

Award No. 13180
Docket No. CL-14756

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

THE WASHINGTON TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5505) that:

1. The Carrier violated the Clerks' Agreement when on June 19, 1963, it summarily dismissed Joseph R. Balthrop, Baggage and Mail Handler, Washington, D. C., from service.

2. Baggage and Mail Handler Joseph R. Balthrop shall now be reinstated to the service of the Carrier with seniority and all other rights unimpaired.

3. Baggage and Mail Handler Joseph R. Balthrop shall now be compensated for all wage and other losses sustained account this summary dismissal.

4. Baggage and Mail Handler Joseph R. Balthrop's record shall be cleared of all alleged charges or allegations which may have been recorded thereon as the result of the alleged violation named herein.

OPINION OF BOARD: This is a discipline case.

There is a fatal omission in the record.

Claimant was served with the following notice and charge dated May 28, 1963:

"You are hereby notified to report to the office of the General Baggage Agent, West Basement, Union Station, at 10:00 A. M., EST, Friday, June 7, 1963, at which time you will be accorded a hearing on the following charges:

1. You failed to properly perform your duties in the loading of sack car #37072, about 9:30 A. M., Friday, May 10, 1963.

2. You refused to comply with the instructions of Supervisor of Mails W. R. Flaherty in the handling of empty sacks on Friday, May 10, 1963.

You may be accompanied by any witnesses selected by you, without expense to the company, and also by a member of your Union Committee, as provided for in Rule 24, Paragraph C.

Yours truly,

/s/ W. H. Key
General Baggage Agent"

Pursuant to the notice hearing was held on June 7. The hearing officer was W. O. Cole. No findings were made by the hearing officer. Instead, on June 19, 1963, General Baggage Agent Key, who was the charging party and not present at the hearing, wrote the following to Claimant under date of June 19, 1963:

"Reference is made to the hearing accorded you in my office on June 7, 1963, on the charges contained in my letter to you dated May 28, 1963:

1. You failed to properly perform your duties in the loading of sack car #37072, about 9:30 A. M., Friday, May 10, 1963.
2. You refused to comply with the instructions of Supervisor of Mails W. R. Flaherty in the handling of empty sacks on Friday, May 10, 1963.

I have carefully reviewed the transcript of hearings, and find that the evidence adduced therein substantiates the charges. It is my decision, therefore, that you be relieved from service with the Washington Terminal Company, effective this date, June 19, 1963." (Emphasis ours.)

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.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1964.

DISSENT TO AWARD NO. 13180, DOCKET NO. CL-14756

In Award 13180 the majority has completely ignored the issue of whether Carrier was justified in dismissing Claimant account of failure to properly perform his duties and refusing to comply with the instructions of his Supervisor. Instead, the majority has chosen to revoke the discipline assessed against Claimant on an unwarranted finding that:

"No findings were made by the hearing officer. Instead, on June 19, 1963, General Baggage Agent Key, who was the charging party and not present at the hearing, wrote the following to Claimant" * * *

Rule 24 provides, in part, "decision in writing will be rendered within 15 calendar days after completion thereof", but makes no provision as to who should prefer the charges, or conduct the hearings, or issue the decision. This Division has no jurisdiction to prescribe that which the parties have not supplied through negotiations. If the Organization desires such a rule, the proper means of achieving it is through negotiations under Section 6 of the Railway Labor Act. In Award 2608 the Division, without the assistance of a referee, held:

"The Board finds nothing in the rules of the controlling Agreement defining who shall prefer charges or conduct hearings. There being no such definition in the rules, the Board cannot supply same."

In Awards 4840 (Carter), 8725 (Daugherty), 9817, 9819 (McMahon), 10355 (Harwood), 10569, 10571 (LaBelle), we affirmed the principle and findings in Award 2608. See also Awards 10015, 8310, 10717, 8572, 9936, 12001, 12002, among others.

The majority further states:

"* * * 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. * * *"
(Emphasis ours.)

but, nevertheless, proceeds upon a determination based on speculation and conjecture that the hearing officer made no recommendation to the General Baggage Agent.

In the handling of this claim on the property and in their submission to this Division, the Organization at no time questioned the General Baggage Agent's right to decide Claimant's guilt or innocence and/or to assess the discipline.

In Award 10015 (Weston) we held:

" * * * Petitioner nevertheless contends that the investigation was unfair since the Superintendent, who was not present at the hearing, rather than the hearing officer, Mr. Buffalo, rendered the decision. There is no express requirement in Rule 39 that the officer conducting the hearing must render the decision, but the problem is that a decision by the Superintendent at the first stage may deny Claimant the full avenue of appeal guaranteed by Rule 41. The objection was not raised on the property or in the submissions of the parties and Carrier has had no opportunity to explain or explore it; cf. Awards 7021 and 9102.

Quite apart from that question, however, we are satisfied that the record does not establish that the Superintendent actually rendered the decision, although proof as to that preliminary point is essential to the success of this procedural objection. The mere fact that the Superintendent signed the suspension notice does not alone support the conclusion that he, rather than Buffalo, made the initial determination as to the credibility of witnesses and Claimant's insubordination. See Award 8310. We, therefore, find the objection to be without merit in the light of this record. * * *"

It is a well-known principle that this Division cannot go beyond the claim referred to it (Award 6954-Coffey). Further, the Carrier is not required to rebut anything not covered in the "Statement of Claim" (Award 10537-Sheridan). Furthermore, issues not raised in the "Statement of Claim" cannot be considered by this Division (Awards 11735-Stark, 11006-Boyd, 10904-Ray, 7077-Whiting, among others). In recent Award 12356 (Dorsey) we held:

" * * * It is beyond question that this Board's jurisdiction is confined to deciding each case before it on evidence of record in that case introduced on the property. * * *"

The award is erroneous, contrary to principles firmly established and adhered to by this Board and we dissent.

R. E. Black
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White