor infraction of rules." With this we cannot agree. It is never trivial or minor when rules are violated governing the handling of funds of the Carrier. Funds of employers and third persons should be handled strictly in accordance with instructions and rules. The handling of funds of third parties is a trust, and monies should be handled strictly in accordance with the instructions and rules.

The Claimant was charged with violating "Carrier's General Rules and Instructions 439 and 440," which are as follows:

"No checks, notes, drafts nor anything except lawful money must be received in payment of C.O.D.'s or collections unless special instructions in writing to such effect are given by shipper and endorsed by agent at shipping points, in which event the paper must be made payable to order of shipper and be forwarded in lieu of cash or C.O.D. check"; also Rule 440 reading as follows:

"Exceptions 1: On definite written (or printed) instructions from shipper which must be shown on or attached to C.O.D. brief or enclosed in collection envelope and also written on collection envelope, consignee's check, note or draft may be excepted when made payable to the order of shipper, and must then be forwarded to shipper in lieu of C.O.D. draft or cash. Agents delivering such C.O.D. shipments or collections must retain shipper's written instructions as their authority for accepting consignee's paper.

"Exception 2: If an occasional check must be accepted in payment of C.O.D.'s or Collections, agent if certain as to the responsibility of the patron, may accept if made payable to the agent. If drawn on a bank local to the agency, check must be cashed immediately."

The record reveals that the Claimant did violate the last-cited Rules, and there is substantial evidence of probative value to sustain the charge.

The Claimant was subject to discipline.

We must next consider whether, under the facts as revealed, the action of the Carrier in assessing the penalty for violation was capricious, arbitrary, or unreasonable.

The evidence shows that the Claimant would, under the rules, have to refuse checks tendered by the Carrier's patrons when offered in payment of shipments. The Claimant would accept checks made out to him personally for shipments, which he would later cash, turning in the cash to the Carrier. The shortage in Claimant's accounts was the result of these transactions, and the cash which the Claimant turned over to the Agent was from personal checks accepted by Moreno. The Carrier did not lose any money, nor did Moreno use the Carrier's money for his personal use. There was evidence introduced that the Claimant's acts were a regular practice at this station. The present Agent, immediately on his being assigned at the Chester, Pennsylvania, Agency, attempted to stop the past practice of accepting checks for C.O.D.'s. The Agent was assigned to this station December 12, 1947. He notified others at this station not to accept checks. He did not notify Moreno not to accept checks as he did not know that Moreno had been accepting checks. No general instruction was issued not to accept checks for C.O.D. shipments at the station after Agent Kommosser's arrival.

At the investigation hearing the Claimant attempted to have certain witnesses called to testify to the past practice of accepting checks for C.O.D. shipments, but was denied this right as being "irrelevant." Past practice in such a case would not be irrelevant, and these facts certainly would be relevant to the punishment to be inflicted. The Claimant was entitled to have this evidence presented to the investigating officer.

There was no evidence that the Claimant was ever reprimanded or disciplined by the Carrier in approximately seven (7) years of service.

Under the facts of this case, we believe that the action of the Carrier was arbitrary, unreasonable, and an abuse of discretion. The Claimant was subject to discipline, but not to dismissal.

The Claimant is ordered to be restored to service, with all seniority rights unimpaired. The forfeiture of all pay is sustained. Claimant's record should not be cleared of the charges.

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 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 Carrier's act of dismissing Moreno from the service was unreasonable and arbitrary discipline.

AWARD

The claim for restoration of service, with seniority rights unimpaired, is sustained. In all other respects the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 13th day of March, 1953.