

Award No. 10405

Docket No. TE-12037

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

HUDSON AND MANHATTAN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Hudson and Manhattan Railroad that:

1. Carrier violated the agreement between the parties when it did not accord Emory Lee, porter, a fair and impartial hearing.
2. Carrier's action in dismissing Mr. Lee from service on charges unproved was unjust, unreasonable, arbitrary, capricious, and in abuse of its discretion.
3. As a consequence of its improper action, Carrier shall be required to:
 - (a) Promptly restore Mr. Lee to service, allowing him to select any position to which his seniority entitles.
 - (b) Expunge from his record any notation placed thereon as a result of Carrier's improper action.
 - (c) Pay Mr. Lee for all time held out of service, including payments of amounts which would have accrued to him had he remained in service.
 - (d) Pay Mr. Lee for all vacation time he would have received had he remained in service.
 - (e) Pay Mr. Lee \$11.05 per month, or the adjusted amount resulting from negotiations currently under way, for each month he is suspended, which amount represents the premium payment Carrier would have made to Travelers Insurance Company for Mr. Lee, under the Health and Welfare Agreement.
 - (f) Reimburse Mr. Lee for any medical, hospital, surgical, or related expenses that he is required to assume for himself and/or dependents, to the extent that such expenses would have been paid by Travelers Insurance Company, had Mr. Lee continued in Carrier service.

(g) Should any other benefits accrue to employes under the Porters' Agreement, during the period Mr. Lee is under suspension, to the same extent that such benefits would have applied to him had he remained in Carrier service.

OPINION OF BOARD: Claimant was employed as a porter for the Carrier for about 14 years.

On February 9, 1960 — Carrier wrote Claimant setting up investigation for February 15, 1960 on the following charge:

"Violation of the Company Rules 7 and 45 in that you were guilty of making bets and participating in illegal activities while on duty and on company property."

Hearing was held as scheduled and a transcript of the record is set forth in the record. On March 10, 1960, Carrier wrote Claimant that after consideration of the testimony and evidence, it was discharging him from the service. The instant claim was filed and denied at all stages of its handling on the property.

The first question that confronts us is that the Division has no jurisdiction over paragraph (e) and (f) of part 3 of the claim, as they do not involve and are not supported by the Agreement between the parties. We do not find it necessary to pass upon this question, as the Claimant has not shown any loss contemplated by parts 3(e) and 3(f) of the Statement of Claim, and these two portions of the claim are dismissed.

The sole issue before this Division on its merits is whether or not the charges against Claimant were proved. It must be kept in mind that the burden of proving the charges rests upon the Carrier.

The record of the investigation, is only nine pages long, and it consists mainly of statements by the Assistant Superintendent of Ways and Structures Department of the Carrier, who conducted the hearing, and Mr. Rose of the O.R.T., representing the Claimant.

The Carrier relies mainly on the fact that the Claimant was tried in a civil court charged with possession of "numbers", relating to the number game. The record of the civil trial, were not introduced in the investigation.

Claimant admitted that he was arrested, that he pleaded not guilty to the charge in the civil court, was found guilty and sentenced to pay a fine of \$250.00.

The following is the record, upon which the Carrier found Claimant guilty at the investigation held by the Carrier. We quote from the record:

"Mr. Yocum: Q Can you deny any part of those charges the man was tried and found guilty of last week? Do you deny the charges made by the Company in its letter?

Mr. Lee: The copy is right. They got it from the police. I was grabbed ten minutes after I came out of the locker room.

Mr. Yocum: Q Are you saying that none of this transpired during working hours?

Mr. Rose: A Exactly what do you mean?

Q Making bets and gambling?

A No."

It is the claim of the Carrier that this is an admission of the Company charges, but as will be noted the question posed two questions in one. It also indicates that Claimant was talking about the offense he was charged with in the civil court.

Later in the record we find the following:

"Mr. Lee: A It wasn't cleaned. The top had books and things in it. I don't know about numbers, I know I don't fool with them."

The record does not sustain the Carrier charges that Claimant was guilty of violation of Rule 45, as there is no evidence of any gambling on the premises, and no evidence of participation in any unauthorized activity while on duty.

There is a complete lack of proof on the part of the Carrier, and the Company's discharge of the Claimant was unfair, unjust, and arbitrary.

Claimant should be restored to service, to whatever position his seniority entitles him, and expunge from his record any notation placed thereon as a result of Carrier's improper claim. Mr. Lee should be paid for all time lost less whatever amount he has earned. Sections (e) and (f) of the claim are dismissed as set out above. There was a violation of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained as set out in the Opinion. Mr. Lee to be restored to his position, the record expunged, and paid for all time loss less whatever amount of money he has earned since his discharge.

Claims (e) and (f) are dismissed as set out above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of March 1962.