Award No. 18536
Docket No. CL-18693

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Robert M. O'Brien, Referee

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## PARTIES TO DISPUTE:

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

## INTERSTATE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6733) that:

(a) Carrier violated the Agreement at Andover, Virginia, when it held Mr. Wesley P. Johnston, Dispatcher, from the service of the Carrier beginning October 8, 1968, based on the findings of a Federal Grand Jury which convened at Abingdon, Virginia, on October 7, 1968. Mr. Johnston was neither disciplined nor discharged, nor was he charged with an infraction of any company rule.

(b) Mr. Johnston shall be compensated at this monthly rate of $685.14 plus all wage increases since that date, pro rated on a daily basis for each work day beginning October 8, 1968, and continuing until he is restored to the service of the Carrier. Further, he shall be credited with days necessary to qualify for vacation, and be reimbursed for any and all hospital and medical bills for which he or members of his family would have been covered under the Health and Welfare Plan, and further that his seniority be unimpaired.

(c) Mr. Johnston shall be allowed interest at the rate of six per cent on the amount awarded beginning October 8, 1968, and continuing until claim is paid.

OPINION OF BOARD: The facts out of which this claim arose are not in dispute. On or about October 29, 1967, while the Brotherhood of Locomotive Firemen and Enginemen was on strike against Carrier, a subsidiary of Southern Railway Company, a segment of the track of Southern Railway was dynamited, causing damage to its equipment, tracks, and bridge and derailing one of Southern's trains.

On October 7, 1968, after an investigation of the dynamiting by agents of the FBI, Claimant, along with several others, was indicted by a Federal Grand Jury for conspiring to wreck a train operated on Southern Railway

Company as well as for wilfully wrecking said train on or about October 29, 1967.

On October 8, 1968, Carrier's General Manager wrote Claimant as follows:

> "I have been informed that the Federal Grand Jury which convened at Abingdon, Virginia on October 7, 1968, has indicted you making the following charges: [here the letter stated in full the Grand Jury charges against Claimant.] This is to notify you to attend an investigation in my office at 9 o'clock A. M., Thursday, October 10, 1968, in connection with these charges that have been made against you. This is also to notify you that, meanwhile, you are being held out of service."

At the investigation held October 10, 1968, Claimant refused to answer any of the questions put to him by pleading the Fifth Amendment. Consequently, the General Manager recessed the investigation with the following statement:

> "MR. GURLEY: The Federal Grand Jury has taken jurisdiction in this matter and I will not proceed with the investigation at this time since I do not want to do anything that will prejudice your case; therefore, I will await the decision of the Federal Court but, meanwhile, Mr. Johnston and Mr. Frazier will be held from all service of the Interstate Railroad Company.
>
> I declare this investigation recessed until after the Federal Court has ruled. I will notify you of the time and date the investigation will be convened.
>
> I declare this investigation recessed at 9:43 A. M."

Neither Claimant nor his representatives objected to this recess.

On July 21, 1970, the recessed investigation was resumed and to all questions put to him, Claimant responded, "I pled not guilty in court; I plead not guilty now", except on two occasions his reply was that, "You will have to ask my representative." Testimony was produced at this investigation by several witnesses including Carrier's security officer who had conducted an investigation of the dynamiting incident. As a result of evidence adduced at the hearing, Claimant was dismissed from service. He was so notified on July 28, 1970.

It should be noted that as of this date Claimant had not yet been brought to trial on the charges made against him by the Federal Grand Jury on October 7, 1968.

Claimant is submitting this claim on procedural grounds, contending that because of violations of the applicable Agreement, he has been denied contractual rights. He alleges violations of the Agreement because: (1) Carrier had knowledge of the facts giving rise to the charge before the indictment and failed to charge Claimant within 30 days thereof; (2) Carrier never charged Claimant with an offense; (3) Carrier unilaterally recessed the investigation; and (4) Carrier failed to complete the investiga-

tion within 10 days of starting it. Furthermore, the investigation should never have been commenced since the strike settlement agreement between Carrier and the Brotherhood of Locomotive Firemen and the Brotherhood of Locomotive Firemen and Enginemen contained a no-reprisal provision.

The pertinent provisions of the Agreement with which we are concerned are:

"RULE 23. ADVICE OF CAUSE

An employe, charged with an offense, shall be furnished with a letter stating the precise charge at the time the charge is made. No charge shall be made that involves any matter of which the carrier has had knowledge thirty (30) days or more."

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"RULE 24. INVESTIGATION

An employe who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending investigation. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within ten (10) days after completion of investigation."

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"RULE 31. EXONERATION

If the final decision decrees that the 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 all time lost."

The Board holds that Claimant was not deprived of any procedural safeguards guaranteed him by the Agreement.

The basis for the charges brought against Claimant by Carrier was the indictment by the Federal Grand Jury on October 7, 1968. When Carrier sent Claimant notice of the investigation on October 8, 1968 and then held the investigation of its charges against Claimant on October 10, 1968, it came well within the 30 day limitation required by Rule 23. Nor can it be said that Carrier failed to charge Claimant with an offense as is also required by Rule 23. It is a well settled principle of this Board that the formation of a charge need not be in the technical language of a criminal complaint. However, it must be sufficiently precise to enable the accused employe opportunity to prepare his defense. Carrier's letter of October 8, 1968 certainly came within this procedural requirement. It not only mentioned that the charges grew out of the indictment, which Claimant obviously knew about, but went further by including the entire charges brought against him by the Federal Grand Jury. A mere reading of the letter would be sufficient to apprise Claimant of the precise charges against him. From that he could certainly prepare his defense.

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AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1971.

## LABOR MEMBER'S DISSENT TO AWARD 18536

### (Docket CL-18693) (Referee O'Brien)

The Referee has made several serious errors in his Award, among which are the following:

On page 4, the Opinion reads as follows:

> "Nor can it be said that Carrier violated Rule 24 by not completing the investigation within 10 days of starting it. Nothing in the language of Rule 24 requires such a result, nor can we read such language into it. The investigation, required by Rule 24, was held within ten days of the date of the charge, and a decision was rendered within ten days after completion of the investigation. **The Agreement is silent on the question of recessing investigations.** If Claimant had any objections to the recess, he or his representative should have raised them when the recess was declared. This they failed to do.
>
> In so recessing the investigation, Carrier did the only fair thing it could have done. If it had pursued the investigation to its conclusion, this might have proved prejudicial to Claimant's pending trial. This was an extremely serious consideration since, if found guilty, Claimant could have received twenty-five years in prison and $20,000 in fines.
>
> Yet, Carrier could not delay commencing the investigation until after the criminal proceedings were over since the investigation was based on the charges in the October 7, 1968 indictment, and, pursuant to Rule 23, charges had to be made within 30 days thereof, and then the investigation had to be started within ten (10) days thereafter, or else Rule 24 would have been violated. Consequently, if Carrier delayed starting the investigation until after the trial it would have been precluded from holding any investigation at all, even if Claimant had been found guilty of the charges at the trial."

On page 27 of the record in this Docket a statement made by Mr. T. E. Gurley, General Manager, Interstate Railroad Company, who conducted the Investigation, reads as follows:

> "The Federal Grand Jury has taken jurisdiction in this matter and I will not proceed with the investigation at this time since

I do not want to do anything that will prejudice your case; therefore, I will await the decision of the Federal Court but, meanwhile, Mr. Johnston and Mr. Frazier will be held from all service of the Interstate Railroad Company.

I declare this investigation recessed until after the Federal Court has ruled. I will notify you of the time and date the investigation will be convened.

I declare this investigation recessed at 9:43 A. M."

You will note the emphasized portion of the first paragraph of the Opinion, above quoted, reads:

"The Agreement is silent on the question of recessing investigations."

This statement is absurd; ten (10) days is the absolute limit of the Rule.

But, let us thoroughly examine the provisions of Rule 24:

"An employe who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within ten (10) days after completion of investigation."

Those provisions are mandatory, specifically providing that the investigation shall be held within ten (10) days of the date the employe is held from service.

We now cite the provisions of Rule 33, Time Limits:

"The time limits provided in Rules 23, 24, 27 and 32 may be extended by mutual agreement."

Here again, we have mandatory provisions.

The referee was specifically advised by the Labor Member that Rule 24, Investigations, provides that the investigation should be held within the ten-day period as provided therein and, he was further advised, that any extension beyond the ten days had to be by mutual agreement as shown in Rule 33. Both rules are very clear and free of ambiguity.

It is obvious that the referee ignored the rules, disregarded the facts, and wrote the award based on fiction.

For these reasons, I dissent.

C. E. Kief
Labor Member
5-7-71

## CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 18536, DOCKET CL-18693

Award 18536 is well reasoned and sound in every respect. The dissent is simply a rehash of the argument presented by the Labor Member to the Referee on more than one occasion. The argument was found wanting when presented originally and repetition in the dissent does not add validity to it.

The Award is correct in finding that the Agreement is silent on the question of recessing investigations. The conclusion that if Claimant had any objections to the recess, he or his representative should have raised them when the recess was declared, is in accordance with the well-established principle that objections to the manner in which a hearing is being conducted must be raised during the hearing, and that failure to raise such objection constitutes a waiver. See Awards 16678, 17424, 17154, 16261, 16121, 15994, 15574, among many others.

The dissenter also has apparently overlooked the contention of the Petitioner in its submission that —

> "Mr. Johnston had a right to do this [refuse to answer any questions put to him] as the case had not been tried in Federal Court, and to answer any questions or discuss the matter could be prejudicial to his receiving a fair and proper hearing before the court."

The manner in which the case was handled by the Carrier did not prejudice the Claimant's rights in any way. To the contrary, it was to keep from possibly prejudicing his rights in the criminal proceedings that the investigation was recessed. The Claimant was protected under Rule 31 if eventually exonerated.

Award 18536 and the record on which it is based stand as ample refutation of the views of the dissenter, and correctly reveals who engages in fiction. The dissent in no manner detracts from the soundness of the Award.

P. C. Carter
R. E. Black
H. F. M. Braidwood
W. B. Jones
G. L. Naylor

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.