

Award No. 8808
Docket No. CL-9852

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

J. A. Mills shall now be restored to Carrier's service as Messenger, Knoxville, Tennessee, Relay Telegraph Office, with seniority and all other rights unimpaired and compensated for wage loss sustained in accordance with Rule 40 of the effective Agreement.

OPINION OF BOARD: Claimant Mills, seniority date October 13, 1943, worked as a Messenger in Carrier's relay telegraph office at Knoxville, Tennessee. On July 2, 1956 the Manager of this office, P. L. Payne, gave Claimant the following written notice:

"You are hereby dismissed from the service for taking and having in your possession Southern Railway Records."

Claimant then exercised his right under Agreement Rule 40 to request an investigation, said request being presented to Office Manager Payne. The investigation was conducted by D. G. Whitfield, Superintendent Communications who is Payne's superior. The Organization's Local Chairman was present at the investigation. Office Manager Payne was one of the complaining witnesses who offered testimony. At the conclusion of the investigation the Local Chairman answered in the affirmative to the question as to whether "this investigation has been conducted in a fair and impartial manner and in accordance with the requirements of your scheduled agreement?"

On July 18, 1956 Superintendent Communications Whitfield issued decision that the evidence adduced at the investigation showed Claimant was guilty as charged, and that the dismissal would stand. Thereafter the matter was successively appealed to J. R. Smith, Assistant to Vice-President, and to the Assistant Director of Labor Relations—the latter being the highest Carrier officer designated to handle appeals.

It is contended in Claimant's behalf that he was denied full avenue of appeal as guaranteed by Rule 40 (b) since the Superintendent Communications conducted the investigation and made the decision. According to the view here urged, the Claimant's immediate superior, Office Manager Payne, was the "proper officer" to hold the investigation per Rule 40(a), and to make the resulting decision, thus leaving the Superintendent Communications free to act upon an appeal from such decision.

In addition to having made the initial decision of dismissal, the Office Manager was directly involved in the course of events that led to Claimant's discharge, thus being a necessary complaining witness at the investigation. Moreover, during the hearing, considerable effort was made to show that Manager Payne had an ulterior motive in trying to get rid of Claimant. Yet in appealing the case to this Board the Organization contends that Payne should have conducted the investigation. We think that in affirmatively acknowledging that the investigation was conducted in accordance with the requirements of the Agreement, the Local Chairman gave recognition that in view of the prevailing situation the contract rights of the Claimant were best protected by having the investigation conducted by the Superintendent Communications.

With respect to the merits of the dispute, upon being questioned on July 2, 1956 concerning the records that were missing for four specific dates, Claimant admitted he had removed them from their place of storage in the telegraph office. His explanation was that he was seeking evidence to support certain time claims which he had previously filed, and which had already been progressed on the property. The records taken were for the particular dates involved in these claims. It appears the Organization had advised the aggrieved that before these claims could be progressed to this Board it would be necessary to provide evidence in support thereof. It should be said, however, that nothing in the record indicates the Organization requested Claimant to seek this evidence in the manner that he did.

Upon being asked for the missing data, Claimant returned the records for one of the involved dates. The other records are still missing. Claimant contends he returned these other records to their proper storage place, the inference being left that they were later removed by unknown persons. The evidence leads to the conclusion, however, that Claimant simply does not know what he did with these other records after he had removed them from the files.

It is clearly established that Claimant was guilty of improper conduct. He had no authority to remove and take possession of the subject records, regardless of his purpose in so doing. He had reason to know his action was wrong. We are unable to say that the penalty of dismissal which Carrier assessed was so patently arbitrary or capricious as to warrant being set aside.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1959.