Award No. 10260
Docket No. DC-12484

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ben Harwood, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Ex Parte submission of the Brotherhood of Railroad Trainmen in —

Request of Dining Car Stewart John A. Meany, Northern District, for reinstatement with seniority unimpaired and claim for compensation for all time lost as a result of his dismissal from the service, December 3, 1959, for alleged violation of rules covering the dining car service of the Southern Pacific Company.

EMPLOYES' STATEMENT OF FACTS: Under date of September 21, 1959, Carrier's Superintendent of Commissary addressed the following letter to claimant:

"You are hereby charged with responsibility for irregularities in connection with the handling of meal checks while assigned as Steward in Coffee Shop Car 10264, operating in Train #10 enroute Oakland to Portland September 11th, 1959, which may involve violation of the General Rules and Regulations of the Dining Car Department dated San Francisco, California, January 1st, 1956, as follows:

Rule 'E' — Employees must render every assistance in their power in carrying out the rules and instructions and must report to the proper officials any violation thereof.

that portion of Rule 801 reading:

Rule 801 — Employees who are . . . dishonest . . . will not be retained in the service.

that portion of Rule 802 reading:

Rule 802 — Indifference in the performance of duties will not be condoned.

ousness in Carrier's actions in the instant case; hence in line with its established principle, the Board is requested not to disturb Carrier's action. In this connection the Board's attention is particularly directed to Award 8301 of this Division between the two parties here involved, involving similar circumstances.

Notwithstanding Carrier's position supra and in no way admitting that the dismissal of the Claimant was improper, the Carrier submits that in the event the Board does sustain the claim insofar as the request for reinstatement is concerned, and gives consideration to the matter of compensation for time lost, such consideration must necessarily be confined to the difference between the amount the Claimant would have earned in the service of the Carrier from the time of his dismissal to the time of his reinstatement and the amount he earned in other employment during said period, in accordance with the provisions of paragraph (e) of Rule 20 quoted above.

CONCLUSION

Carrier asserts that the claim in this docket is entirely without merit and requests that it be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The Carrier reserves the right, if and when it is furnished with the submission which may have been or will be filed ex parte by the Petitioner in this case, to make further answer as may be necessary in relation to all allegations and claims that may be advanced by the Petitioner in such submission, which cannot be forecast by the Carrier at this time and have not been answered in this, the Carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim here under consideration arose due to Claimant's dismissal as Dining Car Steward December 3, 1959, following formal investigation conducted September 30 and November 10 and 11, 1959, wherein a large volume of evidence was adduced concerning Carrier's charge that Claimant was responsible for irregularities in the handling of meal checks which "may involve violation of the General Rules and Regulations of the Dining Car Department dated San Francisco, California, January 1st, 1956, as follows:" (at this point was set forth a considerable number of said rules which for the purposes of this opinion it is deemed not necessary here to repeat.)

The transcript of testimony taken at the investigation, some 94 pages of the record, shows unusual care by both parties in adducing evidence in support of and against the charges and also most exhaustive cross-examination with reference to controverted facts. It is unfortunate that such a protracted hearing could not have disposed of the controversy. But in our view prejudicial error was committed by the Carrier in conducting the investigation when the hearing officer not only excluded certain written evidence offered by Claimant during cross-examination of one of two "investigators" for the Carrier, a Mrs. Carmichael, whose earlier testimony had strongly supported the charge of irregularities in the handling of meal checks by Claimant, but also prevented a witness from testifying in behalf of Claimant.

The situation referred to came about at the hearing as follows. It seems that Claimant expected to prove through an employe of the Carrier, Mr. Sam Miller, a steward, that Mrs. Carmichael was not even on the train in question on September 11, 1959, when said irregularities were alleged to have occurred.

Mrs. Carmichael under cross-examination previously had denied being a guest in the Hotel Imperial at Portland, Oregon, on September 11th, at a time which would have made it impossible for her to have been on the train in question from Davis, California, to Portland. The foundation for the evidence sought to be admitted had thus been properly laid. In order to portray the development of this situation at the hearing which led to what is considered to have been prejudicial error, we will quote from the record.

"MR. MEANY TO MRS. CARMICHAEL

Where did you board train 10 that date?

At Davis.

Both you and Mrs. Meurer at Davis?

Yes.

Were you in Davis 3 or 4 days?

MR. DOIG

That has no bearing on the case, Mr. Meany.

MR. RUTLEDGE

Let us enter an objection to Mr. Doig's ruling on that question.

MR. MEANY TO MRS. CARMICHAEL

Do you make your own schedule? Do you go where you want to go, or do they tell you where to go?

They give me my instructions.

And you went all the way from Davis to Portland on Train # 10 Sept. 11th?

Yes.

What time did you get in Portland?

I don't remember the exact time but I could tell you if you are interested. We arrived at 12:15 a. m.

Do you go to Portland very often?

On occasion.

When was the last time you were in Oregon?

I don't remember.

Where do you stay in Portland?

MR. DOIG

That has no bearing in the case, Mr. Meany, if this line of testimony you are following is to develop some facts which happened on the train on the date in question, we would be glad to listen to you.

MR. MEANY

We are coming to that, Mr. Hearing Officer, it has a very important bearing and we object to your ruling.

MR. DOIG

Your objection noted in the record.

MR. MEANY

Our objection is based on the fact that you are permitting Mrs. Carmichael to answer what you think might be favorable, and you are not permitting her to answer questions that will eventually lead to a very imporant matter.

MR. MEANY TO MRS. CARMICHAEL

Did you make a report on Mr. Miller and Mr. Wiggin also that day at the hotel in Portland?

MR. DOIG

I object to that, Mr. Meany. Mr. Miller and Mr. Wiggin, or whatever steward you name are in no way connected with Train 10 on the date in question.

MR. MEANY TO MRS. CARMICHAEL

You say you arrived in Portland at 12:15 a. m.?

The following morning — it must have been on the 12th.

The morning of Sept. 12th?

Yes, by my wristwatch. I don't carry a railroad watch.

We are not going to quibble over a few minutes, but are you sure it was the right date?

Yes, sir, I am.

It would 12:15, approximately, a. m. on Sept. 12th?

15 minutes after midnight, yes.

I want to introduce at this time in evidence, registration slip of the Imperial Hotel and ask Mrs. Carmichael if this is her signature?

It is not. I have never stayed at the Imperial Hotel and don't know where it is. It is not my signature.

Do you have your signature on your driver's license, or on a report; we want to see it to compare signatures.

That is not mine.

(signature compared with document Mrs. Carmichael presented.)

MR. DOIG

That won't be necessary. She stated for the record that she was not at the Imperial Hotel. I believe that should be sufficient.

MR. MEANY

We have reason to believe that Miller, whom you cut out a minute ago — we have reason to believe he saw her there.

MRS. CARMICHAEL

Mr. Miller is a liar.

MR. DOIG

I don't believe Mr. Meany, whether Mr. Miller saw Mrs. Carmichael or not — I believe it has absolutely no bearing on Train # 10 that particular date.

MR. MEANY

I want to say for the record that the name Carmichael, as written on the registration compares very favorably with the one I have just seen on the Bank of America card.

MR. DOIG

I object to that.

MR. MEANY

I want this offered in evidence. I am going to prove this is her signature. If you want to call off the hearing —

MR. DOIG

I don't wish to call the hearing off, we want to give you all the latitude in the world to develop the facts on train # 10 from Davis to Portland, Oregon, Train # 10 on the particular date, and then if you have no further facts to develop relative the incidents on that particular date, — I can see no reason why this should be entered in the investigation.

MR. DOIG TO MRS. CARMICHAEL

I will direct one question to Mrs. Carmichael. Did you stay at the Imperial Hotel and registered at the Imperial Hotel in Portland at the termination of your trip on Train # 10?

I did not.

Thank you, Mrs. Carmichael.

May I go further with that?

Yes.

I have never heard of this Imperial Hotel in my life until he shoved that slip in my face. I did not know such a place existed.

MR. MEANY

It is quite odd that the Imperial Hotel would have a guest by the name of Mrs. Carmichael, even though the Hearing Officer would not examine this slip, he would see that the time clock has a date on this slip Sept. 11th, 1959.

MR. DOIG

The time and date on the back of this Imperial Hotel registration slip shows Sept. 11th at 12:44 a. m. Train # 10, according to time sheet rendered by you, shows train # 10 arriving at Portland at 12:20 a. m. which under the circumstances, this slip, if it is the one you have in mind, is time and date one day prior to arrival of Mrs. Carmichael.

MR. MEANY

At last Mr. Doig has arrived at the same conclusion we were leading up to and that is that the present records indicate Mrs. Carmichael was registered in at the Imperial Hotel 12 hours ahead of the arrival of Train # 10 and was not even on Train # 10 Sept. 11th. Can you produce, Mrs. Carmichael, any witnesses other than Mrs. Meurer who can say you were on Train # 10 that day?

MR. DOIG

I will state for the record that anything relating to Mrs. Carmichael's actions other than the time she was on Train # 10 Sept. 11th to Sept. 12th, we will not accept as testimony at this hearing.

MR. MEANY

I again wish to put in the record a photostatic copy of a guest registration slip of the Imperial Hotel, Sept. 11th. I also wish to enter into the record another hotel guest registration slip # 78536, practically 72 slips back, bearing my own signature and my time of arrival was Sept. 12th at 1:04 a. m. I will ask the Hearing Officer

if he wishes to accept in evidence these photostatic copies of registration slips?

I do not.

MR. RUTLEDGE

Let the record show that we object to your ruling, Mr. Doig.

MR. DOIG

It will be so noted."

[Later in record with reference to Mr. Miller]

"November 11th.

Reconvened: 8:55 a. m.

MR. DOIG

Following is letter handed to me by Mr. Rutledge, to be introduced into the record:

November 11th, 1959.

Mr. C. O. Sullivan,
Supt., West Oakland Commissary.

We herewith request the presence of Steward Sam Miller at the reconvening of the investigation of Steward John Meany.

/s/ L. M. Rutledge
Vice Chairman of Grievance Committee
of B. of R. T., Lodge # 236

MR. DOIG TO MR. MEANY

Mr. Meany, may I ask at this time why you have requested Mr. Miller as a witness at this time?

Because Mr. Miller has important information that is very pertinent to our case.

Was Mr. Miller on Train # 10 Sept. 11th?

It has nothing to do with train # 10 Sept. 11th.

What bearing will this have on the evidence?

He will refute the testimony of Mrs. Carmichael as she presented it here yesterday.

Was Mr. Miller in Portland the day prior to your arrival in Portland?

Mr. Miller was in Portland the day I left Portland.

I have here, Mr. Meany, departure card for Train # 12 dated Sept. 11th, train # 12, departing Oakland at its usual time. I also have time sheet signed by Mr. S. Miller to cover departure card of that date. Mr. Miller left here on train # 12 on the 11th, arriving in Portland the morning of the 12th. Testimony which you have given previously, if I am not confused, you testified that Mrs. Carmichael was registered at the Imperial Hotel on the night of August 11th. Mr. Miller at that time was here in Oakland or aboard train # 12. Do you still wish to call him?

We do.

Do you want him now?

We might as well.

MR. DOIG TO MR. MILLER

Mr. Miller, you have been called by Mr. Meany as a witness to testify in his behalf as to certain incidents happening on train # 10 Sept. 11th Oakland to Portland. Will you identify yourself by your correct name for the transcript.

Sam H. Miller.

By what company are you employed?

Southern Pacific.

In what capacity?

Steward.

Dining Car Steward?

Yes.

Were you a passenger on Train # 10 Sept. 11th?

No.

Or an employee on Train # 10 departing from Oakland Sept. 11th, arriving in Portland the same date?

No.

Do you have any information with reference to anything that would have happened on train # 10 as of that date?

No.

Then I will have to disqualify you as a witness, Mr. Miller. Any testimony you would give her [sic — "here"] would have no bearing on any incidents relating to incidents on a particular train on a particular date.

MR. RUTLEDGE

We strongly protest your ruling in this matter, because we know that Mr. Miller has very important information pertinent to the allegations and facts of this investigation.

MR. DOIG

Your objection and protest will be noted in the testimony. However, my original ruling still stands and Mr. Miller may be excused.

MR. RUTLEDGE

Yesterday we proved —

MR. DOIG

I will object to that, Mr. Rutledge. Nothing has been proven, nor did we intend to."

Timely objection of record to the disqualification of Mr. Miller as a witness for Claimant was then made by both Mr. Meany and his representative Mr. Rutledge.

As was said in brief on behalf of Claimant "it was the duty and responsibility of the Hearing Officer to hear all witnesses for development of the facts, citing First Division Award 12,500 as follows:"

" 'Where it is made to appear that the investigating officer fails or refuses to call to his assistance witnesses whom he has been informed have personal knowledge of the facts which are the subject of the inquiry, he, in our judgment, **has failed to carry out the true intent of the inquiry.** It was the evident intent of the parties that the investigating officer should be impartial, neither interested in proving the charges, nor in disproving them. He should keep his eye singled on the one and only purpose, and that is, to develop the truth, regardless of the result to either party.' "

Again it is said in another First Division Award No. 18847:

". . . . there is the more serious shortcoming of an essential witness not having been called at the request of the claimant, or his having not been given time to produce the witness on his own, because even in cases where the employe has admitted infringement of the rules, this Division has ruled that the procedure was fatally defective if the employe was not fully protected in his right to produce witnesses in his behalf. Award [1st Division] 11364."

"The right of an employe to have witnesses called on his behalf is so fundamental that we often have upset disciplinary proceedings with that either as one of the bases for our censure or the sole one. (Awards [1st Division] 8260, 10348, 11820, 13633, 14351, 14354, 14358, 16333.) Sometimes we have severely criticized the hearing officers for high-handedness in the denial of this right, and while we do not do so in this instance, we adhere to our settled view that the reasonable opportunity to present witnesses in his own behalf is a right of an employe which must not be abridged, and therefore the

claim must be sustained." (And see Awards 5297, 15656 and 19910, First Division; and Third Division Awards 2613 and 7088.)

Here the employe was denied such fundamental right, even though it be argued, as it was by Carrier, that the evidence sought to be adduced but excluded would not have invalidated "the incontrovertible and accepted facts to the contrary that had previously been entered in evidence without exception having been taken thereto at the time."

We believe that the exclusion of the offered evidence and the disqualification of Claimant's witness Miller was arbitrary, unjust and indefensible (Awards 3000 and 6104) and we so hold. Accordingly, it is our conclusion that the Carrier violated the Agreement and that the claim should be sustained.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1961.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 10260
DOCKET NO. DC-12484

NAME OF ORGANIZATION: Brotherhood of Railroad Trainmen

NAME OF CARRIER: Southern Pacific Company (Pacific Lines)

Upon application of the Carrier involved, that this Division interpret said Award in the light of a dispute between the parties as to its meaning and application, as provided in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question posed for interpretation is whether Carrier must pay Claimant under Award 10260 full compensation for all time lost as a result of his dismissal, with no deduction therefrom for earnings made in outside employment between the time he was dismissed from Carrier's service and the time he was reinstated therein.

Rule 20 (e) of the Agreement between the parties reads:

> "Where discharge (or suspension) is found to have been unjust, the steward shall be returned to service and paid for net wage loss."

In other words the Division is asked to determine the meaning of the words "net wage loss" when applied under the award here concerned.

The written and oral argument presented in behalf of opposing parties, Claimant and Carrier, and the considerable number of Interpretations to Awards and Awards themselves submitted by way of authority, have been given detailed study and consideration.

Obviously, we are here dealing with a written contract and as was said in First Division Award No. 16495:

> "In construing a constitutional provision or any writing first resort is to letter and spirit. That implies application of writing to subject matter. If without going farther, the meaning is plain, interpretation is at an end." University v. Chase, 175 Minn. 259, 220 NW 958.

Here it would seem there can be little, if any, doubt about the meaning of the parties to the Agreement when they say "net wage loss". Without attempting to discuss Interpretations and Awards arising under different Agreements and different fact situations, and believing it futile to try to reconcile certain conflicting Interpretations and also dicta therein which have been called to our attention, we hold that in complying with Award

10260, and in accordance with Rule 20 (e) of the Agreement of the parties, Carrier may have credit for earnings of Claimant in outside employment, to-wit in employment other than by Carrier, from the date of his dismissal from Carrier's service until the date he was reinstated in said Service. See Third Division Interpretations Nos. 1 to Awards 9216 and 8807.

Referee Ben Harwood, who sat with the Division as a neutral member, when Award 10260 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July 1962.

LABOR MEMBER'S DISSENT TO INTERPRETATION NO. 1 TO AWARD 10260, DOCKET DC 12484

The Majority is in grievous error when it reopens the case and makes a new award in the guise of an interpretation, reaching a result wholly inconsistent with the factual situation as contained in the record, Award 10260.

Regardless of the position taken by the Carrier in its so-called request for an "interpretation", the parties have adopted the proper interpretation and application of Rule 20(e) over a long period of time, which is diametrically opposite to Carriers' contention here.

The question posed for "interpretation" was whether or not the Carrier must pay Claimant under Award 10260 full compensation for all time lost as a result of his dismissal, with no deduction therefrom for earnings made in outside employment.

The question at issue is fully set forth in the record, however, the Carrier submitted nothing in support of its contention. In defense of its position, Petitioner submitted Exhibits "L", "M" and "N".

The aforementioned Exhibits "L", "M" and "N" show that Rule 20(e) is not subject to the "interpretation" sought by the Carrier.

Exhibit "L" discloses that in the final disposition of the notices served by the Organization on June 20, 1947, an agreement was reached on December 12, 1947, in which the Carriers' proposal No. 18 — reading:

"Pay for time lost is to be reduced by other earnings . . ." was withdrawn by the Carriers' Conference Committee and the current rule has remained unchanged since it became effective on July 1, 1936, and adhered to by the Carrier since that time, as evidenced by Exhibits "M" and "N" relating to a similar (1953) case in which the employe was reinstated and paid for all time lost with no deductions for outside earnings being urged or made by the Carrier.

The parties own interpretation, as established by practice, custom and usage over the years, is the best evidence of what was intended to be the basis of compensation for time lost in a case such as herein.

The Award in the instant case therefore should have been applied in accordance with the established practice of the Carrier, which for all practical purposes may be regarded as a part of the Agreement.

The Majority states:

> "Here it would seem there can be little, if any, doubt about the meaning of the parties to the Agreement when they say, 'net wage loss'."

We are in complete agreement with the Majority that the parties understood the meaning of the rule. The Carrier, in 1947, was represented by a Carrier's conference committee during negotiations for changes of rules. Its proposal to insert language into Rule 20(e) which would permit it to take credit for earnings a Claimant received from other employment during a period of dismissal, was rejected by the Committee representing the employes and subsequently withdrawn. The Carrier's primary purpose in requesting an "interpretation" to Award 10260 was to prevail upon the Board to grant by 'interpretation' that which it was unable to achieve during negotiations.

The question at issue was dealt with by the parties in the record and it is reasonable to assume that the facts of record were carefully considered by the Majority. The Award was rendered **without qualification or limitation.** It is clear and unambiguous in its decision, "Claim Sustained", based upon the facts of record.

The Claim was for:

> ". . . Compensation for all time lost as a result of his dismissal from the service . . ."

The order of the Board directed the Carrier to make effective Award 10260 and pay the sum to which the employe was entitled under the Award, on or before February 16, 1962. This was in accordance with the provisions of Section 3 First (O) of The Railway Labor Act as amended reading as follows:

> "In the case of an Award by any division of Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the Award effective and, if the award includes a requirement for payment of money, to pay the employe the sum to which he is entitled under the award on or before a day named."

This Board has no authority to modify an award through the guise of an interpretation as was done here, there by reducing the sum of money due the employe, in direct violation of The Railway Labor Act (supra). In the instant case, the Division cannot properly go further than:

Interpretation No. 1 — Serial No. 66 — Wherein Referee Tipton stated:

> "This Board can only interpret the award that has already been adopted in this dispute and **not make a new award.**" (Emphasis ours)

Interpretation No. 1, Serial No. 105, Referee Carter stated:

". . . The award is necessarily based on the facts shown by the record . . ."

Interpretation No. 1 — Serial No. 110, Referee Wenke held:

"In doing so it should be understood that an interpretation of an award is not a rehearing or a new trial of the case on its merits. Its purpose is to explain or clarify the award as made, **not to make a new one. Consequently questions raised and disposed of will not be considered again.** (Emphasis ours)

Interpretation No. 1, Serial 10, Referee Sharfman held:

"Since the claim was sustained without condition or limitation, the measure of relief to which the employe is entitled must be determined by the terms of the claim. These terms, based upon the contention that the employe was improperly displaced from his regularly assigned position, embraced two requests: first, that he be restored to his regularly assigned position; and second, that he be 'compensated in full for any monetary loss resulting from the carrier's action in removing him from his assignment.' The fact that the claimant is not now required to return to his former position is immaterial, since this arrangement was reached by agreement of the parties subsequent to the award. The sole issue concerns the extent of the compensation to which the claimant is entitled under the original award. When the claim as to compensation was sustained, it was sustained in the terms in which it had been submitted and argued on behalf of the employe; and this claim was not limited to net wage loss, but included 'any monetary loss' resulting from the carrier's action. The substantive position of the carrier in the original proceeding had been directed solely to a denial that any provision of the prevailing agreement between the parties had been violated. The Board expressly found otherwise, and liability on the part of the carrier for the full measure of compensation as specified in the claim naturally followed." (Emphasis supplied)

Interpretation No. 1, Serial No. 31, Referee Blake held:

"The award sustains the claim without qualification."

Interpretation No. 1, Serial No. 39, Referee Mitchell held:

"The claim in this case was for all losses sustained by all employes involved in or affected by this Agreement violation from October 1, 1940, until the violation is corrected. **The award sustained the claim as made, which means that the employe affected should be paid until the violation is corrected."** (Emphasis added)

Under the above referred to authorities, the Board is guilty of unjustifiable error in not dismissing the Carrier's request for an interpretation of an issue that had already been considered and rejected.

For the above reasons, I dissent.

H. C. Kohler, Labor Member
Third Division, NRAB