

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3584
Docket Number 3569

Referee Theodore H. O'Brien, Jr.

PARTIES Railroad Yardmasters of America
TO
DISPUTE: Consolidated Rail Corporation
STATEMENT Claim and request of Railroad Yardmasters of America:
OF CLAIM:

SYSTEM DOCKET 619
NORTHEASTERN REGION - NEW ENGLAND DIVISION

Claim of Yardmaster K. J. Regele who was disqualified as yardmaster on June 8, 1976 and subsequently dismissed from the service on July 14, 1976.

OPINION OF BOARD: The Claimant was a Yardmaster employed by the Carrier at Worcester, Mass., and was working his regular tour of duty at the time that the instant dispute arose, i.e. 10:30 P.M. on June 7, 1976 to 6:30 A.M. June 8, 1976. During Claimant's tour of duty, Train TV - 13 arrived at Worcester at 12:08 A.M. and departed at 2:25 A.M. The scheduled departing time for this train was 1:15 A.M., i.e. one hour and ten minutes prior to TV - 13's delayed departure. Because of this delayed departure of TV - 13 from the yard under Claimant's jurisdiction, he was notified by letter dated June 8, 1976 that he was disqualified as Yardmaster effective on Tuesday, June 8, 1976. On July 7, 1976, the Claimant attended two separate investigations, one involving his disqualification as a Yardmaster on June 8, 1976, and the second for leaving the Company property with a Conrail Employee's, i.e., Claimant's son's, pay check. It is only the former investigation that is before this Board. In a letter dated July 12, 1976, the Claimant's disqualification as Yardmaster was reaffirmed by the Division Superintendent, Mr. Cross, as a result of the investigation held on July 7, 1976. Claimant was subsequently dismissed from the service of the Carrier on July 14, 1976. However, the instant claim applies only to the period of disqualification from June 8, 1976 to July 14, 1976.

The Organization takes the position that certain procedural defects existed in the handling of the instant dispute by the Carrier including the contention that the Claimant's hearing, which was held concerning his disqualification as Yardmaster, was not held in an impartial manner. In support of this contention it is the Organization's position that the hearing officer did not afford the Claimant his "due process" rights, and that the hearing officer was also the officer who took Claimant out of service at the time that the incident arose. He also reaffirmed his decision to disqualify Claimant as a Yardmaster following the investigation. The Organization contends that the hearing officer prejudged the Claimant's case since he had already decided the issue when he removed the Claimant from service.

The Carrier argues that since no investigation is mandated by the Controlling Agreement, the Carrier has the right to disqualify the Claimant, and that Petitioner's due process argument has no relevancy. The Carrier further contends that the Claimant's disqualification was justified due to his failure to perform his duties properly.

The lack of a contractual rule requiring that the Claimant must receive an investigation or hearing does not relieve the Carrier from due process requirements should they elect to afford the Claimant an investigation. This issue was addressed in Award No. 3244 of this Division. The Board in that award held, in pertinent part, as follows:

"... under the terms of the applicable Agreement, Carrier was not required to give Claimant an investigatory hearing as a condition precedent to imposing discipline. However, in view of Carrier's decision to follow the usual practice with other Organizations and conduct a hearing in this instance, Carrier is bound to accord elementary due process to Claimant."

A thorough review of the record persuades this Board that the hearing officer did not meet the due process requirements necessary for the conduct of a fair and impartial investigation. In the instant claim, the Division Superintendent, Mr. Cross, removed the Claimant from service when the incident in dispute occurred, as well as presiding as hearing officer at the Claimant's investigation. Following the investigation, the same Division Superintendent upheld his own previous decision when, as a result of the investigation, he reaffirmed his position with respect to Claimant's disqualification. Thus, the Division Superintendent, made the initial decision to disqualify Claimant as a Yardmaster, then acted as hearing officer, prosecution and appeals officer when he reaffirmed his previous decision to disqualify the Claimant. Moreover, the hearing officer showed his prejudgment of the Claimant in his badgering of witnesses and in his opinionated manner of questioning witnesses during the investigation. It is our opinion, from an analysis of all the evidence before us, that the hearing officer had prejudged the Claimant's guilt and that a fair and impartial hearing was not afforded Claimant. The First Division in Award No. 21 046 decided a similar issue as follows:

"At this late date there is little excuse for the managerial personnel of a Carrier to ignore the principle that in a discipline case Carrier is essentially, and must, conduct itself like, a trial court. Among several things this means that the Carrier Official who conducts an investigation of a charge made by a Carrier against an employe (1) should not normally have been involved in the occurrences leading up to the leveling of the charge and (2) should comport himself at the investigation, in his questioning of all witnesses (managerial as well as employe), in a truly objective and aloof manner, just as would an outside judge."

In Second Division Award No. 7119, this issue was addressed as follows:

"... He activated the investigation, preferred the charge, held the hearing, reviewed the record, assessed the discipline and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested development of evidence, the unbiased, review thereof, and the objective assessment of appropriate penalty, inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions."

It is clear from a thorough reading of the record that the Claimant was not afforded a fair and impartial investigation. Numerous awards on various Divisions of the Board, have held that a cornerstone of the due process requirement dictates that the one conducting the hearing must do so in a fair and unbiased manner. Mr. Cross failed to do so. While the hearing officer's overlapping of functions does not, per se, constitute procedural error, when this situation occurs the hearing officer must take special pains to isolate his roles and thus remain impartial. In the instant claim this was not done. The decision of Mr. Cross was not based on an objective evaluation of the evidence, but was biased by a pre-conceived judgment and prior decision concerning Claimant's responsibility in the charges brought against him. This was a substantial denial of Claimant's due process rights. We shall thus sustain the claim based thereon without addressing the merits of the claim. See Awards of the Second Division, No. 6158, No. 7119, and Fourth Division Awards No. 1951, No. 3065.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By:


Assistant Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1978

Interpretation No. 1
To Award No. 3584
Docket No. 3569

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

NAME OF ORGANIZATION:

Railroad Yardmasters of America

NAME OF CARRIER:

Consolidated Rail Corporation

The Organization requests an interpretation of Award 3584 (Docket 3569) which was adopted on May 4, 1978.

In their letter of June 9, 1978, the Organization stated that the claim presented to the Fourth Division in Docket No. 3569 was as follows:

"...Yardmaster K. Regele be restored to service as a Yardmaster with all rights unimpaired and paid for all time lost..."

However, the actual claim as presented in Docket No. 3569 stated as follows:

"Claim of Yardmaster K. J. Regele who was disqualified as Yardmaster on June 8, 1976 and subsequently dismissed from service on July 14, 1976."

Furthermore, on Page One (1) of the Organization's Ex Parte Submission in Docket 3669, the Organization specifically state their claim as follows:

"Since his dismissal has been resolved in the handling on the property, his disqualification remains to be heard by the Board. This claim applies to the period from June 8 to July 14, 1976."

The Claim of the Organization in Docket No. 3569 did not seek restoration of the Claimant to service with all rights unimpaired and pay for all time lost as they claim in their letter of June 9, 1978. The claim presented to this Board was clear and specific. Award No. 3584 sustained the claim for the period of disqualification from June 8 to July 14, 1976, and nothing more. Accordingly, we affirm the findings in that Award.

Referee Theodore H. O'Brien, Jr., who sat with the Division as a member thereof when Award 3584 was adopted, also participated with the Division in making this decision.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By: 
Assistant Executive Secretary

Dated at Chicago, Illinois, this 6th day of November 1978.