Award No. 10718

Docket No. CL-12424

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ben Harwood, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4900) that:

1. The Carrier violated the current Clerks' Agreement at Savanna, Illinois, when it dismissed Yard Clerk L. R. Arno from service.

2. Mr. Arno shall be restored to his regular position of Yard Clerk with seniority and all other rights unimpaired and his record cleared of the charges placed against him on January 18, 1960.

3. Mr. Arno shall be compensated for all monetary loss sustained on and after February 3, 1960.

OPINION OF BOARD: Under date of January 18, 1960 a letter was sent by Assistant Superintendent M. T. Sevedge to L. R. Arno, then Yard Clerk at Savanna, Illinois, setting forth as follows:

"Charges are hereby preferred against you as a result of allegedly misrepresenting facts to absent yourself from duty on January 13, 1960 and alleged subsequent conduct unbecoming an employe, on January 14, 1960. . . ."

The investigation was conducted on January 25, 1960, by Assistant Superintendent M. T. Sevedge who interrogated Mr. Arno, the above named Claimant. The latter admitted "reporting ill" and absenting himself from duty January 13, 1960; that, however, he did not stay at home but "went to town and laid around;" "stopped into Ballas' Tavern"; later returned home about 6:00 P. M. but did not stay here, again returning downtown at 10:00 P. M. to a tavern. As a result of Claimant's conduct while at the tavern charges against him were noted on the police blotter of the City of Savanna, Illinois, and were also recorded in "Transcript of Proceedings — Preliminary Examination" in the local Justice Court. Subsequently, the Savanna Times Journal carried a news item

concerning Claimant being charged with a felony and having been bound over to the March Grand Jury.

Before the Grand Jury indictment charging two counts of felony came to trial, the Claimant was permitted to plead guilty to violation of Section 159 of the Criminal Code of Illinois, defining a lesser crime, and was fined $200.00 and costs.

Involved in this claim and included in the record are two agreements between the parties: one with effective date of September 1, 1949 and the other being the National Agreement dated August 21, 1954. The particular rules incorporated within those agreements which are cited here for our consideration are as follows:

Rule 22 — Discipline and Grievances

(Agreement effective September 1, 1949)

"(a) An employe who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation and prior thereto the employe will be notified in writing of the precise charge. Such charge will be filed with the employe within fifteen (15) days from the date the supervising officer would have knowledge of the alleged offense. At the investigation he may be represented by one or more duly accredited representatives. The employe may be held out of service pending such investigation, however, investigations will be held prior to the time employes are held from service when it is possible to do so.

(b) Investigations shall be held within seven (7) days (earlier if possible) of the date when charged with the offense or held from service and decision will be rendered within ten (10) days after completion of the investigation. Employes shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses. Investigation and hearing will be held whenever possible at the home terminal of the employes involved. They will also be held at such time as to not cause employes to lose rest or time whenever possible.

(c) 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.

(d) If an appeal is taken from any hearing, it must be filed with the next higher official and a copy furnished the official whose decision is appealed within thirty (30) days after the date of the decision. A hearing on the appeal will be held within thirty (30) days from the date filed.

(e) The time limits provided in this rule may be extended by mutual agreement.

(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."

Article V — (Agreement of August 21, 1954)

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

Following the investigation of January 25, 1960 before Assistant Superintendent M. T. Sevedge, a letter was addressed February 3, 1960 by Superintendent A. O. Thor to employe-claimant Arno dismissing him from the service of the Carrier. Then, on February 10, 1960, the Employes addressed a letter to Mr. S. W. Amour, Assistant to Vice President,

said by Employes to be the highest officer of the Carrier designated to handle all claims or grievances, contending that "the alleged charges were not sustained at the investigation and that the rules were not properly complied with in conducting the investigation" and requesting that he "grant a hearing on appeal from the decision of Superintendent A. O. Thor as provided in Rule 22(c) and Article V of the August 21, 1954 Agreement." Mr. Amour's answering letter dated February 12, 1960, stated he was not an appeal officer (under the provisions of Rule 22) in the case in question and could not honor the request for a hearing on appeal. He also stated that Article V of the August 21, 1954 Agreement was not applicable.

Then in the Brotherhood's Ex Parte Submission on behalf of Claimant under "Statement of Facts," it is alleged as follows:

> "As result of Mr. Amour's refusal to grant Employe Arno an appeal hearing, claim was filed with Superintendent A. O. Thor for Employe Arno's restoration to service. . . ." "Mr. Thor declined the claim in his letter of April 22, 1960."
>
> "Superintendent Thor's declination was rejected under date of April 26, 1960 and the claim appealed to Mr. S. W. Amour under date of May 4, 1960. Mr. Amour declined the claim in his letter of June 7, 1960."
>
> "Conferences have been held thereon and no settlement reached."

With the exception of Mr. Amour's letter of June 7, 1960, the above-mentioned "claim", Mr. Thor's declination thereof April 22, 1960, the rejection of the latter dated April 26, 1960 and appeal to Mr. Amour May 4, 1960 do not appear in the record, but in view of the Board's decision hereinafter announced their omission is considered immaterial.

Examining first the question of Claimant's innocence or quilt as to the charges preferred and heard at the investigation of January 25, 1960. A study of the record leaves no doubt as to Claimant's guilt with reference to misrepresenting facts to absent himself from duty January 13, 1960. He laid off as ill, and spent a good portion of his work assignment visiting a tavern or taverns "downtown." Then, as to the charge that his subsequent conduct on January 14, 1960 was unbecoming an employe, the record is equally clear that Claimant's conduct the night of January 13-14 led to his arrest by the police of Savanna, Illinois, his later indictment on two counts of felony by a Grand Jury and his subsequent plea of guilty to a lesser charge and payment of the maximum fine prescribed by the statute, Section 159 of the Criminal Code of Illinois, which reads as follows:

> "Whoever shall be guilty of open lewdness, disorderly conduct, or other notorious act of public indecency, tending to debauch the public morals, shall be fined not exceeding "$200.00."

One of the awards cited in behalf of Claimant was No. 8195 upon the proposition that carrier is without authority to impose punishment for conduct away from property and adjudged by civil court. In that Award it is said:

> "In this case with the deletion of the charge of violating Rule E all that remained was the charge of disorderly conduct, causing

a disturbance and refusing to leave the premises. For this the claimant was arrested, adjudged quilty and he paid the full penalty imposed by the Cleveland Court. No justification exists in this case for further punishment, this time by the Carrier."

But in the following paragraph Referee Sidney A. Wolff had this to say:

"Now, if the claimant's **misconduct** had been **of such a nature as to have brought discredit upon the Carrier,** or if it had been **harmful or detrimental** to it, **we would have denied the claim,** regardless of whether or not a violation of Rule E was specified in the charge. However, we find that the offense was not of such a nature and our judgment in this regard is supported by the Carrier's own readiness to withdraw that portion of the charge claming a violation of Rule E." (Emphasis ours.)

A plea of guilty to a charge of committing an "act of public indecency, tending to debauch the public morals" (above cited Section 159 of Illinois Criminal Code) certainly is misconduct of such a nature as to have brought discredit upon the Carrier; also to be harmful and detrimental to it. Therefore, were it not for other charges of violation of "the current Clerk's Agreement," the claim here under discussion would have to be denied.

However, this claim brings up for consideration a charge by the System Committee of the Brotherhood that here again we have a situation much similar to that dealt with in Award 9832 where the same parties were involved and the same agreements.

In the present case, the investigation was held by the Assistant Superintendent. Then the Superintendent, who was not at the investigation, dismissed the Claimant from the service of Carrier. Having passed judgment on the facts, it is contended and we agree that the Superintendent disqualified himself from hearing the first appeal under Rule 22, and that Claimant was deprived of any further appeal by virtue of refusal of Mr. S. W. Amour, Assistant to Vice President, (the next officer designated to hear appeals — Carrier's letter of December 1, 1954) to entertain the appeal on the ground that he was not an appeal officer in any discipline or grievance case.

As was said in Award 9832:

"We cannot accept this as proper compliance with the procedural steps set forth in Rule 22. The language of the parties' Agreement provides for two appeal steps. It assures the employe who is being disciplined 'a fair and impartial hearing before the next higher officer.' **The Carrier cannot unilaterally deny the employe independent consideration and decision at each successive appellate step** without vitiating the whole purpose and intent of Rule 22. (Award 7021.)" (Emphasis ours.)

In other words, we have here a violation of the Agreement by the Carrier, which in the situation dealt with under Award 9832 impelled the Board to sustain the claim. But in this case we have an element not present in the facts dealt with in Award 9832, which was issued February 15, 1961 while the present case was still in the consideration of the parties

by way of preparation of reply or rebuttal arguments following Ex Parte Submissions.

After publication of Award 9832, in a letter dated May 10, 1961, Assistant to Vice President S. W. Amour made the following offer:

> ". . . in deference to Award 9832 I am agreeable, in this particular case, to granting your request for an appeal hearing in Mr. Arno's behalf and arrangements have been made to meet with you in this office at 2:00 P. M. Daylight Saving Time, Friday, May 19, 1961, for that purpose."

While we have no criticism of the fact that the offer was declined, nor of the General Chairman's reasons for so doing, nonetheless we bear in mind the admonition of the Railway Labor Act, Section 2,:

> "First, it shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof."

And further, we believe, as was said in Award 2637: "The ends of justice would not be served by unconditionally sustaining or denying this claim." Also, as the Board stated in Award 4207: "We think in view of the seriousness of the charge, despite the elements of bias pointed out above, we would not be justified in directing—reinstatement and return to duty,—"

It is therefore the judgment of the Board that Claimant be accorded a hearing on appeal as offered in letter of Assistant to Vice President S. W. Amour on May 10, 1961 addressed to Mr. H. V. Gilligan, General Chairman of the Brotherhood.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained as indicated in the Opinion.

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
AWARD NO. 10718 DOCKET NO. CL-12424**

Prior to the adoption of this Award by Referee Harwood and Carrier Members of the Board, the Referee was advised that in my opinion he had exceeded the authority vested in him by the Railway Labor Act (45 U.S.C.A. 153) in that he had prematurely judged the claimant guilty prior to that question being properly before him and further, that he had violated Section 6 of the Act and usurped the prerogatives of the contracting parties, as provided in Rule 22(d), by ordering that Carrier's unilateral proposition that an untimely hearing on appeal be held.

The courts have held that seniority is a valuable property right that cannot be taken away from an employe without due process. See Awards 2616, 4747, 4989, 5231. The record shows, and the Referee admits, that Carrier here did not comply with the due process provisions of Rule 22 when it refused claimant's request for a hearing on appeal, as provided in Rule 22(d). That Claimant could not be declared guilty until all his guaranteed rights under the Rule had been complied with, is fundamental.

Even if the Referee had the right to order that a hearing be held after the 30 day period provided in Rule 22(d), which he did not, it is clearly prejudicial error to find Claimant guilty before such hearing was held. Therefore, it is clear that any rights guaranteed to Claimant by the Rule were abrogated by the Referee's prejudgment that the former was guilty before that question was properly before him. Consequently, any hearing held after such prejudicial determination would be a farce and a useless act. The law does not require a person to perform a futile act. Under these circumstances, the Referee has denied claimant a "fair and impartial" hearing under Rule 22(d) and has become a party to taking claimant's valuable property rights of seniority without due process of law.

In Third Division Award 2654, Referee Shake ruled, here pertinent, that:

> "The carrier does not deny that there was a failure to comply with Rule 21. It says, however, that this only amounted to a technical non-compliance with a procedural requirement, which ought not to be allowed to obscure the fact that its conduct was fully justified. We cannot regard the carrier's falure to advise the claimant of the nature of the charge and to accord him a hearing as technical. **These pre-requisites are in the nature of guarantees of due process, and until they have been complied with any consideration of the merits would be premature.** However conclusive the evidence in the possession of the carrier may appear to be, the claimant is entitled to the benefit of the presumption of innocence until his guilt is formally admitted or duly established in accordance with the rules." (Emphasis ours.)

It is fundamental that a "fair and impartial" hearing cannot be had where the accused has already been prejudged guilty. In Third Division Award 7088, Referee Whiting ruled in part, here pertinent:

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> "As noted above the service entry record of discipline was signed by the Superintendent, before whom the claimant had a

> contractual right to a fair and impartial hearing on appeal. That entry shows that such official had determined the case against the claimant and she was thereby deprived of her contract right to a fair and impartial hearing before him on appeal."

Also, see Third Division Awards 6087, 8020, 8810 and 8811 on the question of prejudging the accused prematurely as was done here.

Rule 22(e) provides that the time limits provided in Rule 22 **may be extended by mutual agreement.** Not only does the Referee attempt to usurp the prerogatives of the parties by extending the 30 days provided in Rule 22(d) for holding a hearing on appeal, he also infers that the General Chairman's refusal to accept the belated offer of Mr. Amour to hold such hearing, was in conflict with Section 2. First of the Railway Labor Act.

This is strange logic indeed, when viewed in the light of the fact that Carrier had repeatedly refused to afford claimant and others a hearing in accordance with Rule 22(c) and (d), and that Carrier's offer was not made until after Award 9832 had been adopted, holding Carrier in violation of the Rule under similar circumstances. Therefore, it is obvious that the duty was placed upon the Carrier by this Section of the Act to settle this dispute in accordance with the interpretation placed on Rule 22 by Award 9832, which constituted a controlling and binding precedent on the confronting parties, as well as the Referee. The Referee does not contend that Award 9832 was palpably wrong.

In fact, he recognized that Carrier violated the Agreement by stating:

> "In other words, we have here a violation of the Agreement by the Carrier, which is the situation dealt with under Award 9832 impelled the Board to sustain the claim."

however, he feebly attempts to distinguish this case from that decided in Award 9832. It will be noted that the only "element" that he claims that was not in the facts dealt with in the previous Award was Mr. Amour's untimely offer to hold a belated hearing, which came after the publication of Award 9832.

It is conceded by all students of the Railway Labor Act that changes in existing rules must be handled in accordance with Section 6 of the Railway Labor Act, or by the mutual Agreement of the parties. That changes in existing rules affecting rates of pay, rules, or working conditions are major disputes over which the National Railroad Adjustment Board has no jurisdiction. Yet, we here have a Referee who, with the support of the Carrier Members, has changed the 30 day period, in which a hearing is required to be held under Rule 22(d), to over two years by ordering a hearing at this late date. That he exceeded his authority in doing so, is clear from the Act and previous awards of this Board, some of which are as follows:

In First Division Award 20074 (January 22, 1962), Referee Daugherty, ruled:

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> "***The record establishes that Fraher was not so present. Carrier contends that his absence was in no way prejudicial to

claimant's rights, and this may well be true. **But the Division, as well as carrier, is not empowered to disregard the clear provisions of a schedule rule.** Rules like Rule 14 and 18 here are negotiated to safeguard the rights of all accused employes. They are in the schedule to protect those who may be innocent as heaven. The fact that such rules, in a democracy like ours, may sometimes, here and in our courts, be applied to exonerate those who may be guilty as hell cannot justify and departure from an evenhended application of all such rules and principles." (Emphasis ours.)

In Third Division Award 4747, supra, Referee Carter ruled:

"It will be observed that the provisions of Sections (a) and (b) of Rule 14 were completely ignored by the Carrier. **This Board had said many times that the seniority rights of employes to positions under collective agreements are valuable property rights. The Agreement provides the method by which they may be terminated or restricted as a matter of discipline. The method pursued by the Carrier in this case is wholly ineffective to sustain the assessment of discipline.** Claimant was not advised before or at the hearing that he was on trial. **The most casual examination of the controlling Agreement would have disclosed the procedure to be followed. We feel obliged to point out again, as we have bfore, that agreements are made to be kept and when, as here, the rights of an employe are prejudiced by their violation, it is the function of this Board to award the relief required. An affirmative award is required, irrespective of the merits of the case."** (Emphasis ours.)

In Third Division Award 5369, Referee Elson said:

"***These are strong equitable considerations, but regardless of how the individual members of this Board may react to them, this Board has no choice but to exclude them from its considerations. It is an old saying that hard cases make bad law. We do not have the power, nor are we inclined to make bad law. We could not rectify the situation complained of without writing into the Agreement a provision which has not been obtained by collective bargaining. This we will not do."

In Third Division Award 2253, Referee Swaim ruled:

"The facts admitted by the Carrier in its submission clearly show a violation of the agreement***. It is not a mere 'gentlemen's agreement' which may be thus lightly disposed of and thrown aside by one of the parties feeling the pinch of its provisions. It was negotiated while the principle agreement was being negoitated.***. **It became and is the solemn contract of the parties which must be complied with until changed or amended in the manner provided by law. It is not the function nor within the power of this Board to amend the agreement to avoid a seeming hardship to one of the parties. Award 450."** (Emphasis ours.)

In Third Division Award 5079, Referee Coffey stated:

"This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation

and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take from, or write rules for the parties. Awards 871, 1230, 2612, 3407, 4763."

Also, see Awards 2765, 5472, 5483, 6365, 6595, 6611, 6757, 6759, 10035 in addition to those referred to above.

In Award 10410, adopted by this Division on March 8, 1962, involving these same parties and circumstances, Referee Begley quoted from Award 7021 and 9832 with approval and stated:

"When C. P. Downing, Assistant to Vice President, refused to hear an appeal under the provisions of Rule 22(d) the Carrier violated the Agreement in this case. Therefore, the claim will be sustained."

In Award 10260 Referee Harwood properly held that it was reversal error when Carrier refused to allow Claimant's witness to testify. It will be noted here, however, that he not only sanctioned Carrier's refusal to hold a hearing, but went far afield in an attempt to relieve Carrier of its obligation under the Agreement.

The few awards cited in support of the instant decision are either distinguishable or cover entirely different situations than those here.

From what has heretofore been said, the Award was clearly conceived outside the Board's jurisdiction and as a consequence, is null and void.

/s/ J. B. Haines

J. B. Haines
Labor Member