

Award No. 13482

Docket No. CL-14909

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD—NEW YORK REGION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5522) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 7-A-1, when it held Mr. Cleo Richardson, Baggage man, Pennsylvania Station, New York, New York, New York Region, out of service commencing October 5, 1962, and subsequently imposed discipline of dismissal from service.

(b) Cleo Richardson should be restored to service with seniority and all rights unimpaired and his record cleared.

(c) Cleo Richardson should be reimbursed for all wage loss sustained as a result of the Carrier's action. (Docket 1456)

OPINION OF BOARD: This is a discipline case. Claimant had been employed by the Carrier since September 23, 1957. On October 5, 1962 he was assigned as an Extra Station Baggage man at Pennsylvania Station, New York City. On the morning of that day he is charged with having committed acts of insubordination against the Baggage Agent in charge of the Baggage Department, Pennsylvania Station, New York, New York. Investigatory hearing of the charges was initially scheduled for October 10, 1962. Claimant asked for an adjournment of the hearing for one week. He was granted an adjournment of six days, until the afternoon of October 16, 1962.

The hearing was held on October 16, 1962. The agent of the Carrier assigned to conduct this hearing was the Supervisor of Baggage and Mail of the Baggage Department of the Pennsylvania Station in New York City. The Organization points out this employe was immediately subordinate in authority to the Baggage Agent who preferred the charges and who was directly involved in the insubordination incident charged.

The testimony developed at the hearing is clear. It came from the Baggage Agent, the sole witness who appeared and testified at the hearing. In brief it is that the Claimant was due to report for work at 7:59 A. M. on October 5, 1962. Instead he did not show up until 8:15 A. M. He was nevertheless permitted to go to work and was directed by the Baggage Agent to report "alongside of Table B, to help work the P.As." Claimant was not seen again until 8:50 A. M. at which time he was again directed "to go and assist with the

P.As." Instead of going to work as directed Claimant paused alongside a skid at the work table and uttered an extremely abusive, vulgar and personal remark directed to the Baggage Agent. Because of his repeated refusal to comply with the order as well as the gross contumely of his utterance, Claimant was told to leave the premises immediately. He left and was thereafter dismissed in consequence of the investigation held on October 16, 1962.

Claimant pleaded "not guilty" to the charge. However, he refused to answer questions directed to him by the Hearing Officer on the ground, among others, that "when I am allowed to present three witnesses in my behalf then I will answer all questions to the charge". The reference to the three witnesses came about when the Baggage Agent in his testimony referred to the fact that Baggage men Skinner, Medina and Flynn were present in the room when and where the occurrence took place. At that point, Claimant's spokesman had asked that the three named employes be produced as witnesses or else that a continuance be granted to Claimant so that he could summon them himself. The request was denied, as had other like requests on behalf of the Claimant for postponement of the investigation made earlier in the hearing. The reasons stated for this refusal will be considered later in this opinion. Suffice it to say here that this is one of the grounds why the Organization contends that Claimant was denied a fair and impartial hearing.

There is nothing in the record to discredit the testimony of the Baggage Agent and thus there is no question but that if one accepts this testimony there was ample cause for dismissal of the Claimant. And, despite the citation by the Organization of Award No. 39, Special Board of Adjustment No. 374 (Lynch), the mere fact that this testimony was uncorroborated by other witnesses would not make the result any different. It remains that this testimony stands unchallenged and uncontroverted in the record and we know of no rule of law or interpretation which states that, in such circumstances, such testimony needs any separate corroboration (See Award 944); see also Awards 8504 and 10650).

What does give us pause for serious concern is the Organization's contention that the Claimant was not accorded "a fair and impartial trial" as required by Rule 6-A-1 of the parties' Agreement. In this regard the two areas of principal concern are both related strictly and narrowly to the nature of the charges in this case: the one is the failure to grant a continuance to permit the calling of the three baggagemen who admittedly were present when the ugly remarks in question were said to have been made; the other and related one is that the Hearing Officer at the investigation on the property was a subaltern of the Baggage Agent against whom the insubordination was directed.

In connection with the first point, the three baggagemen who were potential witnesses to the event were all very forthrightly named in the testimony of Mr. Aicher, the Baggage Agent. When this occurred the following colloquy appears in the record:

"Q. You want to call in witnesses now?

A. Yes.

Q. What witnesses did you have in mind?

A. In as much as Mr. Aicher has named these witnesses, I would like to call them. I would like to withdraw the request I made earlier

in regards to the earlier witnesses. In as much as the testimony of Mr. Aicher has brought to light three witnesses to this alleged incident, I hereby request that management call Baggage man Skinner, Baggage man Flynn and Baggage man Medina to present themselves here for testimony to prove that this gentleman did perform some work on that date and to point out that no such incident took place on the date in question.

STATEMENT BY MR. KANE: [The Hearing Officer]

S. Mr. Harris, as you stated earlier Baggage man Skinner was not available. The time is now 4:43 P.M., D.S.T. and Baggage men Medina and Flynn are relieved from duty and are enroute home and as testified by Mr. Aicher; employes of the same class or craft do not want to get involved in insubordination cases involving an employe, therefore your request will have to be denied.

MR. HARRIS TO MR. KANE:

Q. It is my understanding that you definitely refuse to call the three witnesses, Baggage men Skinner, Flynn and Medina, and that they will not be called today nor any day in regards to the trial?

A. The witnesses named, their stand has been already outlined by the principle witness in this case, Mr. Aicher, and it is a known fact that they would have nothing for or against to contribute to this trial record.

* * * * *

"MR. KANE TO MR. RICHARDSON: [Claimant]

Q. Where were you at 8:53 A.M., D.S.T. on October 5th, 1962?

A. When I am allowed to present three witnesses in my behalf I will answer the questions.

Q. Your representative just said that you will answer all questions pertaining to 8:53 A.M., D.S.T. on October 5th, 1962?

A. When the management grants me the right to have present here three witnesses in my defense, then I will answer all questions to the charge.

Q. Your representative withdrew the witnesses for your defense and requested the three witnesses from the management?

A. That was outlined in the testimony of the Baggage Agent.

Q. His testimony stated that they either did not hear, were too busy or did not want to get involved, therefore they are neither rebuttal or corroborating witnesses.

A. I do not agree with his thesis in regards to this incident."

While it may very well be, as Mr. Aicher testified, that these three named witnesses could or would contribute nothing to the Claimant's defense, it re-

mains that unless and until they were called what they would or would not say as to the incident resides strictly in the realm of hearsay. And the significant fact is that in denying the Claimant's request for a continuance, the Hearing Officer was accepting this hearsay by Mr. Aicher as though it had been established in fact.

This leads to the second area of concern in this case: the Hearing Officer was an immediate subordinate of Mr. Aicher. The charges involved were that Mr. Aicher had been insubordinated by Claimant. One may assume that a Hearing Officer in such a position would hardly reject the word of his superior, even to the extent of the hearsay the latter placed in the record concerning the indisposition of the three named witnesses to testify.

It is not the duty or obligation of the Carrier to produce witnesses in the Claimant's behalf; it has been repeatedly held that this burden is upon the Claimant and the Carrier cannot be required to assume this responsibility. See, among others, Awards 6067 (Wenke), 10394 (Mitchell). But that is not the same as holding that a Claimant must be denied a reasonable continuance of the hearing and thus denied the opportunity to produce the witnesses on his own.

In all the circumstances and in the interest of justice this seems to be a case for a remand of the claim to complete the investigation, rather than to affirm on the basis of something less than a full hearing in the first instance. See Awards 3346 (Tipton); 4634 (Carmody); see also Awards 862, 2637, 2728 and 10439. Accordingly, the claim will be remanded and a new date set for the investigation in accordance with this Opinion.

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 Employee involved in this dispute are respectively Carrier and Employee 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 claim be remanded and a new date set for the investigation in accordance with the Opinion.

AWARD

That the Claim be remanded and a new date set for the investigation in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1965.