Award No. 16464
Docket No. CL-16964

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

LOS ANGELES UNION PASSENGER TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6278) that:

(a) The Los Angeles Union Passenger Terminal violated the Rules of the Agreement when it failed to afford Mr. Nelson Jackson a fair and impartial hearing, following which it dismissed him from service on February 4, 1965, based on alleged responsibility for an action not specified in the charge used to bring him to trial;

(b) The Los Angeles Union Passenger Terminal shall now be required to restore Mr. Nelson Jackson to service with all rights unimpaired and with compensation for all time lost from February 4, 1965, and for each and every subsequent date thereafter until restored to service.

OPINION OF BOARD: After a formal investigation, Mr. Nelson Jackson, Baggage and Mail Handler, received a notice of dismissal effective February 4, 1965, stating that the evidence developed at the hearing established his guilt for engaging in other employment with the City of Los Angeles which conflicted with the performance of his duty at the Los Angeles Passenger Terminal, in violation of Rule 21 of the Rules and Regulations of the Los Angeles Union Passenger Terminal.

Mr. Jackson contends that the notice of investigation was vague and inadequate because no time and dates of violations were specified. He emphasizes that there were numerous procedural defects in the conduct of the proceedings which denied him a fair and impartial investigation, and although his representative protested about these abuses, he was ignored. For example, he points out that the first Hearing Officer, Mr. Pierson, was the Terminal Officer who preferred charges against him and thus acted as both accuser and judge. Following a recess, the investigation reconvened with Mr. R. D. Workman as the new Hearing Officer. Since he was the highest officer at the Terminal, to whom all appeals are made, Claimant contends that he was deprived of one step in the appeals process, for Mr. Workman could no longer impartially hear an appeal. Furthermore, he alleges that evidence which his representative attempted to introduce was ruled inadmissible, whereas, on the

other hand, evidence was admitted concerning dates of absences from work which was not related to the charge. Claimant further contends that he was not furnished copies of this information prior to the investigation so that he could properly prepare his defense. He also protests that Carrier refused his request to call additional witnesses to authenticate employment records.

In another argument, Claimant maintains that he was singled out for an alleged violation of Rule 21. It was common practice for many employes at Terminal, including supervisory personnel, to engage in outside employment without permission of the proper officer, but his attempt to offer proof of this practice was suppressed. Hence he claims the application of this Rule to him was an act of discrimination.

Petitioner also takes the position that he was found guilty of charges of which he was not made aware prior to the investigation. He states that he was charged with maintaining dual employment without permission of the proper officer but was subsequently dismissed because his outside employment conflicted with the performance of his duties at Terminal. In short, he argues that Carrier relies on Rule 21 for the charges against him, but the reason given to Carrier for dismissal cannot be found in Rule 21.

Carrier submits in its denial that Claimant was presented with a proper notice which apprised him of the charge of violation of Rule 21, that he was accorded a fair and impartial hearing, that the evidence adduced at the investigation conclusively established the guilt of Claimant in engaging in other employment without permission of the proper officer, and that his dismissal was warranted on the basis of his admitted and proven guilt.

The notice of investigation which Claimant asserts is not specific reads as follows:

> "You are hereby notified to be present at the office of the Baggage and Mail Agent . . . for formal investigation with your allegedly engaging in other business without permission of the proper officer, in that you are allegedly employed by the City of Los Angeles which may involve violation of Rule 21. . . ."

This charge clearly apprised Claimant that the purpose of the investigation concerned his alleged outside employment in violation of Rule 21. Although the notice did not include specific dates, this information was presented as evidence so that he had an opportunity to examine the records or question witnesses concerning whether he worked for the City on the specific dates he was absent from Terminal service. Furthermore, Claimant's representative secured a continuance of the hearing in order to verify these records and did, in fact, present his own witness for this purpose. Since Claimant was not misled by the charge or by the form of notice, we find the notice was sufficient.

All of the contentions of a procedural and substantive nature which Claimant raises to point out that he was deprived of a fair hearing and was not proved guilty of the offense with which he was charged cannot be supported by the record.

Although Mr. Pierson signed the notice and conducted part of the investigation, his behavior at the hearing does not show him to be autocratic, over-

bearing and prejudiced. When requested by Claimant, he removed himself as Hearing Officer for the purpose of serving as a witness. On previous occasions, in disputes between Brotherhood and Carrier, Mr. Pierson signed the notice and assumed the role of Hearing Officer without objection by this Organization.

The fact that Mr. Workman participated as a Hearing Officer did not disqualify him as an appeal agent. Furthermore, Claimant's right of appeal was not terminated with this officer's decision. Although it may be better practice to have an appeal officer who does not act as a Hearing Officer, the holding of both positions by the same person does not necessarily mean prejudgment and a denial of justice.

Among the criticisms directed at the Hearing Officer was the admission of certain evidence particularly relating to dates of employment and comparative absences at the two jobs and the refusal to call in for cross examination Clerks who had made entries in these records. The basis for Claimant's objections was that this evidence did not concern the charge. We find, however, that the evidence was relevant and material since it related to Rule 21, the subject in the notice. Moreover, the data concerning his attendance were official records and properly admitted in evidence. Since it would serve no additional purpose to have the Clerks available for cross examination, and since Claimant's rights were not prejudiced, the Hearing Officer properly rejected such requests.

The record however shows that Claimant was unduly restricted in his efforts to offer certain aspects of his defense. He was not given the opportunity to show that Rule 21 had not been enforced and that the enforcement of this Rule was a change in policy of which he was not apprised. The Hearing Officer ruled inadmissible evidence that Claimant worked for the City of Los Angeles eleven years in addition to his Terminal employment which Claimant regarded as tacit approval of Carrier's non-enforcement of the Rule. Moreover, there was a denial of admission of evidence that the change in policy discriminated against him in that it was not applied to other employes in dual jobs whose names and places of outside employment he could furnish.

This evidence, if considered, would not serve to contest Rule 21 or to deny Carrier's right to preclude employes from maintaining dual employment, but might have aided him in explaining and justifying his dual employment. In addition, the evidence does not show an excessive pattern of absences from Claimant's work at the Terminal that was not explained for the most part by personal or family illness.

For these reasons we find that the penalty assessed was excessive and we hold that Claimant be restored to service providing he gives up his outside employment. We award compensation from February 4, 1967 for time lost from his Los Angeles passenger Terminal position.

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 by the Carrier.

AWARD

Claim sustained in accordance with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1968.

STATEMENT OF CARRIER MEMBERS — AWARD 16464, DOCKET CL-16964 (Referee Engelstein)

We agree with the finding in the seventh paragraph of the Opinion, which reads:

> "All of the contentions of a procedural and substantive nature which Claimant raises to point out that he was deprived of a fair hearing and was not proved guilty of the offense with which he was charged cannot be supported by the record."

Having properly found that Claimant's contentions that he was deprived of a fair hearing and was not proved guilty **cannot be supported by the record,** there could be no valid basis for sustaining any part of the claim under Rule 46; yet the majority have arbitrarily attempted to sustain part of the claim under the pretense that Claimant:

> ". . . was not given the opportunity to show that Rule 21 had not been enforced and that the enforcement of this Rule was a change in policy of which he was not apprised. . . ."

From the record concerning the Terminal's enforcement of Rule 21 we see that in the last paragraph of their reply, the Employes give us this unqualified admission of the Terminal's right to enforce Rule 21 by dismissal:

> **"This claim of course, has not been progressed to your Board for the purpose of establishing an employe's right to maintain dual employment. Neither is there any intent to contest the Terminal's prerogative to establish reasonable rules for the guidance of its employes. This is merely a case where an employe was suddenly placed in jeopardy, without warning,** due to Terminal's inconsistent and unpredictable enforcement of a rule, resulting in unjust actions against the Claimant . . ." (Emphasis ours.)

The allegation that the Claimant was "suddenly placed in jeopardy" is clearly contradicted by Claimant's own statement which the Employes have

placed in evidence in their initial submission. The Employes have quoted a complaint which Claimant allegedly filed with the California Fair Employment Practices Commission in which Claimant asserts:

> "However, periodically **for the last three months** I have been subjected to harassment by the LAUPT Baggage and Mail Agent, Mr. H. E. Pierson. **Periodic warnings about my being employed by the City of Los Angeles as a Plant Attendant.**" (Emphasis ours.)

This unqualified admission of Claimant that he had received periodic warnings from Terminal Baggage Agent Pierson establishes that he was adequately forewarned and he deliberately resisted the attempts of the Terminal to enforce Rule 21 with respect to him.

Thus, the Employes' admission of the Terminal's right to enforce this rule upon reasonable notice and Claimant's allegation that he had two or three months notice establishes there was no merit in this claim. This is especially true in view of the Employes' further admission that:

> ". . . other employes were given the opportunity to resign if they preferred to retain their outside employment . . ."

The foregoing is a frank admission that the Terminal was attempting to enforce Rule 21, and unquestionably that is the reason Claimant himself for years concealed the fact that he was engaged in outside employment.

Thus the statement of the majority that the enforcement of Rule 21 by the Terminal ". . . was a change in policy of which he [Claimant] was not apprised . . . " is plainly and categorically contradicted by the record, even by the admissions of Claimant himself.

As we understand the Award, Claimant is to get nothing unless he first gives up his outside employment. If he does that, and returns to Carrier's service, he is to be paid from February 4, 1967, for net wage loss as provided for in Rule 46.

For the reasons stated, we believe that the portion of the Award which purports to sustain part of the claim is arbitrary and void.

G. L. Naylor
R. E. Black
W. B. Jones
P. C. Carter
G. C White

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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 16464

Docket No. CL-16964

Name of Organization:

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

Name of Carrier:

LOS ANGELES UNION PASSENGER TERMINAL

Upon application of the representatives of the Employe involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application as provided for in Section 3, First (m) of the Railway Labor Act as approved June 21, 1963, the following interpretation is made:

The request for interpretation of Award No. 16464 concerns the last paragraph which reads:

> "For these reasons we find that the penalty assessed was excessive and we hold that Claimant be restored to service providing he gives up his outside employment. We award compensation from February 4, 1967 for time lost from his Los Angeles passenger Terminal position."

This statement provides that the condition for restoration for service with the Terminal be Claimant's severance of his outside employment. If he chooses to meet this prerequisite, he is to be allowed compensation from February 4, 1967 for time lost from his position at the Los Angeles Union Passenger Terminal. In allowing Claimant compensation, the Board took note of the date of dismissal February 4, 1965, and ordered payment for the time lost from his employment at Terminal beginning February 4, 1967, without regard to income earned from other employment.

Referee Nathan Engelstein, who sat with the Division as a neutral member when Award No. 16464 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1969.

CARRIER MEMBERS' DISSENT TO INTERPRETATION NO. 1 TO AWARD 16464

(Referee Engelstein)

We respectfully submit that Award 16464, as interpreted by the Referee in Interpretation No. 1, is invalid for the following reasons:

I.

It is wholly baseless and completely without reason in that it expressly holds that Claimant was not entitled to maintain dual employment with Carrier and the City of Los Angeles so long as he had notice of Carrier's intention to enforce Rule 21, yet it attempts to allow Claimant all earnings of both positions for the years subsequent to February 4, 1967, after Claimant was admittedly aware of Carrier's intention to enforce the rule. On the point that an award which is wholly baseless and completely without reason is invalid, see **Gunther v. SD&AE**, 382 U. S. 253, 261 (1965), also Report No. 1201 of the Senate Committee on Labor and Public Welfare re HR 706, 89th Congress, 2nd Session.

II.

The Award and the Interpretation manifest an infidelity to the language of the controlling contract in that an attempt is made to return Claimant to Carrier's service and allow him full pay of a Carrier position without deduction for the full pay he has already received in outside employment, in spite of a finding that he was guilty of the charges made against him; whereas the contract provides in Rule 46 that:

> "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 net wage loss."

The Employes stipulate in their submission that Rule 46 is controlling, and a binding interpretation of this Board has established that "net wage loss" under this rule means that an employe who has proved a wrongful discharge is only entitled to the amount he would have earned in Carrier's service reduced by all sums earned in outside employment (Interpretation No. 1 to Award 9216). Hence, even if the ruling had been that Claimant was not guilty of the charges and therefore entitled to reinstatement, the most that would have been included in his claim for compensation for all time lost would have been "net wage loss" or earnings of the Carrier position he would have occupied less all earnings in outside employment.

Since he admittedly insisted on retaining his outside employment when he was warned to give it up and forfeited his position with Carrier rather than give up the outside work, that work must pay more. Even now, Claimant prefers the outside work and refuses to return to Carrier unless in doing so he will get the tremendous windfall that this Award, as interpreted, would give him. Both the clear language of Rule 46 and this Board's final and binding interpretation thereof preclude such a windfall. This attempt of the Referee to give him the windfall and return him to service manifests obvious infidelity to the language of Rule 46, which the Employes stipulate is controlling. Award 10547.

See **United Steel Workers v. Enterprise**, 363 U. S. 593, 597 (1960) on the point that an award which manifests infidelity to the language of the contract is invalid. Also see Awards 8426, 15075, 16260 on attempts to expand claim.

III.

The Award is capricious in that the reasons given for finding the penalty assessed by Carrier was excessive are contrary to the clear and conclusive admissions of Claimant and Claimant's representatives contained in the record. The reasons given for finding the discipline excessive are stated as follows:

> "The record however shows that Claimant was unduly restricted in his efforts to offer certain aspects of his defense. He was not given the opportunity to show that Rule 21 had not been enforced and that the enforcement of this Rule was a change in policy of which **he was not apprised.** The Hearing Officer ruled inadmissible evidence that Claimant worked for the City of Los Angeles eleven years in addition to his Terminal employment which Claimant regarded as **tacit approval of Carrier's non-enforcement of the Rule.** Moreover, there was a denial of admission of evidence that the change in policy discriminated against him in that **it was not applied to other employes** in dual jobs whose names and places of outside employment he could furnish.
>
> **This evidence, if considered, would not serve to contest Rule 21 or to deny Carrier's right to preclude employes from maintaining dual employment, but might have aided him in explaining and justifying his dual employment. . . .** "(Emphasis ours.)

Thus, the sole reasons given for the conclusion that Claimant was hindered in explaining his dual employment are three, namely, that the rule was not applied against other employes in dual jobs, that Claimant regarded his alleged eleven years of dual employment as tacit approval by Carrier, and that Claimant was taken by surprise and not apprised of Carrier's intention to enforce the rule. Each of these reasons is so plainly contradicted by the admissions of the Employes in the record that capriciousness in asserting them is manifest.

As to the first, regarding enforcement of Rule 21 against other employes, the Employes themselves argue at pages 38 and 43 of the record that Carrier was enforcing the rule against other employes by giving them an opportunity to resign one position or the other, and their complaint was that Claimant had allegedly been taken by surprise without receiving such an opportunity. Claimant's admissions prove this "surprise" allegation false, as we shall note.

With respect to the contention that eleven years of dual employment had been construed by Claimant as tacit approval by the Carrier, Claimant's own testimony shows that he concealed his dual employment and that it was not discovered by the Carrier until shortly before the incidents involved in this claim.

With respect to the central and key argument that Claimant was taken by surprise and was not apprised that Carrier intended to enforce this rule, the record contains Claimant's written admission that "for the last three months" prior to the incidents involved in this claim he had received "periodic warnings

about . . . being employed by the City of Los Angeles as a plant attendant." With such admissions appearing in the record and in the Employes' own submission, we can only regard it as capricious for the Referee to suggest that Claimant could have justified his dual employment at the time of the investigation by evidence of the three types mentioned, even if such evidence had been offered in good faith at the hearing. Certainly nothing was offered that could in the slightest have overcome the frank admissions noted above. See our awards on the conclusiveness of admissions. Also see Statement of Carrier Members appended to the Original Award.

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