



Award No. 16190

Docket No. CL-16620

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6035) that:

(a) Carrier violated the Agreement at Lynchburg, Virginia, when it suspended Mr. R. L. Coleman, from service, without pay, beginning on September 21, 1964, and ending 12:01 A. M., October 20, 1964, accused of "being in a poker game and playing poker on company property while on duty at 2:55 A. M., Sunday, September 20, 1964" and for allegedly not properly carrying out his duties as Mail Baggage Clerk, on September 20, 1964, at 2:55 A. M.

(b) Mr. Coleman shall be compensated at his daily rate of pay for twenty-one (21) days, the time lost while suspended.

OPINION OF BOARD: Claimant received a disciplinary layoff of 30 days without pay for "being in a poker game and playing poker on company property while on duty" and for "not properly carrying out his duties as Mail Baggage Clerk on September 20, 1964."

It is the contention of Claimant that Carrier did not have just cause in disciplining him as required by Rule 40 of the Agreement.

The record discloses that H. C. Willis, Patrolman, Special Service, testified that on the date in question he and Trainmaster S. E. Hawkins were at Kemper Street Station in Lynchburg and found the baggage room door open and discovered the Claimant in the N&W trainmen's room located in the mail room at Kemper Street Station; that before entering the trainmen's room he heard Claimant say "that should have been another ace"; that upon entering said room he saw Claimant and eight other men were around a long table and that Claimant was leaning over the table with cards in his hands; that he told Claimant that the reason why he and Mr. Hawkins were present at that time was because four days previously he had seen Claimant come out of the N&W trainmen's room to the baggage room to call the train and that it had occurred to him that Claimant might have been playing poker with the N&W crew on that date, namely, September 16, 1964.

Mr. S. E. Hawkins, trainmaster, testified that he, in the company of Special Agent Willis found the baggage room at the Kemper Street Station empty and the door to said room ajar, and that there were three pieces of checked baggage inside this room; that there was a cash drawer in the baggage room, together with a company typewriter and some cleaning equipment; that he went to the trainmen's room and saw Claimant and eight others around a table with Claimant leaning over the table, on which he saw money and playing cards; that Claimant was not properly performing his duties in that he had no reason for being away from the baggage room on this particular date and further no reason for leaving the baggage room unlocked; that he had previously instructed Claimant not to leave the baggage room unlocked unless left in the care of some other person.

Claimant testified that upon seeing an automobile parked, which hindered him in handling the mail for the Star Routes, he went directly to the trainmen's room and found that the auto belonged to one of the trainmen, who said that he would move it, and about that time Special Agent Willis and Trainmaster Hawkins walked in; that he wasn't playing cards and couldn't have been because the other men at the table were playing seven card and only the seven men sitting at the table were playing; that he did not close and lock the door when he left the baggage room, but that said baggage room was protected by two red cap porters, whom he told to let him know if they say anyone going into it; that he had been instructed to lock it only when he couldn't protect the baggage room; that at times baggage is left outside of the baggage room due to crowded conditions.

This Board has held on numerous occasions that it is not our function in discipline cases to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. See Awards 5032 and 16074.

The Carrier did not show, in this instance, by direct and positive evidence that Claimant was actually "playing poker." However, the circumstantial evidence produced by the Carrier at the hearing pointed so definitely to guilt to this first charge against Claimant that Carrier therefore met its burden of proving beyond a reasonable doubt a finding of guilt.

This is clearly seen by the testimony of Special Agent Willis and Trainmaster Hawkins. Although neither Agent Willis or Trainmaster Hawkins saw Claimant actually "playing poker." Mr. Willis testified that on walking up to the trainmen's room, he heard Claimant say, "That one should have been an ace", and upon entering the room he saw Claimant and eight other men around a long table, and that Claimant was leaning over the table with cards in his hands. Further, Trainmaster Hawkins testified that upon entering the trainmen's room with Agent Willis, he saw Claimant and eight other men around a table, with Claimant leaning over the table, and that on the table were money and cards.

There is no doubt that Claimant was present in the trainmen's room while a card game was in progress. Claimant himself admitted this (although he said it was for the purpose of ascertaining who owned the auto blocking delivery of the mail). His mere presence in the room is not sufficient to prove guilt; however, the fact that he had cards in his hand, was leaning

over the table, and was heard to say, "That one should have been an ace", shows a chain of circumstances that is so strong and conclusive that we can infer that Claimant was "in a poker game and playing poker", as charged by Carrier.

Therefore, Carrier produced material and relevant substantial evidence to support a finding of guilty against Claimant to the first charge.

In regard to the second charge against Claimant of "not properly carrying out his duties as "Mail Baggage Clerk" on the date in question, the evidence is undisputed that Claimant left the baggage room unattended and unlocked while he was in the trainmen's room. By doing so, he was failing to follow instructions given to him by Carrier's officers. The fact that two porters may have or were in the vicinity of the baggage room did not relieve Claimant of personal responsibility of protecting the baggage room by either being there himself or locking the door when away from said room. Having failed to follow and adhere to the specific Carrier instructions given him, Claimant must accept the consequences of being disciplined for failing to work properly and according to instructions.

For the aforesaid reasons, this Claim must be denied.

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 Employee involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1968.