

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  
( - Coaet 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, end 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 dhily 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 switchmen 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. Warper.

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 (Wall) 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 **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 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.