Award No. 10547
Docket No. CL-9688

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Rules Agreement when the General Storekeeper failed and refused to follow the proper procedure in conducting a hearing requested on appeal from the decision rendered by the District Storekeeper following and investigation held in connection with charges preferred against Employe Gustave Vollmann, Milwaukee, Wisconsin.

2. Employe Gustave Vollmann shall be reinstated to his former position with seniority and all other rights unimpaired and compensated for all loss suffered from March 27, 1956 until his return to service.

OPINION OF BOARD: The Claimant, Gustave Vollmann, a Carrier employe since November 13, 1950, was dismissed from his position on April 4, 1956, for insubordination, threats against Assistant Stockman William Kaczmarski; and for violation of Rule 2, Page 2, of the Safety Rules for employes in the Locomotive, Car and Store Departments.

The Claimant's guilt is not an issue in this case. The case was submitted to this Board for a determination of the intent and meaning of Rule 22(c) of the September 1, 1949, Agreement which reads as follows:

"An employe dissatisfied with the decision may have a fair and impartial hearing before the next higher officer, at which such witnesses as are necessary and duly accredited representatives, as specified in Rule 52, may present the case provided written request is made to such officer and a copy furnished the officer whose decision is appealed within ten (10) days from date of advice of decision. The hearing shall be held within ten (10) days from date of appeal and decision rendered within ten (10) days after completion of hearing.

Copy of evidence taken in writing at the investigation or hearing will be furnished to the employe and his representative on request."

The Organization contends that:

1. A "fair and impartial hearing before the next higher officer" was not accorded the Claimant, because General Storekeeper G. V. Ireland simply reviewed the transcript of the investigation conducted by District Storekeeper W. C. Lummer and based his concurring decision on that transcript.

2. Rule 22(c) "clearly indicates that such hearing shall be taken in writing and the employe and his representative furnished a copy thereof on request."

The Organization's contention Number 2, supra, can be readily disposed of by the following pertinent language of Rule 22(c):

"Copy of evidence taken in writing at the investigation **or** hearing . . . . ." (Emphasis ours.)

The conjunction **"or"** unmistakably indicates that the Carrier has a choice or alternative. The Carrier can make a transcript of proceedings at the investigation or at the hearing. The choice rests with the Carrier. In the instant case it fully complied with the language of Rule 22(e) by electing to make a transcript of the **investigation proceedings.** (Emphasis ours.)

Now let us consider the Organization's first contention which in substance was that "a fair and impartial hearing before the next higher officer" was not accorded the Claimant.

For the answer to that contention, we turn to the record and Mr. Ireland's letter of April 13, 1956, to Mr. J. J. Lipinski, Division Chairman, which reads as follows:

"After hearing your appeal of the Gustave Vollman case at 9:00 A. M. April 13, 1956, as requested in your letter of April 8, 1956, I have carefully reviewed the transcript of investigation held by Mr. Lummer on Thursday, March 29, 1956, and I concur with the decision rendered by Mr. Lummer in regard to the dismissal of Mr. Vollmann."

From the language of the above letter, only one logical and inescapable conclusion can be reached, namely, that Mr. Ireland based his decision on the transcript of the investigation conducted by Mr. Lummer. Certainly no one could successfully argue that Mr. Ireland's action constituted "a fair and impartial hearing before the next higher officer . . . . ." It is abundantly clear that Mr. Ireland merely "rubber stamped" Mr. Lummer's action.

Although the Claimant's guilt is not an issue in this case — the fact that the Claimant is undeniably guilty is an important consideration in our deliberations.

This latter fact brings up an usual and interesting point. If the Claimant was admittedly guilty — a second "fair and impartial" hearing as prescribed by Rule 22(c) could have no different result from the investigation. Therefore, since a second such hearing could have resulted only in the same conclusions,

one might ask what difference does it make whether the appeal hearing complied with the letter and the spirit of the law.

There is, however, a far broader application involved. A guilty party — no matter how often heard impartially — will remain guilty. The outcome of guilt is guilt, but, it is a big BUT — the innocent party who has possibly **not** been vindicated by the first investigation — has the opportunity provided by Rule 22(c) to prove that innocence in a "fair and impartial hearing" and thus, receive his just desents. (Emphasis ours)

Since every labor Agreement is a protective instrument, it must be concluded that Rule 22(c) was undoubtedly intended primarily for such innocent cases. This protection works both ways — protection of the wronged employe against injustice through appeal hearings and protection of management against the loss of desirable and deserving employes through a miscarriage of justice.

Therefore, if the rubber stamp, carbon copy method of interpreting Rule 22(c)'s "fair and impartial hearing" as a mere review of the transcript taken at an investigation were to become the rule, the basic intent of the controlling Agreement would be lost. The present instance has little importance other than to point out this all important fact for future situations. An appeal hearing must be something more than a carbon copy of the investigation — otherwise it serves no useful purpose.

To sum up, the following two factors of this rather involved case must be noted:

1. The Claimant was guilty as charged;

2. The Carrier was guilty of violating Rule 22(c).

Now, when both parties have guilt on their side — can a just decision heap injustice on either party? Can a guilty employe honestly and with justice be awarded back compensation extending over a long period? That would certainly be an unfair, undeserved and unjust result.

Fortunately, Rule 22(f) of the Agreement provides an answer to the request for back pay and reinstatement — "if the final decision decrees that charges against the employe were not sustained the record shall be cleared of the charge."

Our final decision decrees that the Claimant's guilt cannot be denied — and, therefore, neither reinstatement nor back pay are in order.

The final decision also decrees, however, than an appeal hearing — under Rule 22(c) — means something more than reviewing an investigation transcript and concurring in lower officer's decision. It means that the appeal officer must exercise free and independent judgment in reaching his determination — which was not done in the instant case.

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 Employes involved in this dispute are respectively Carrier and Employes 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 violated Rule 22(c).

AWARD

The Claimant is not entitled to reinstatement, nor is he entitled to back compensation for the reasons expressed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1962.

LABOR MEMBER'S DISSENT TO AWARD 10547 (Docket CL-9688)

The Referee has outrageously erred in his Revised Opinion in Award 10547.

On April 10, 1962 the Referee released his proposed award, which we quote in full:

> **"STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:
>
> 1. Carrier violated the Clerks' Rules Agreement when the General Storekeeper failed and refused to follow the proper procedure in conducting a hearing requested on appeal from the decision rendered by the District Storekeeper following and investigation held in connection with charges preferred against Employe Gustave Vollmann, Milwaukee, Wisconsin.
>
> 2. Employe Gustave Vollmann shall be reinstated to his former position with seniority and all other rights unimpaired and compensated for all loss suffered from March 27, 1956 until his return to service.
>
> **Paragraph No. 1**
>
> **OPINION OF BOARD:** The Claimant, Gustave Vollmann, a Carrier employe since November 13, 1950, was dismissed from his position on April 4, 1956, for insubordination, threats against Assistant Stockman William Kaczmarski; and for violation of Rule 2, Page 2, of the Safety Rules for employes in the Locomotive, Car and Store Departments.
>
> **Paragraph No. 2**
>
> **The Claimant's guilt is not an issue in this case.** The case was submitted to this Board for a determination of the intent and meaning

of Rule 22(c) of the September 1, 1949, Agreement which reads as follows:

> 'An employe dissatisfied with the decision may have a fair and impartial hearing before the next higher officer, at which such witnesses as are necessary and duly accredited representatives, as specified in Rule 52, may present the case provided written request is made to such officer and a copy furnished the officer whose decision is appealed within ten (10) days from date of advice of decision. The hearing shall be held within ten (10) days from date of appeal and decision rendered within ten (10) days after completion of hearing. Copy of evidence taken in writing at the investigation or hearing will be furnished to the employe and his representative on request.'

Paragraph No. 3

"The Organization contends that:

1. A 'fair and impartial hearing before the next higher officer' was not accorded the Claimant, because General Storekeeper G. V. Ireland simply reviewed the transcript of the investigation conducted by District Storekeeper W. C. Lummer and based his concurring decision on that transcript.

2. Rule 22(c) 'clearly indicates that such hearing shall be taken in writing and the employe and his representative furnished a copy thereof on request.'

Paragraph No. 4

The Organization's contention Number 2, supra, can be readily disposed of by the following pertinent language of Rule 22(c):

> 'Copy of evidence taken in writing at the investigation **or** hearing . . . . . .' (Emphasis ours.)

Paragraph No. 5

"The conjunction **'or'** unmistakably indicates that the Carrier has a choice or alternative. The Carrier can make a transcript of proceedings at the investigation or at the hearing. The choice rests with the Carrier. In the instant case it fully complied with the language of Rule 22(c) by electing to make a transcript of the **investigation** proceedings. (Emphasis ours.)

Paragraph No. 6

Now let us consider the Organization's first contention which in substance was that 'a fair and impartial hearing before the next higher officer' was not accorded the Claimant.

Paragraph No. 7

"For the answer to that contention, we turn to the record and Mr. Ireland's letter of April 13, 1956, to Mr. J. J. Lipinski, Division Chairman, which reads as follows:

'After hearing your appeal of the Gustave Vollmann case at 9:00 A. M. April 13, 1956, as requested in your letter of April 8, 1956, I have carefully reviewed the transcript of investigation held by Mr. Lummer on Thursday, March 29, 1956, and I concur with the decision rendered by Mr. Lummer in regard to the dismissal of Mr. Vollmann.'

Paragraph No. 8

"From the language of the above letter, only one logical and inescapable conclusion can be reached, namely, that Mr. Ireland based his decision on the transcript of the investigation conducted by Mr. Lummer. **Certainly no one could successfully argue that Mr. Ireland's action constituted 'a fair and impartial hearing before the next higher officer . . . . . .' It is abundantly clear that Mr. Ireland merely 'rubber stamped' Mr. Lummer's action.** (Emphasis ours.)

NOTE: Omitted in "Revised" Award

Although Award 7021 is factually distinguishable from the instant case, the Board's determination regarding Rule 22 is precisely in point with this case. There the Board held:

'What this rule means and requires is independent consideration and decision at each successive appellate stop.'

"Accordingly, we must hold that:

1. The General Storkeeper did not use 'independent consideration and decision' when he rendered his appellate decision;

2. That the Claimant did not receive 'a fair and impartial hearing before the next higher officer';

3. That the Carrier violated the Agreement;

4. Claim is 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 Employes involved in this dispute are respectively Carrier and Employes 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 violated the Agreement.

AWARD

Claim sustained."

On the date the proposed award was distributed, April 10, 1962, a Carrier Member requested an opportunity to re-argue this dispute with the Referee;

such re-argument was scheduled and held the following day, April 11, about 11:00 A. M.

At this re-argument session, the Carrier Member wailed like a banshee, so-to-speak, contending, in effect, that the Claimant had a fair trial, that he was proven guilty as charged, and that this Board could not and has not interferred in or questioned the Carriers' judgement in discipline cases; and further, if the claimant were to be restored to service, 22(f) prohibits the Referee from going beyond the provisions of that paragraph which limits the payment of compensation to the difference between that which was earned elsewhere during this period.

The Carrier Member also had in his possession the original file on a Third Division Award, (I believe it was Award 7021) to which the instant record referred; however, I contended the Division adopted the **Award** to this file **not the entire file** and objected to Referee accepting the file. He did not accept it, but the Carrier Member reminded the Referee that it is in the files in the office of the Executive Secretary and could be obtained there if the Referee desired to see it.

In rebutting the re-argument, I advised the Referee that if the Carrier Member was sincere in his belief that the Claimant was guilty as charged he could not then expect any relief under Rule 22(f) and I read Rule 22(f) to them, which reads as follows:

> "If the final decision decrees that charges against the employe **were not sustained** the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost less any amount earned in other employment." (Emphasis ours.)

I pointed out that the rule applied only in instances when the "charges against the employe were **not** sustained" and, therefore, could not be applied in the dispute since the Carrier Member contended the charges **were** sustained.

In conclusion, I advised the Referee that there was absolutely nothing adduced in the re-argument (second hearing) which would cause him to change his opinion; that the opinion as written was in accordance with the facts and applicable agreement and **consistent with the question put to him for decision.**

Nothing more was heard regarding this dispute until about 4:00 P. M., Monday, April 23, 1962, when the "REVISED" Award was distributed.

Upon examining the "REVISED" Award I noted there were no material changes in the first eight (8) paragraphs of the "REVISED" Award (Note: Those 8 paragraphs are marked #1 through #8 for ready reference). The remainder of the Opinion, Findings and Award were completely changed, in fact an absolute reversal prevailed.

For ready reference we quote the substituted portions of the "REVISED" Opinion, Findings and Award:

> "Although the Claimant's guilt is not an issue in this case — the fact that the Claimant is **undeniably** guilty is an important consideration in our deliberations. (Emphasis ours.)
>
> This latter fact brings up an usual and interesting point. If the Claimant was **admittedly guilty** — a second 'fair and impartial' hearing as prescribed by Rule 22(c) **could have no different result from the investigation.** Therefore, since a second such hearing **could have**

resulted only in the same conclusions, one might ask what difference does it make whether the appeal hearing complied with the letter and the spirit of the law. (Emphasis ours.)

There is, however, a far broader application involved. **A guilty party** — no matter how often heard impartially — will remain guilty. The outcome of guilt is guilt, but, it is a big BUT — the innocent party who has possibly NOT been vindicated by the first investigation — has the opportunity provided by Rule 22(c) to prove that innocence in a 'fair and impartial hearing' and thus, receive his just deserts. (Emphasis ours.)

Since every labor Agreement is a protective instrument, it must be concluded that **Rule 22(c) was undoubtedly intended primarily for such innocent cases.** This protection works both ways — protection of the wronged employe against injustice through appeal hearings and protection of management against the loss of desirable and deserving employes through a miscarriage of justice. (Emphasis ours.)

Therefore, if the rubber stamp, carbon copy method of interpreting Rule 22(c)'s 'fair and impartial hearing' as a mere review of the transcript taken at an investigation were to become the rule, the basic intent of the controlling Agreement would be lost. The present instance has little importance other than to point out this all important fact for future situations. An appeal hearing must be something more than a carbon copy of the investigation — otherwise it serves no useful purpose.

To sum up, the following two factors of this rather involved case must be noted:

1. The Claimant was guilty as charged;

2. The Carrier was guilty of violating Rule 22(c).

Now, when both parties have guilt on their side — can a just decision heap injustice on either party? Can a guilty employe honestly and with justice be awarded back compensation extending over a long period? That would certainly be an unfair, undeserved and unjust result.

Fortunately, Rule 22(f) of the Agreement provides an answer to the request for back pay and reinstatement — 'if the final decision decrees that charges against the employe were not sustained the record shall be cleared of the charge.'

Our final **decision decrees that the Claimant's guilt cannot be denied** — and, therefore, neither reinstatement nor back pay are in order. (Emphasis ours.)

The final decision also decrees, however, than an appeal hearing — under Rule 22 (c) — means something more than reviewing an investigation transcript and concurring in lower officer's decision. It means that the appeal officer must exercise free and independent judgment in reaching his determination, — which was not done in the instant case.

FINDINGS:

* * * * * *

That the Carrier violated Rule 22(c).

"AWARD

The Claimant is not entitled to reinstatement, nor is he entitled to back compensation for the reasons expressed in the Opinion."

After reading in the Findings "That the Carrier violated Rule 22(c)" and then reading in the Award that "The Claimant is not entitled to reinstatement, nor is he entitled to back compensation for the reasons expressed in the Opinion", I immediately contacted the Referee, for it was impossible to match up the Findings with the Award. I called his attention to the complete reversal of his Opinion.

At the adoption sessions held April 25-26, I vigorously expressed my views regarding the Referee's complete change of opinion, and pointed out that it was beyond my comprehension how a sincere Referee who had deligently considered all facts and issues before rendering his first opinion could completely change his views when the only issue before the Board was, in effect, the question: "Did the Carrier comply with provisions of Rule 22(c)?" That question could be answered by a simple "yes" or "no", but the Referee found Claimant guilty of the charges which were not before the Board for determination.

The Referee states in his "Revised" Opinion that:

> "This latter fact brings up an unsual and interesting point. If the Claimant was admittedly guilty — a second 'fair and impartial' hearing as prescribed by Rule 22(c) could have no different result from the investigation. Therefore, **since a second such hearing could have resulted only in the same conclusions,** one might ask **what difference does it make whether the appeal hearing complied with the letter and the spirit of the law."** (Emphasis ours.)

Here, then, the Referee contends that a **second** hearing would only result in the same conclusions. To prove the fallacy of that statement, we have only to look at what the Referee has done here: **He granted the Carrier Member a second hearing** (the re-argument) **and as a result of that second hearing he** (the Referee) **changed his mind completely and reversed himself.** What he has held here, therefore, is that the Carrier officers were not required to grant a re-hearing because the Hearing Officer conducted an honest investigation and gave an honest opinion; and, therefore, futher hearings would only result in the same conclusion.

But, turning to his own line of reasoning, he has shown, in effect, that **he** erred in the opinion he wrote as a result of the hearing **he** conducted (the panel discussion) on April 2nd; that the second hearing (re-argument session held April 11) **was** necessary to correct **his** outrageous error made in **his** first Opinion. Putting it another way, the Carrier could not **possibly** make a mistake in the investigation held on Claimant so there was no need for Claimant to get a second chance to prove his innocence; **but** the Referee here humbly admits to **his** gross mistake. If he could have erred as a result of the first hearing (which he admits he has done) then could not the Carrier officer likewise have erred at the first hearing? Could not the second hearing have produced a different decision? Are Carrier officers infallible?

We pointed out two paragraphs in Carriers' Exhibit E on pages 30 and 32, respectively, which read as follows:

> "Mr. Lummer: Mr. Lipinski, you can understand what a difficult time we are having here in trying to get Mr. Vollmann to answer questions. He is deaf and supposed to be wearing a hearing aid. He has

one, and said it will not work. He cannot hear or understand anything about the questions we are asking him and if we have that kind of difficulty trying to hold a hearing in this office, it is easy to understand how a supervisor trying to give Mr. Vollmann instructions as to what he wants done would have to raise his voice, or talk in a loud manner to make him hear or understand and then he thinks someone is picking on him. You notice here that we have to repeat the question a half-dozen times at the top of our voice to get him to understand what we are talking about."

"Mr. Lummer: Owing to the difficulty experienced in trying to conduct this investigation, it was almost impossible to ask Mr. Vollmann a question and get an answer, as it was necessary for the Secretary to read certain parts of the testimony very loud into Mr. Vollmann's ear, and at that, we experienced difficulty trying to make him understand."

These statements were made by the Hearing Officer, Mr. Lummer, the Carrier's District Storekeeper, and were taken from the transcript of the investigation. Claimant's right to be heard on appeal should have been granted if for no other reason than these two statements from which the so-called guilty verdict was derived.

We pointed out to the Referee at the adoption session that the issue here was not to determine guilt but the due process provided for in the agreement, the right to be heard, so-to-speak; and we called to his attention a recent pandering case in a U. S. District Court in St. Louis wherein the matter of guilt was not questioned but a new trial was given **because a fair trial was not afforded** the individual.

What other procedure can be devised in a democracy to prove the first trial was unfair except through the due process of the right to be heard the second time which was the full extent of our dispute and the only question before the Board.

We also pointed out two notorious cases, one in California a few years ago and another here in Chicago just a few months ago, both of whom, while guilty, escaped the death penalty for approximately twelve and eight years, respectively, through the due process of law.

Before finality becomes a reality, the full right to be heard must be granted, and that was the **only** issue before the Board.

At the conclusion of the discussion at the adoption session, the Referee advised that he was going to stand on his "revised opinion" and would not change one word.

In this revised opinion, the Referee grossly erred when he failed to recognize on what question his decision should be based in this dispute.

The Referee answered in the affirmative the question "Did Carrier violate Rule 22(c)" when he clearly holds "That the Carrier violated Rule 22(c)", in **both** his "proposed" award and "Revised" award. That was the only dispute before him for adjudication.

There should be no doubt that the Employes are sustained by such a statement.

The Referee went far beyond his authority when he decided the "guilt" of Claimant, as that was most definitely not the dispute brought to the Board. This Referee is guilty of an action for which the Board itself has condemned

parties to a dispute, i.e., **new issues cannot be considered.** The "guilt" which the Referee has here decided was, indeed, a new issue, which he himself considered and injected into the dispute; and then, after making a unilateral and arbitrary finding of "guilty", he compounded that error by using it in arriving at his decision in the "Award", notwithstanding his clear and definite statement in the "proposed" award that "The claimant's guilt is not an issue in this case. The case was submitted to this Board for a determination of the intent and meaning of Rule 22(c) ***." and his equally clear and deliberate "Opinion" in the Revised version that "although the Claimant's guilt is not an issue *** the fact that the Claimant is undeniably guilty is an important consideration in our deliberation." The Referee has gone far beyond the legal authority vested in him by the provisions of the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board, in determining an issue which was not presented to him.

In conjunction with that held by the Referee, i.e., "It is abundantly clear that Mr. Ireland merely 'rubber stamped' Mr. Lummer's action" and his further statement that "* * * if the rubber stamp, carbon copy method of interpreting Rule 22(c)'s 'fair and impartial hearing' as a mere review of the transcript taken at an investigation were to become the rule, the basic intent of the controlling Agreement would be lost.", it will suffice to say that the Referee has here taken that same route, first, that he, too, "rubber stamped Mr. Lummer's action" and used the "carbon copy method of interpreting Rule 22(c)'s 'fair and impartial hearing' in deciding the guilt of Claimant; second, his abetting Carrier's violation, which he fully recognizes in both Opinions, by merely tapping it on the knuckles and uttering a very soft and almost indistinguishable reprimand; and third, his mere review of the record in this dispute and utter disregard of the fact that only one question was before him. The basic intent of the Agreement is lost. Yet, taking the Referee's statement in his "Revised" Opinion: "A GUILTY PARTY — NO MATTER HOW OFTEN HEARD IMPARTIALLY — WILL REMAIN GUILTY". The Referee has not here exercised the power of his own convictions.

The final analysis of the erroneous Award:

(1) The Carrier has been found "guility" of violating the Agreement and this was done through due process of law; but it shall neither rectify, nor pay a penalty for, such guilt.

(2) Claimant has been found "guilty" — without benefit of due process of law — and he is required to suffer and pay an extreme penalty.

As it was so aptly stated by Referee Curtis G. Shake in Award 2611 of this Division:

> "It was as much the duty of the Carrier to conform to the current Agreement as it was that of the employe and his organization to protest a violation thereof, and it would be inequitable to permit the Carrier to reap a benefit from its own wrong."

The Board has consistently held by a long line of awards that its function is limited to the interpretation and application of Agreements as agreed to between the parties. Award 1589. It is without authority to add to, take from, or write rules for the parties. Awards 871, 1230, 2029, 2612, 3407, 4763, 6959, 7577, 7631, 7718, 9253, 9314, 9606 and 10008.

Therefore, although not vested with such authority, the Referee has here taken it upon himself **to add to and write a new Rule 22(c)** for the parties, when he states in his "Revised" Opinion that: "* * * it must be concluded that Rule 22(c) was undoubtedly intended primarily for such innocent cases." He

concedes, however, that such "protection works both ways", one of which is for "the protection of the wronged employe against injustice." Here the Carrier denied Claimant's right to protection against injustice, and has been condoned for such violative action.

Award 10547 is in harmful error, a gross miscarriage of justice, is repugnant to previous Awards as well as to all who clearly recognize their obligations as Neutrals in a dispute.

For the foregoing reasons, I dissent.

May 11, 1962

C. E. Kief
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 10547, DOCKET CL-9688

It is not our purpose nor our function to indulge in personal retortions. Therefore, this answer will be limited to a brief reference and evaluation of the facts and the rule which we were asked to interpret, namely, Rule 22.

In this case there were three charges lodged against the Claimant. He was found guilty of the charges after a fair and impartial investigation. The Claimant admitted this. He requested and was granted an appeal hearing, after which the Carrier's appeals officer denied the claim and sustained the charges. The Organization thereupon contended the appeal hearing was not fair and impartial because a written transcript was not made and because the Carrier's appeals officer merely considered the investigation record in making his decision.

The Organization appealed the claim to this Board solely on the grounds that Carrier had violated Rule 22 (c) when it allegedly did not afford the Claimant a fair and impartial hearing on appeal. They made no comment about the charges nor did they challenge the fact that the charges were sustained. In their initial brief they said "the merits of the dismissal" were not before us. Obviously, therefore, they did not contest Claimant's guilt of the charges. Turning now to Rule 22, paragraph (f), which reads:

> "(f) If the final decision decrees that charges against the employe were not sustained the record shall be cleared of the charge; if suspended or dismissed, the "employe shall be reinstated and paid for all time lost less any amount earned in other employment."

The rule provides for reinstatement and pay for time lost in only one situation, i.e., where the "charges against the employe were not sustained." In this case, the Petitioner admitted the merits of the dismissal were not before us; therefore, we had no grounds for holding the charges were not sustained and a fortiori no basis for concluding that paragraph (f) applied. In the absence of paragraph (f), the Claimant had no support for his claim for reinstatement and time lost. The issue and decision was just that simple. Unfortunately it has been unnecessarily complicated by the dissent.

/s/ W. F. Euker
W. F. Euker
/s/ R. E. Black
R. E. Black
/s/ R. A. DeRossett
R. A. DeRossett
/s/ G. L. Naylor
G. L. Naylor
/s/ O. B. Sayers
O. B. Sayers