

Award No. 18008  
Docket No. CL-18465

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Paul C. Dugan, Referee

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**PARTIES TO DISPUTE:**

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

**THE MINNESOTA TRANSFER RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-6650) that:

(1) Carrier violated the rules of the Clerks' Agreement when, on July 1, 1968, it withheld C. E. Cayler from service; and when, on August 12, 1968, it dismissed him from the service of the Company.

(2) Carrier shall now be required to clear his record and restore him to service with all rights unimpaired.

(3) Carrier shall be required to compensate him for all wages lost as a result of its action, including losses suffered by him and/or his dependents as a result of the cancellation of Group Policy 23000, and the life and dismemberment insurance.

(4) Carrier shall be required to adjust all lost wages due by eight per cent (8%) per annum.

**OPINION OF BOARD:** Claimant was advised by letter dated July 2, 1968 from Carrier's Superintendent, C. Lamphere, that an investigation would be held at 9:00 A.M., July 5, 1968, at said Superintendent's office "to determine the cause and fix responsibility, if any, for your alleged injury at 8:30 A.M. on April 24, 1968."

At said hearing, which was postponed at Claimant's request to July 19, 1968, Claimant was questioned by Carrier's Mr. Lamphere in regard to said alleged accident, and refused to answer certain questions relative to details surrounding said alleged accident involving Claimant.

By letter dated July 19, 1968 over the signature of W. D. Zalusky addressed to Claimant, said letter read, in part, as follows:

"An investigation will be held in the office of the Superintendent at 9:00 A.M. on July 25, 1968, at which time you will answer to the charge of insubordination relative to your refusal to answer ques-

tions put forth at the investigation held at 9:00 A. M., July 19, 1968."

The aforesaid letter was not delivered to Claimant, and on July 30, 1968, Carrier's Agent Zalusky wrote Claimant another letter, enclosing the first letter, and rescheduling the hearing for August 2, 1968.

On August 2, 1968, hearing was held in the office of Carrier's Superintendent, with Mr. W. Hammon, Superintendent M. B. & E. Department, St. Paul Union Depot, as the presiding officer. Agent Zalusky was not present at this hearing.

By certified mail, dated August 12, 1968, Carrier's said Agent, W. D. Zalusky, advised Claimant as follows:

"The investigation held on August 2, 1968, confirmed the charge, and you are hereby dismissed from the service of this Company."

The Organization contends that (1) the investigation of August 2, 1968 was not timely held in conformity with the requirements of Rule 17; (2) the investigation of July 19, 1968 was held on Claimant's day of rest, in violation of said Rule 17; (3) procedural error occurred on Carrier's part when it permitted Agent Zalusky, who was not present at the investigation of August 2, 1968, to render the decision of dismissal rather than Mr. W. Hammon, Superintendent Mail, Baggage and Express Department, St. Paul Union Depot Company, separate property from Carrier; (4) that in appealing Agent Zalusky's decision, the Organization followed Carrier's letter of instructions of December 4, 1959, and appealed therefore to Mr. W. F. Bannon, Vice President, rather than to Superintendent Lamphere; (5) the transcript of the investigation is barren of any evidence that Claimant was insubordinate in that (a) Claimant responded to each question propounded to him at the investigation of July 19, 1968 and there was no suggestion on the part of Carrier at the hearing that his answers were inappropriate; (b) the only purpose of the July 19, 1968 investigation was Carrier's attempt to trap Claimant into making statements which would jeopardize any claim that he may have under the Federal Employers' Liability Act; (c) that Claimant complied with Rule 46 in making out an accident report and if Carrier felt said accident report was defective or deficient, it should have given said report to Claimant shortly after it received the report rather than surprise Claimant at the hearing and request him to answer questions for the purpose of completing said accident report; (d) that Carrier failed to produce any witnesses at the July 19, 1968 hearing so as to afford Claimant an opportunity to face his accusers and hear their testimony and review their evidence, and thus Claimant was simply facing a charge as a Company witness.

Carrier's position is that (1) the claim as filed by the Organization with the Executive Secretary, Third Division, National Railroad Adjustment Board, in its letter of June 6, 1969 is not the same claim as that handled or progressed on the property in that July 1, 1968 was stated as the date Claimant was held from service rather than July 21, 1968 and the asking of an additional 8% per annum; (2) the Organization failed to comply with the procedural requirements of Rule 17 by not appealing to Carrier's next higher proper appeal officer, Superintendent of the Operating Department, C. Lamphere; (3) the investigation record is barren of any procedural defects which can be considered sufficiently prejudicial to find that substantial rights were denied

the Claimant; (4) there is sufficient evidence of record to warrant the disciplinary action taken by the Carrier; (5) that if a sustaining award is rendered, Claimant is not entitled to damages as claimed.

Carrier contends that Claimant's appeal is procedurally defective due to the bypassing of Superintendent Lamphere in the appeal procedure as required by Rule 17 of the Agreement.

Rule 17, the pertinent parts thereof, provides as follows:

"(b) Appeals. An employe dissatisfied with decision shall have the right to appeal to the next higher proper officer, provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed, within twenty (20) days of the date of advice of the decision. The right of further appeal in the regular order of succession, up to and inclusive of the highest official designated by the Railway to whom appeals may be made, is hereby established."

Carrier's position is that when Agent Zalusky rendered his decision dismissing Claimant from Carrier's services, the next higher proper officer is Superintendent Lamphere to whom Claimant was required to have directed his appeal as set forth by the requirements of said Rule 17, and failure to so comply warrants dismissal of the claim without consideration of the merits.

The Organization's defenses to said alleged procedural defect are that (a) Carrier by its letter of instructions, dated December 4, 1959, regarding avenue of appeal, authorized the appeal herein of Agent Zalusky's decision to Carrier's Vice President and General Manager, W. F. Bannon, rather than to Carrier's Superintendent, C. Lamphere, as Carrier contends it should have so done in this instance; (b) an appeal to said Superintendent Lamphere would be no appeal at all, inasmuch as he took Claimant out of service and was the Company's primary witness at the investigation of August 2, 1968, and thus he had already reached a conclusion on the disposition of Mr. Cayler.

The letter of December 4, 1959, relied upon by the Organization, reads as follows:

"December 4, 1959

Mr. F. A. Emme, General Chairman  
Brotherhood of Railway and Steamship Clerks  
305 First Federal Building  
St. Paul 1, Minnesota

Dear Sir:

Effective December 4, 1959, Mr. C. A. Pearson, Vice President-Personnel, Great Northern Railway Company, St. Paul, Minnesota, was designated the final determining officer on all claims presented to the Minnesota Transfer Railway Company by its employes, and the Vice President-Personnel, Great Northern Railway Company, has authority to make all labor contracts for the Minnesota Transfer Railway Company.

In the handling of claims, grievances or negotiations, such shall first be considered by the department head, then appealed to

the Vice President and General Manager, and finally appealed to the Vice President-Personnel, Great Northern Railway Company.

Yours truly,

/s/ H. P. Congdon

cc: Mr. C. A. Pearson  
Mr. G. M. Hare  
Mr. D. K. Lawson"

We do not agree with the Organization that Mr. Zalusky was the department head designated by the Carrier in the second paragraph of the above letter to consider the claim herein. Superintendent Lamphere is the head of the operating department and "the next higher proper officer" to Mr. Zalusky. Said letter of December 4, 1959 does not, in our opinion, permit Superintendent Lamphere to be bypassed in appealing to the Vice President and General Manager. Therefore, the Organization's contention in this regard is without merit, and must be denied.

Second, the Organization's argument that it would be useless to appeal to said Superintendent Lamphere because his decision is apparently readily known due to his position of witness against Claimant at the hearing, is also untenable because Rule 17 of the Agreement clearly provides and requires that the appeal of a dissatisfied decision be made to the "next higher proper officer." Inasmuch as Superintendent Lamphere is the "next higher proper officer" of Carrier in this instance, the Organization should have appealed said decision of Agent Zalusky to him.

Further, the record does not disclose that Superintendent Lamphere's inquiry into the accident showed a prejudgment by him in regard to the charge of insubordination later filed against Claimant so as to nullify the requirements of the appeal to him as set forth in said Rule 17.

Having failed to follow the mandatory requirements of said Rule 17 involving "appeals", we are compelled to dismiss this 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.

#### AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1970.

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