Award No. 14031
Docket No. CL-14641

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5489) that:

(1) The Carrier violated the rules of the Clerks' Agreement of December 1, 1956, as amended, when it arbitrarily dismissed Crew Dispatcher R. G. King, Columbus, Georgia Yard Office from its service following investigation held on July 19, 1963 and that, therefore

(2) Crew Dispatcher R. G. King, who has since been restored to his position with seniority and all other rights unimpaired, but who has not been compensated for loss total of forty-nine (49) days' time at his regular rate of $485.46 per month, shall now be so compensated for that amount of lost time.

OPINION OF BOARD: The Claimant, Crew Dispatcher R. G. King, complains of several errors in the manner in which he was disciplined. King was dismissed from service for failure to protect his regular assignment July 12, 1963. Claimant was reinstated to the service of the railway company on a leniency basis, 45 days after the discipline commenced. He did not return to work until four days after his reinstatement, and so this claim is presented for a total of 49 days' compensation.

The Organization first alleges that there is error in the case because Claimant was not represented at the hearing July 19, 1963, in violation of Rules 21 and 22 of the agreement. We have reviewed these rules, and it is our opinion that the same are permissive, as they apply to investigations. In this particular case the Claimant testified at the beginning of the hearing, "I choose to represent myself." We hold that there was no error in allowing Claimant to represent himself at the investigation.

The Organization next alleges that there is error in the case because the person who conducted the investigation, Trainmaster R. A. Newell, was

not the person who decided the case, Superintendent H. L. Bishop, Jr. They allege that this is a violation of due process of law and further served to close an avenue of appeal, contractually available to Claimant under Rule 20(d) of the agreement.

The Carrier first asserts that this argument was not raised on the property and, therefore, cannot be now considered by this Board. The Supreme Court of the United States has held that the rights afforded under the agreements involved in cases before this Board are, in fact, property rights. It is our responsibility, then, to ascertain whether or not an employe has been denied his property rights without due process of law. If the Organization successfully proves to this Board that due process has been violated, then we will hold that such violation is fundamental, and can be raised at any stage of the proceedings. In the instant case we believe that the issue involved in this question was raised by reference to the appeal rights of Claimant under Rule 20(d). Therefore, we will hold that this Board will examine the record to determine if the Claimant's fundamental rights under due process of law have been violated.

In this case, Superintendent Bishop preferred the charges against Claimant. The Terminal Trainmaster, C. G. Rutland, was a witness in the investigation, and so Trainmaster R. A. Newell was assigned to conduct the investigation.

The Organization alleges that after Trainmaster Newell conducted the investigation, he turned the transcript over to Superintendent Bishop, who made the decision to dismiss Claimant after studying the record. The Carrier contends that the Superintendent was just an instrument in communicating the decision to the Claimant. They urge that he was merely giving force and effort to the recommendations of Trainmaster Newell.

Following the investigation, the Superintendent sent the following letter to the Claimant:

"CENTRAL OF GEORGIA RAILWAY COMPANY

Office of Superintendent–Columbus Division

H. L. Bishop, Jr.
Superintendent

Columbus, Georgia
July 23, 1963 ad
File E-7310-A

Mr. R. G. King
Crew Dispatcher
Columbus, Georgia

Dear Mr. King:

Reference is made to formal investigation, which was held in the office of the trainmaster, Columbus, Georgia, at 2:00 P. M., EST, July 19, 1963, in connection with your alleged failure to protect your regular assignment as relief crew dispatcher, Columbus Yard, Columbus, Georgia, going on duty at 11:00 P. M., July 12, 1963, as instructed by Terminal Trainmaster C. G. Rutland and Chief Yard Clerk W. O. Murray.

A thorough study of the transcript of this investigation reveals you are guilty as charged; therefore, for the aforementioned offense, you are hereby dismissed from the services of the railway company.

Kindly arrange to turn in your rule book, switch key, pass, and any other company property in your possession.

Very truly yours,

/s/ H. L. Bishop, Jr.
Superintendent"

This letter seems to indicate that the Superintendent studied the transcript and determined that King was "guilty as charged."

At page 26 of the Carrier's submission to this Board, they make the following statement:

"Clearly, then, Mr. King was entitled to be disciplined. For this serious offense, the Superintendent was justified in dismissing Mr. King from the service, July 23."

And on page two of Carrier's reply to the Brotherhood's Ex Parte Submission:

"At the top of Page 2 of the Brotherhood's submission, they refer to Superintendent Bishop's letter of July 23, 1963, to Mr. R. G. King, in which letter Mr. Bishop found Mr. King guilty of the charges, and dismissed him from the service. That letter is reproduced on Page 8 of Carrier's Ex Parte Submission."

And on page 14 of the same reply, we find:

"The further allegations in the bottom half of Page 9 of the Brotherhood's Submission are not based on fact, and are emphatically denied by Carrier. The fact is, for this very serious offense it was entirely proper for Superintendent Bishop to consider prior incidents concerning Mr. King's lack of interest in his job at the railroad, and his persistent efforts to be relieved from protecting his assignment. Mr. King was not, of course, discharged for past offenses — but they were considered by Superintendent Bishop, and, instead of letting Mr. King lay off from work additional time, Mr. Bishop separated Mr. King from the service long enough for Mr. King to make up his mind whether he wanted to work for the railroad, or whether he wanted to let his cocktail lounge and liquor store or other interest occupy his time. That was the very reason Mr. Bishop arranged for Mr. King to come to his office in early September, 1963, to talk the matter over. Mr. King stated he wanted to work for the railroad, and, after consideration, Mr. Bishop allowed Mr. King to return to service on a leniency basis, without pay for time lost, on Friday, September 20, 1963."

Therefore, it appears to us that the Carrier has recognized that the Superintendent was, in fact, the person who made the determination that the Claimant was guilty, and then assessed the punishment.

In Second Division Award 3266 (Hornbeck) it was said:

"It is within the province of the representative of the Carrier who presides at the hearing to determine the credibility of those who testify and to weigh and evaluate their testimony. If upon so doing, it is probable that the charge is proven and the representative so finds, this Board may not disturb that finding, unless it is manifestly unsupported by the evidence."

If this Board is going to enforce the rule as enunciated in that and many other similar awards, then it would seem that we must insist that the person who listens to the testimony of the witnesses, also be the one who makes the initial decision which results from the evidence there presented.

Indeed, this is not a new decision as far as this Board is concerned. Award 7088 (Whiting); 8020 (Bailer) and many others speak to this same proposition.

In addition to the question of fundamental due process, we are concerned with Rule 20(d):

"(d) The right of appeal by employes or their duly accredited representatives in the regular order of succession up to and including the highest official designated by the management to whom appeals may be made is hereby established. When appeal is taken, further hearing shall be granted, if requested of the official to whom appeal is made. Appeals will be registered within thirty (30) days after decision is given and a copy furnished official whose decision is appealed. Hearings and decisions on appeals will be given within thirty (30) days."

The instant case was decided by the Superintendent. Therefore, the Claimant was not allowed to perfect an appeal to this officer with any hope that he could receive a fair and impartial hearing.

Award 7021 (Wyckoff) presents a situation very similar to the instant case. There it was held:

"Claimant was removed from service and charged with failure to protect his assignment.

The hearing was conducted by a Trainmaster, but the decision was made by a second Trainmaster in collaboration with the Superintendent, who was the next succeeding higher officer designated by the Carrier to whom appeal might be made.

Successive appeals were taken to the Superintendent and to the General Manager, both of which were denied. Claimant was represented throughout by his General Chairman. Both appeals were taken on the merits only.

FIRST. Rule 22 explicitly guarantees the right of appeal 'to each succeeding higher officer up to and including the highest officer designated by the carrier to whom appeals may be made.' What this rule means and requires is independent consideration and decision at each successive appellate step. By participating in and giving his written approval to the initial decision, the Superintendent made it his own and so pre-judged, denied and nullified the right of appeal to him."

It would appear to us that since the Superintendent had determined Claimant's guilt, the Claimant was denied an avenue of appeal which is guaranteed to him under Rule 20(d).

We are of the opinion that after Trainmaster Newell conducted the investigation, that Superintendent Bishop reviewed the transcript, determined Claimant's guilt, and ordered him dismissed. We hold that this was a fundamental violation of due process of law and a specific violation of Rule 20(d).

In this case Claimant was held out of service seven days pending the investigation. Rule 20(b) gives the Carrier an absolute right to hold an employe out of service for seven days, pending a hearing. Although this rule works a hardship on those who are ultimately determined to be innocent, nevertheless, the rule is clear and concise, and we will not allow compensation for the seven days Claimant was held out pending the investigation. Also, Claimant was restored to service effective September 20, 1963, but he requested that he be permitted to delay his return to service until September 24, 1963. Therefore, we will not charge these four days to the Carrier. We hold that the Claimant is entitled to be compensated for his actual loss for 38 days when he was held out of service. The discipline assessed by the Carrier is hereby reversed.

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 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 Agreement was violated.

AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1965.

CARRIER MEMBERS' DISSENT TO AWARD 14031,
DOCKET CL-14641 (Don Hamilton, Referee)

The reasoning advanced in this award displays a misunderstanding of the functions of this Board and basic principles underlying collective bargaining agreements.

The Railway Labor Act, in Section 3, First (i), confers jurisdiction on this Board over disputes growing out of the interpretation or application of agreements concerning rates of pay, rules and working conditions, only after such disputes have been handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. Confining itself to this jurisdiction, the Board, throughout the years of its existence, has consistently held it is limited to interpreting agreements, and that it lacks the power to add to, take from, or make rules. In simple terms, the Board's function is to interpret agreements as they stand, and not rewrite them in accordance with our notions or theories on labor-management relations.

Further, in conformity with Section 3, First (u) of the Act, this Board issued Circular No. 1, the Board's Rules of Procedure, which, insofar as is here pertinent, provides:

> "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

and:

> "Position of Employes: Under this caption the employes must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employes' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

The issue on which the majority turned this case was never considered during handling of the dispute on the property or even raised in the submissions of the parties. In fact, it was raised for the first time by the Labor Member during panel argument, and, in accordance with numerous awards, and the admonition of Circular No. 1, should never have been considered. The Referee acknowledges that the issue was never raised on the property, but attempts to circumvent the consequences by an erroneous reasoning process, viz.: rights accorded by a collective bargaining agreements are property rights, and an individual cannot be denied a property right without due process of law so that, if there is a violation of due process, such violation is fundamental, and may be raised at any time in the proceedings.

The majority's initial premise is faulty. The courts have held that seniority and other such rights are not inherent. Rather, they are contractual, ones which are created by a collective bargaining agreement and which can be extinguished or terminated by or through a manner prescribed in that same instrument. At point is **McMullens et al. v. Kansas, Oklahoma and Gulf Railway Company et al.**, 229 F. 2d 50 (1956), cert. den. 351 U. S. 918, wherein the United States Court of Appeals, Tenth Circuit, in affirming the United States District Court, Eastern District of Oklahoma, held:

> "Collective bargaining agreements creating a seniority system do not create a permanent status or give an indefinite tenure to employes. **Elder v. New York Central R. Co.**, 6 Cir., 152 F. 2d 361; **System Federation No. 59 of Railway Employes v. Louisiana & A. Ry. Co.**, 5 Cir., 119 F. 2d 509, 515, cert. den. 314 U. S. 656. Seniority

among railroad employes is contractual and does not arise from mere employment. **Colbert v. Brotherhood of Railroad Trainmen,** 9 Cir., 206 F.2d 9, cert. den. 346 U.S. 931. Those who acquire seniority rights under a contract are bound by the possibility that the contract may be changed, and the rights thereunder revised or abrogated. **Ford Motor Co. v. Huffman,** 345 U.S. 330; **Lewellyn v. Fleming,** 10 Cir., 154 F.2d 211, cert. den. 329 U.S. 715; **Elder v. New York Central R. Co.,** supra; **Lamon v. Georgia Southern and Florida Railway Co.,** — Ga. —, — S.E. 2d —, decided November 14, 1955. Employes have no vested right in the seniority created by contract and the Railway Labor Act does not undertake to guarantee them a job for life. The employer has the right to select employes and to discharge them, so long as the collective bargaining processes are not impaired. **Beeler v. Chicago, R. I. & P. Ry. Co.,** 10 Cir., 169 F.2d 557, cert. den. 335 U.S. 903; **Lamon v. Georgia Southern and Florida Railway Co.,** supra. A myriad of matters arising out of the employer-employe relationship are negotiated, although they are not specifically referred to in the bargaining language of the Act.(1) Seniority and nondiscriminatory discharge, along with wages, are fundamentally contractual and are the most common subjects of bargaining. If seniority and nondiscriminatory discharges could not have been negotiated, then the employing railroad would have been at liberty to discharge the plaintiffs at will, or eliminate their seniority which was retained by virtue of the basic contract provisions and under which they now claim the right to work."

With the initial premise failing, the entire reasoning falls, and the majority erred in considering the belatedly raised issue.

As concerns the merits of the issue, it is equally without foundation. At common law, absent an individual employment contract, an employer was free to discharge an employe for cause or without cause and with or without an investigation as the employer saw fit. A collective bargaining agreement restricts managerial rights to the extent therein provided. It is well understood that, except insofar as it has limited itself by a collective bargaining agreement, management retains all rights. Thus, whatever rights an employe may have are contractual, those accorded him by the collective bargaining agreement.

Nothing in the Agreement in evidence, and particularly those rules dealing with discipline, prescribes who shall prefere charges, conduct investigations and render decisions. The Agreement being silent in those respects, carrier retained the right to make those determinations, and for this Board to provide otherwise under the guise of an interpretation is in excess of its authority. As was held in **Award 14021** (Coburn):

"The complaint that Claimant's appellate rights were prejudiced because the Carrier official who made the finding of guilt and assessed the discipline was not present at the hearing is likewise without merit. There is nothing in Rules 27 and 28, cited and relied upon by the Employes, which either expressly or impliedly would require such official to be present at the investigation. Nor is there any showing here that custom and practice on this property required his presence. (Cf. Award 6226) Accordingly, the Board finds no merit in or rule support for the Employes' contention that Claimant's rights were abrogated or impaired as a result of the procedure followed in this case."

"* * * We must, necessarily, start out with the premise that in the absence of an Agreement restricting the powers of management, the Carrier would have an inherent right to dismiss or discharge an employe without a hearing. On this property, however, Carrier has restricted itself by Agreement in the matter of discipline of its employes as contained in Rules 26 to Rule 31, inclusive, of the Agreement. Having examined these Rules, we can find nothing that prescribes who shall prefer the charges, conduct the hearings, nor that the officer conducting the hearing must render the decision or assess the discipline.

We have held in many awards that the Carrier could not be held to the same degree of perfection in the conduct of discipline cases as would be expected at a trial in a court of law. It is a matter of common knowledge that in court of law, trial and appellate judges frequently delegate to referees the sole and primary duty of taking testimony, this procedure including matters concerning discipline — such as, in contempt proceedings wherein domestic relations are involved, juvenile court hearings, disbarment proceedings involving the discipline of lawyers, and in many other proceedings. In all of these instances just referred to, the trial or assigning judge renders the ultimate decision.

In the instant case we cannot assume there has been a complete lack of co-operation between the Terminal Trainmaster and the Superintendent in arriving at a determination of the disposition of it. If that were to be the claim, such an issue should properly have been raised on the property so as to have afforded the Carrier an opportunity of rebutting it. It could not be raised for the first time here. Petitioner's position in all of the foregoing respects is without merit. See Award 10015 (Weston); Award 2608."

Even then there was no evidence in the record to support the conclusion that the Superintendent rather than the hearing officer made the decision to discharge the claimant. While the Referee quotes various passages from the record, he merely speculates and, in fact, ignores carrier's positive statement that the hearing officer did in fact make the recommendations to discharge the claimant even though the letter of discharge went out over the Superintendent's signature, viz.:

"After consulting with Trainmaster Newell, and based on Mr. Newell's recommendations, under date of July 23, 1963, Superintendent H. L. Bishop, Jr., wrote the following letter to Mr. King:"

Such has never been condemned by this Board. For example, Award 10015 (Weston), held:

"Petitioner nevertheless contends that the investigation was unfair, since the Superintendent, who was not present at the hearing, rather than the hearing officer, Mr. Buffalo, rendered the decision. There is no express requirement in Rule 39 that the officer conducting the hearing must render the decision, but the problem is that a decision by the Superintendent at the first stage may deny Claimant the full avenue of appeal guaranteed by Rule 41. The objection was not raised on the property or in the submissions of the parties,

and Carrier has had no opportunity to explain or explore it. Cf. Awards 7021 and 9102.

Quite apart from that question, however, we are satisfied that the record does not establish that the Superintendent actually rendered the decision, although proof as to that preliminary point is essential to the success of this procedural objection. The mere fact that the Superintendent signed the suspension notice does not alone support the conclusion that he rather than Buffalo made the initial determination as to the credibility of witnesses and Claimant's insubordination. See Award 8310. We, therefore, find the objection to be without merit in the light of this record."

To the same effect are Awards 10717 (Harwood), 12001 (Dolnick), 12138 (Kane), and 8572 (Sempliner) between these same parties.

There was in the disciplinary proceedings involved here no element of violation of "due process of law" under the Constitution of the United States. In labor-management relations, whatever rights an employe has are those accorded by the collective bargaining agreement and, as such are governed by the terms of the collective bargaining agreement. If there is any analogy between "due process" and the rights accorded an employe under the discipline rules of the collective bargaining agreement, it is that the employe be given all the benefits to which he is entitled under those discipline rules. This would under most discipline rules mean a fair hearing, the elements of which under most agreements would be notice of the charge against him, so that he is not deceived or taken by surprise at the hearing, sufficient time to prepare his defense and obtain representation if he so desires, and an opportunity to meet and present evidence and/or witnesses in his behalf. In this case these elements were fulfilled. Claimant was afforded all the "due process" accorded him under the collective bargaining agreement and this Board is without authority to give him more than is accorded by the collective bargaining agreement.

In the final analysis, if there was any violation or deprivation of due process in this case, it was on the part of this Board, by action of the majority, in deciding the case on an issue which the carrier had no opportunity to defend against.

For these and other reasons, this award is patently erroneous, and we dissent.

R. A. DeRossett
W. F. Euker
C. H. Manoogian
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 14031, DOCKET CL-14641

(Don Hamilton, Referee)

Dissentors assert that the reasoning advanced in Award 14031, Docket CL-14641, displays a misunderstanding of the functions of this Board and, by rehashing all the arguments they could muster, attempt to show that both the "initial premise" and "entire reasoning" fails.

The assertion is made that Carrier had no opportunity to defend itself against what the Dissentors allege was the "decisive" issue. If, by such assertion, they intend that the Rules were complied with and there was no procedural error, then they are wrong. The record plainly and unequivocally shows that Rule 20(d), which was violated, was set forth and argued on the property.

For example, under date of August 20, 1963, the General Chairman in his letter stated that " * * * the investigation had denied Relief Crew Dispatcher a regular avenue of appeal * * * " and, in that same letter, he quoted from Award 8811 as follows:

> " '* * * The employes do not contend that the investigation was conducted in an unfair and improper manner, but an investigation is not complete until a decision has been rendered, and when that decision is not rendered by the examining officer, but, as in the instant case, by the highest official of the Carrier to whom Claimant has a contractual right of appeal, the Employes do contend the investigation was improper and the Agreement was violated.' "

all of which appears at pages 32 and 35 of the record. Obviously, then, a question on Rule 20(d) was raised, and neither the court decisions or the awards cited in the Dissent seem contrary to the findings of fact or the decision in this case. In view of the record, the Majority stated:

> " * * * we believe that the issue involved in this question was raised by reference to the appeal rights of Claimant under Rule 20(d). * * * "

and that:

> " * * * We hold that this was a fundamental violation of due process of law and a specific violation of Rule 20(d)."

Such a finding was entirely correct and most certainly was supported by the record and well within the authority of this Board.

The Award does not, in any manner, attempt to rewrite any rules. It does interpret those in existence, and the thrust of the Award is that Claimant was not accorded the due process required under the rules of the Agreement. The Award is also in accord with the prior Awards cited therein, and others, which clearly state that " 'the official who conducted the investigation heard the evidence and saw the witnesses will evaluate the evidence and decide whether the employe was guilty or innocent of the charge against him.' " (Award 7088, as quoted in Award 8020.)

Especially is this standard required when, as here, there is conflict in the testimony, for the hearing officer is to resolve conflicts in fact. (Award 13180.)

The Award is correct as rendered, and what has been said about protecting the rights of all concerned in such cases should be noted well by Carrier even if it necessitates altering their methods of conducting investigations.

D. E. Watkins
Labor Member
2-7-66