

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21238  
Docket Number CL-20804

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(The Atchison, Topeka and Santa Fe Railway Company  
( - Coast Lines -

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood GL-7603,  
that:

(a) Carrier violated the rules of the current Clerks' Agreement at Richmond, California on July 7, 1972 when it wrongfully dismissed Mr. R. L. Southern from the service of the Carrier, and

(b) Mr. R. L. Southern shall now be reinstated and compensated for all monetary loss suffered commencing June 24, 1972, and continuing until such time as he is reinstated, because of such violations of Agreement rules.

(c) The Carrier shall be required to pay 6% interest compounded daily on all wages wrongfully withheld from Mr. R. L. Southern commencing June 24, 1972.

OPINION OF BOARD: Claimant R. L. Southern entered service of Carrier in 1966 and by letter dated July 7, 1972 was dismissed from service for alleged violation of Rules 3, 5, 16 and 17 of Carrier's General Rules for the Guidance of Employees. The basis for these charges is Claimant's alleged participation in gambling on company property together with two other employees, two unidentified males and an unidentified female on the early morning of June 24, 1972 and subsequent refusal to provide information about the incident. Claimant was pulled out of service on June 24, 1972 after he denied all knowledge of the incident when questioned by Company investigators. A consolidated hearing was held for Claimant and the two other accused employees at which Claimant was ably represented. A review of the transcript of the investigation provides the best summary of the evidence relative to Claimant. Pertinent parts of that transcript relating to Claimant are the testimony of Robert T. Harper, Acting Assistant Trainmaster at Richmond, California and that of Mr. Southern, reproduced verbatim as follows:

"Q. Mr. Harper, You have heard the opening statement of the investigation, and the charges against those present. Would you please tell us in your own words what took place about 4:45 am, Saturday, June 24, 1972, on Company property at Richmond?

A. Well, I went over to the switch shanty to look for a switchman that had been late, and when I went into the switchman's shanty and locker room I found the particular switchman I was looking for asleep, and there was a lot of noise going

on, laughter, and loud talk going on in the next room, in the enginemen's room, and the door was closed, so wondering what was going on, I walked on in there and five men and one woman were in the enginemen's room gambling. There was cards and money out on the table, and when I walked in they all looked up at me and finished their hand, and I told them "You'd better break it up", and they all took off going out the doors."

\* \* \* \* \*

"Q. Of the five men which you stated earlier were sitting at the table, are they present in this investigation this morning?

A. Three of them are. The others I did not know or recognize, and Mr. Whittenburg, Mr. Ainsworth and Mr. Southern are here.

Q. Are you absolutely positive that these three gentlemen were in the enginemen's locker room, on Company property, gambling and playing cards?

A. Yes, sir."

\* \* \* \* \*

"Q. As you entered the room, could you positively state the position of the five men and the woman at a table? I presume they were sitting at a table.

A. They were sitting at one of the tables in there. A lunch table, or a table for the convenience of the men. Sitting from an east to west direction, where they can sit on both sides of it and, coming in from the east end of the building of the enginemen's locker room, sitting to my right, was Mr. Southern, first, and then Mr. Whittenburg and the lady and, on the left of the table, was the other two men, and Mr. Ainsworth was on the end."

\* \* \* \* \*

"Q. Do you feel that you are familiar with all of the employees here, that you would recognize them readily?

A. I'm not familiar with all of them, particularly the ones that work on the third shift. I'm pretty well familiar with Mr. Ainsworth and Mr. Whittenburg. He has worked the third shift and just recently went on the second shift, and Mr. Southern was with me as a clerk up at the east end on second shift."

\* \* \* \* \*

"Q. You have heard Mr. Southern, Mr. Whittenburg and Mr. Ainsworth deny that they were participating in a card game or gambling at about 4:45 am, June 24, 1972. Is that contrary to what you saw?

A. Yes, sir. I don't think I'd fabricate a story at 4:45 am in the morning on that many people."

\* \* \* \* \*

"Q. Can you positively say that Mr. R. L. Southern, Mr. J. H. Whittenburg and Mr. Harold Ainsworth were in the switchmen's shanty/Enginemens' shanty on the morning of June 24, 1972 at about 4:45 am?

A. Yes, sir. Positively so.

Q. There is no doubt in your mind whatsoever?

A. No, sir."

\* \* \* \* \*

"Q. Mr. Harper, you accused Mr. Southern, Mr. Whittenburg and Mr. Ainsworth of violating certain rules. Still you didn't feel that it was necessary to question Mr. Southern or Mr. Whittenburg. Why did you feel that it was necessary to talk to Mr. Ainsworth?

A. I talked to Mr. Whittenburg, and at the time I talked to Mr. Whittenburg Mr. Southern had already taken off with the two other men and the woman drove off, too. The reason I talked to Ainsworth last was because he was on duty and I knew that he couldn't get away.

Q. You didn't tell him to remain so that he could talk with you?

A. Yes,

I told them I wanted to talk to all of them and they took off."

\* \* \* \* \*

"Q. Mr. Harper, for one more time, did you positively see Mr. Southern, Mr. Whittenburg and Mr. Ainsworth at the switchmen's shanty at approximately 4:45 am, June 24, 1972?

A. Yes."

\* \* \* \* \*

"Q. Mr. Southern, you have heard Mr. Harper's testimony and, also, heard the opening statement in the investigation. Would you please tell us in your own words what you know about the incident under investigation?

A. In my own words, I know nothing of the incident.

Q. Are you therefore denying that you know anything of it whatsoever?

A. I know nothing of the incident, only what the investigation papers say and that they were served.

Q. Did you hear Mr. Harper state earlier that he positively identified you as one of the five men playing cards on the morning of June 24, 1972?

A. Yes, I heard him state that.

Q. Do you know Mr. Harper?

A. Yes, I know Mr. Harper.

Q. Do you think that he knows you?

A. Why, I've seen him here, and I assume that he does know me.

Q. Have you ever talked to him before?

A. I have said a few words to him at the east end. Yes, I have, in line of duty."

It is quite apparent that a basic conflict of testimony exists herein which can be resolved only by making a credibility determination as between Harper and Southern. The principle is too well established to require elaborate rationalization that this Board does not resolve credibility conflicts. See Awards 9230, 9322, 10113, 10791, 16281 et al. From the record it appears the Organization recognizes this basic premise but argues that Claimant was denied a fair and impartial investigation because the record contains no affirmative statement from the Carrier hearing officer that he resolved the credibility question against Claimant. We have reviewed carefully the opposing authorities cited by the parties on this point and conclude that the better reasoned view is expressed by that line of Awards which refrains from finding per se violations in the absence of express contract provisions and looks instead to an ad hoc determination of the fairness and impartiality of each investigation. See Award 10015 (Weston), 13383 (Hall) and 14021 (Coburn). Our review of this record leaves no doubt that Claimant's right to a fair investigation was not impaired by the procedure followed herein. Nor, absent a resolution of the patent conflict in testimony, has this Board any other basis upon which to sustain the claim. Accordingly the claim must be and is denied.

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 not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A.W. Pauler*  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.