



Award No. 17901

Docket No. TE-18454

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION DIVISION, BRAC
THE DAYTON UNION RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Dayton Union Railway Company, that:

1. J. R. Herron, Train Director on the Dayton Union Railway Company, was denied due process and was otherwise unfairly treated when he was dismissed from service for an alleged charge on November 29, 1968.
2. Carrier shall restore J. R. Herron to the service, pay him for all time lost and restore all other benefits due under the contract as if he had not been suspended, and clear his record of the charge and all references thereto.

OPINION OF BOARD: This is a discipline case which we review as an appellate body to determine whether: (1) Claimant was afforded due process; (2) there is substantial evidence supporting a finding of guilt, in whole or in part; and (3) discipline, if assessed, is reasonable.

The instant case can be disposed of by resolving whether Claimant was afforded due process.

Carrier appointed as hearing officer one G. A. Street, Assistant Superintendent, Penn Central Company. After the hearing Street made no report, made no findings, made no decision.

The transcript of the hearing discloses numerous conflicts in the testimony of the witnesses. Only the hearing officer who observed the demeanor of the witnesses was qualified to make findings of credibility under such circumstances. See our Award No. 13180 in which we held:

"There is conflicting testimony in the transcript of the hearing as to material and relevant facts. Only the hearing officer who presided at the hearing and observed the demeanor of the witnesses was qualified to make findings as to credibility. He did not do so. In the absence of resolution of credibility by the hearing officer it cannot be determined whether there is substantial evidence to support the findings made by General Agent Key. We find, therefore, that Carrier failed to afford claimant a fair and impartial hearing. We will sustain the claim."

Also see Award 13240 in which we stated:

". . . the Hearing Officer made no finding of credibility and made no decision. It is offensive to the concepts of fairness and impartially (sic)

that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the hearing.

In the absence of a finding of credibility by a qualified hearing officer the statements of Complainants have no probative value. Consequently, the decision made on the property is not supported by substantial evidence. We will sustain the claim."

Other apposite Awards are: Third Division Award No. 14031 and Second Division Award No. 3266.

For the foregoing reasons we find that Claimant was: (1) not afforded due process; and (2) the charge against Claimant was not sustained. We, therefore are compelled to sustain the Claim.

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 Employees 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 violated.

A W A R D

Claim sustained with Claimant to be made whole as prescribed in Rule 9 (d) of the Schedule Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of May 1970.

CARRIER MEMBERS' DISSENT TO AWARD 17901, DOCKET TE-18454

This claim was sustained on a finding by the majority that the claimant was denied "due process" in that the trial officer, Mr. Streett, "made no report, made no findings, made no decision."

The concept of "due" process; advanced by the referee is wholly inapplicable. The "due process" clause of the Federal constitution is a restriction on actions of the government against its citizens. That clause "adds nothing to the rights of one citizen as against another", American jurisprudence, 2d, Vol. 16, Section 544, and only applies to acts by governmental authorities. To apply such a concept in the construction of a collective agreement defining the carriers right to discipline employees is wholly erroneous. The same authority just cited states "it is the established general rule that the provisions of the due process clause . . . are inhibitions on the power of government . . . not upon freedom of action of private persons" Section 557. In the absence of a contractual guarantee of due process no such right exists in this case. The question is whether claimant had a fair and impartial investigation.

The conclusion that the trial officer made no findings or decision is pure assumption, and is entirely without support in the record. The only reference on this point is found at page ten (10) of the Employees Ex-parte Submission where they state that Mr. Streett acted as trial officer and "was not heard from thereafter." It may be true that Mr. Streett reported no findings or decisions to the employees. However, it is wholly unjustifiable for the majority to assume that he was not involved in evaluating the record and making the decision to apply discipline, of which formal notice was used by Mr. Yand. The fact is that he was so involved. Both he and Mr. Yand as the record shows were officers of the Dayton Union Railway and were in daily contact. It would require strong evidence to overcome the obvious assumption that they would discuss the case before discipline was applied.

To impose a requirement that the trial officer make formal report, findings or decision is to go far beyond the agreement. It requires a "fair and impartial investigation" and that "a decision will be rendered within ten (10) days after the hearing." It is wholly silent on the procedures within the Company for review of the trial record and decision as to discipline. Many awards have recognized that the procedure followed here is perfectly proper. See pages 11 to 12 in the carrier's submission. The awards cited by the majority, the two earliest of which were by the same referee are erroneous and contrary to previous principles established by this Board.

In the two previous awards by the same referee there was at least some evidence that the hearing officer had not evaluated the record. No such evidence existed here. However, both those awards are erroneous as shown in the dissents to them. In addition in one of those awards the referee also found that there was no substantial evidence to support the discipline.

Award 14031 by Referee Hamilton likewise went far beyond claimants contractual rights and was based on the same erroneous assumptions as Referee Dorsey's previous Awards.

Award 14031 by Referee Hamilton likewise went far beyond claimants For these reasons, we dissent.

/s/ G. C. WHITE
G. C. White

/s/ R. E. BLACK
R. E. Black

/s/ P. C. Carter
P. C. Carter

/s/ W. B. JONES
W. B. Jones

/s/ G. L. NAYLOR
G. L. Naylor