

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

**THE NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood that:

(1) The Carrier violated the provisions of the Clerks' Agreement in the manner it held investigation and removed Mr. George W. Black from service on charges not proven, and

(2) Mr. Black shall now be restored to service with all rights unimpaired and compensated for all monetary loss sustained.

OPINION OF BOARD: On September 27, 1955, Claimant Black, regularly assigned to Car Checker Position No. 469 on the second trick (hours 3 to 11 p.m.) at Carrier's Depot Yard in Portland, Oregon, reported to work at 3:00 p.m. Fifteen minutes later he asked to be relieved because of illness and stayed until the relief employe arrived at 5:00 p.m.

On October 6, 1955, Carrier's Manager J. H. Jones wrote Claimant, notifying him to appear for a formal hearing on October 10, 1955, on the charges of (1) violation of Carrier's Rule G and (2) failure to work satisfactorily during the two hours he was on the job on September 27.

After the hearing conducted on October 10 by Trainmaster Lord, Claimant on October 14, 1955, was notified by letter from Manager Jones (the officer who preferred the charges and the highest official designated by the Carrier for hearing appeals under the Railway Labor Act) that (1) the evidence adduced at the hearing sustained the charges and (2) Claimant's record of having been previously disciplined for violation of Rule G and for mishandling of cars warranted immediate dismissal now.

This decision was appealed, with claim for compensation for time lost, by the General Chairman to Manager Jones. Said appeal, after conference thereon, was formally denied by Mr. Jones in letter dated April 10, 1956.

The Organization argues that the evidence in the transcript of hearing does not support the charges against Claimant. It also alleges certain procedural defects in respect to the making and hearing of the charges, namely (1) the charges were not precise, as required by Rule 22(a) of the Parties' Agreement, in that the charges did not mention Claimant's alleged failure to check certain Northern Pacific cars as requested by Yardmaster Agee, thus not permitting Claimant time to prepare defense against said alleged failure before the point was raised in the hearing; (2) the hearing itself was not fair and impartial, as required by Rule 22(a), in that the person (Jones) making the charges and making the decision was not present at the hearing to listen to the testimony and observe the behavior of witnesses; and (3) Claimant was deprived of his right of appeal to higher officers, as required by Rule 22(c), in that he could go no higher than Manager Jones, the official who made the original decision of discharge.

Carrier denies these allegations, taking particular pains to show in respect to the third supposed procedural defect, that (1) for many years on this small property, the Organization had acquiesced in having disciplinary decisions made and appeals handled by the same highest official and (2) said official had in several cases reversed himself on appeal, so that employes were in fact not denied any right under Rule 22(c).

In a long series of awards on discipline cases since the inception of this Board, the following principles have been developed and applied: (1) A carrier has the right to discipline an employe for just cause, including mainly violation of Carrier rules. (2) The Board will not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion. (3) A Carrier's disciplinary decision is unreasonable, arbitrary, capricious, or discriminatory when (a) the Carrier's rule or rules violated were not reasonably related to the orderly and efficient operation of Carrier's business; (b) given reasonable rules, the employes were not given reasonable opportunity to become acquainted therewith; (c) the Carrier did not make clear the consequence of disobedience or disregard of the rules; (d) the Carrier did not apply and enforce the rules with reasonable uniformity for all employes; (e) rule violation by an accused employe was not established by substantial evidence; (f) a timely hearing after notice on specific charges was not held in accordance with the provisions of the Parties' Agreement; (g) at the hearing the Carrier's managerial representative acted as chief witness as well as interrogator and judge (it is permissible for said representative to act as interrogator and judge); (h) at the hearing the accused was not allowed to have representation, to testify, and, if he wished, to have other witnesses to appear in his behalf; (i) at the hearing the Carrier displayed other kinds of manifest bias; (j) the degree of discipline imposed was not reasonably related to the seriousness of the proven offense (an employe's past record may not be used to establish guilt on the offense charged, but said record may be used to determine the severity of discipline for proven guilt); or (k) the finding of guilt and/or the severity of the discipline discriminated against the employe in respect to other employes charged with similar offenses and having similar past records. (4) In judging the above, the Board will not ordinarily go beyond the record developed at the Carrier's investigation. (5) In connection with said investigation the Carrier has the burden of proving its charge and of showing that its conduct and decision were not unreasonable, etc. (6) On appeal to this Board the Employes have a burden of showing that the Carrier failed to sustain its burden. (7) In judging whether the Carrier sustained its burden the Board will not try to reconcile or choose between contradictory,

conflicting testimony of opposing witnesses at the hearing. It is sufficient if the Carrier's decision was based on substantial evidence of record. (8) If for any of the proper reasons stated above under (3) the Carrier's disciplinary action is deemed not supportable but if at the same time the record of the case shows that in the circumstances directly leading up to the Carrier's action the employe himself was not free of improper behavior, the employe may be required to suffer some penalty such as no pay for time lost, upon reinstatement.

Applying these principles to the facts of the instant case (including the testimony presented at Carrier's investigation) and to the Organization's contentions, the Board rules as follows: (1) Carrier's Rule G prohibiting the use of intoxicants and narcotics is reasonably related to the orderly and efficient operation of its business in that it requires employes to report for work sober and to stay sober while on the job. Carrier's rule requiring obedience to reasonable orders of supervisors, such as Agee's request that Claimant check NP cars, is also fair. (2) Claimant knew of the existence of said rules and of penalties for disobedience and incompetent performance. (3) There is no evidence of record that Carrier had not enforced such rules even-handedly among all employes. (4) Substantial evidence sustained the charges of violation of Rule G and of Claimant's failure to follow orders and competently perform his job on September 27, 1955. (a) As to Rule G, it is true that no one smelled alcohol on Claimant's breath or saw him stagger when walking. But he stayed sitting in the pillbox, and his speech, looks, and behavior convinced several competent witnesses that he, an habitual drinker, had been indulging again. Claimant's counter-argument that these evidences of indulgence had been caused by overwork, loss of sleep, worry, and the taking of sleeping pills was not supported by the testimony of witnesses he would have been free to call, if he wished. (b) As to Claimant's alleged failure to check the cars requested by the Yardmaster and otherwise perform his assigned duties, the evidence was almost wholly in support of the Carrier's charge. (5) The hearing on the charges was timely, as required by Rule 22(a) of the Agreement. (6) Its fairness was not impaired by the absence of Manager Jones, the man who preferred the written charges. A reading of the transcript does not persuade that the hearing was arbitrary or biased. Claimant had representation and could have had witnesses. He was allowed to testify fully in his own behalf. The official who conducted the hearing was not witness as well as prosecutor. Rules 22(a) and (b) were not violated in these respects. (7) The degree of discipline imposed was reasonably related to the seriousness of the proven offense and to Claimant's past record. (8) But the Organization's contention of denial of Claimant's right of appeal to "the next higher officer" must be upheld. It does not avail to argue that thirty years of uncontested past practice and several cases of self-reversal on appeal permits Rule 22(c) to be interpreted so that the highest official of the Carrier on labor grievances can make the original decisions and then pass judgment on appeal therefrom. The plain meaning of the language of Rule 22(c), as well as the intent of the Railway Labor Act, is that in a case like this a first decision on a claim or grievance by a lower Carrier representative or official may be appealed to one or more higher, different officers, including the top or final decision-maker. Accordingly, in this respect (and in this respect only) the Carrier's behavior in this case must be judged to have been arbitrary and unreasonable.

Were it not for the defect found in (8) just above, the instant claim would be denied. As it is, the claim must be sustained. But not in its entirety. Except in respect to required appeal, Claimant was correctly found guilty of proper charges at a proper hearing. He is to be reinstated with

seniority rights unimpaired, but he shall not be compensated for any time or wages lost.

FINDINGS: The Third Division of the Adjustment Board after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Rule 22(c) of the Agreement was violated to extent set forth in Opinion.

AWARD

Claim sustained as set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of September, 1958.

DISSENT TO AWARD NO. 8431, DOCKET NO. CL-8864

This award sustaining the claim as set forth in the Opinion and Findings is ill-advised and palpably wrong.

After setting forth certain principles and applying them to the facts and circumstances, the majority found, among other things, that substantial evidence sustained the charges of violation of Rule G and of claimant's failure to follow orders and competently perform his job, that the transcript does not persuade that the hearing was arbitrary or biased and that the degree of discipline imposed was reasonably related to the seriousness of the proven offense and to claimant's past record. Thus it was found that the charges against claimant were sustained.

No final conclusion can be derived from the above but that the Carrier did not abuse its discretionary right. The majority found that the Carrier's decision to dismiss the claimant was reasonably related to the seriousness of the proven offense and to claimant's past record. Interference in the Carrier's judgment was not warranted. The claim should have been denied under provisions of Rule 22(d).

Nevertheless, what admittedly in the first instance was proper disciplinary action was remitted by reinstating the claimant, not because of failure to give him a fair and impartial hearing, not because of lack of proof of the charges, not because the Carrier's assessment of the discipline was in bad faith, arbitrary or capricious, but because of what can only be termed as an assumed technicality having nothing to do with the propriety of the discipline. The Findings to the award state that Rule 22(c) was violated, and the

Opinion holds in this respect that "the Carrier's behavior * * * must be judged to have been arbitrary and unreasonable" on the supposition claimant had been denied right of appeal. The fallacy is obvious.

Rule 22 does not specify or even imply who shall prefer the charges, conduct the investigation, or make the decision. In the absence of specific terms of agreement to the contrary, the Carrier may freely designate who shall perform these functions. The Railway Labor Act prescribes that representatives, for the purposes of the Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. (Section 2, Third.) The representatives of the Carrier acting in the procedures involved in this case were not restricted by law from doing so, nor were they restricted in any manner from representing the Carrier in the capacities involved in the handling of this case by the terms of Rule 22, or any other Agreement rule. The procedure was that followed for at least thirty years of uncontested practice and the case was handled in the usual manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes. (Section 3, First (i) of the Act.) The usual manner of handling on the property, existing since the enactment of the Railway Labor Act and through revisions of agreement, is improperly brushed aside with the statement that, "The plain meaning of the language of Rule 22(c), as well as the intent of the Railway Labor Act, is that in a case like this a first decision on a claim or grievance by a lower Carrier representative or official may be appealed to one or more higher, different officers, including the top or final decision-maker."

The conduct of hearings and appeals in disciplinary proceedings does not require adherence to all the attributes of hearings and appeals of criminal cases, nor of civil liberty cases, in the Courts.

The claim in this case, which was that Carrier violated the Agreement "in the manner it held investigation and removed * * * (claimant) * * * from service on charges not proven", was appealed in the usual manner to the highest designated officer and his decision was given in complete detail. The claimant's rights were not abridged, nor prejudiced in any way, as the Opinion in this award admits that the charges against the employe were sustained. The finding that Rules 22(a) and (b) were not violated was decisive of the claim as made. No violation of Rule 22(c) was alleged in the statement of claim, nor was any implied therein.

Rule 22(d) deprives this Division of jurisdiction to reinstate claimant by resorting to a strange construction of Rule 22(c) because Rule 22(d) specifically states that the only basis on which claimant may be reinstated is to decide that charges against him were not sustained. The award is glaringly in error in the light of the findings expressed in the Opinion.

It has been said (MStP&SSM vs. Rock, 279 U.S. 410) and oft repeated that "The Carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service." This award does a disservice to the Carrier, its patrons and to those engaged in Carrier's operations. It not only ignores the claim as made, but it conflicts with Rule 22(d) and above all it loses sight of the fact that the procedural rules of agreement are for protecting the rights of the innocent as a general proposition and not for shielding the fault of the

guilty when guilt is clearly proven. The purpose of Rule 22 patently was not to provide a technical loophole for escape from deserved discipline.

For the foregoing reasons, among others, we dissent.

J. F. Mullen

R. M. Butler

W. H. Castle

C. P. Dugan

J. E. Kemp