

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

THE DENVER AND RIO GRANDE WESTERN RAILROAD CO.

J. F. MICHALEK

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

STATEMENT OF CLAIM: a. Dismissal of J. F. Michalek was warranted by evidence and testimony introduced at hearing.

b. Carrier fully complied with and did not violate Article 4, Discipline.

OPINION OF BOARD: The important facts in this case are:

June 6, 1947, J. F. Michalek, a clerk in Carrier's Yard Office at Pueblo, Colorado, while on duty and under pay used the Company's long distance telephone circuit to call the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees at Denver, Colorado. This use of the long distance telephone circuit was in violation of the rules of the Company and of the Contract between the Company and The Mountain States Telephone and Telegraph Company. The calls were placed without the knowledge of or permission from the Company. During the course of the conversation, J. F. Michalek used improper and uncivil language over the long distance circuits in violation of the rules of Carrier. Carrier, upon learning of this matter, notified J. F. Michalek to appear for investigation to develop facts in connection with charges that Mr. J. F. Michalek on June 6, 1947, used the Company long distance telephone circuit without authority while on duty and used improper and uncivil language on Company long distance telephone circuit at that time.

As a result of this investigation, J. F. Michalek was dismissed from Carrier's service. The letter of dismissal reading:

"Pueblo, July 1, 1947

Mr. J. F. Michalek,
Clerk, D&RGW
Pueblo Yard Office

As a result of investigation held in Superintendent's office, Pueblo, June 30, 1947, you are, effective this date, dismissed from service for using company long distance telephone circuits for personal business while on duty, without permission or authority and using improper and uncivil language on company long distance telephone circuits.

Please in any company property in your possession, including annual pass to Mr. T. W. Inman, Assistant Superintendent.

Yours truly,

(Sgd.) E. B. Herdman
Superintendent."

J. F. Michalek has requested that he be reinstated to the service of Carrier with full seniority rights and compensated for wages lost. This request was denied by Carrier.

The investigation was started in the Superintendent's Office, Pueblo, Colorado, on June 24, 1947, to determine facts in connection with the charge above mentioned. Due to the illness of General Chairman W. D. Ryan, a witness, the investigation, while started, was postponed until June 30, 1947, on which date it was concluded. The transcript of the investigation appears in the record as Carrier's Exhibit A. The record shows that on June 24, 1947, J. F. Michalek represented himself, with W. E. Kennedy, Acting Local Chairman, "present as an observer." F. H. Donlon, Vice General Chairman, was also present. It is apparent from the record that Michalek did not desire that officers or members of the Brotherhood of Railway Clerks represent him.

At the postponed investigation held on June 30, 1947 Michalek was represented by a Mr. J. J. Turner, an employe of the carrier but not a member of the respondent Brotherhood or of the craft or class of employes to which Michalek belongs.

We have reviewed with care the transcript of the investigation started on June 24 and concluded on June 30, 1947. We see no good purpose in relating here in detail the evidence there adduced. Suffice it to say that the record made sustains the charge of the carrier. In fact, Michalek admitted that he twice used the carrier's long distance telephone circuit to call General Chairman Ryan at Denver; contacting Ryan personally on the second call. The record clearly evidences the fact that Michalek used improper and uncivil language in his telephone conversation with Ryan. Both of which were in violation of the carrier's instructions regarding employes using the Company long distance telephone and instructions contained on Form 3017 covering General Notice and Rules to employes. Michalek stated that he was familiar with these "general rules."

While we do not approve entirely, the conduct of the carrier officer in the manner in which the investigation was conducted; ruling out the testimony of witnesses who should have been heard and refusing to let other witnesses testify, etc.; there can be no doubt that Michalek violated the carrier's instructions with respect to employes using the telephone, also carrier's rules previously mentioned. However, the penalty of dismissal assessed for such violations seems harsh and unwarranted. Apparently the higher carrier officers had this in mind when in discussing Michalek's dismissal with him on November 3, 1947, the carrier offered to then return him to service with seniority rights unimpaired but without pay for time lost. Michalek rejected this offer which, the carrier said in its submission, "should have been accepted as a fair disposition of the dispute." We understand that the carrier's over still stands.

In view of all of which the Board holds that claim (a) will be sustained and claim (b) dismissed; also that J. F. Michalek shall be reinstated to service with seniority rights unimpaired but without wage loss, if any, suffered.

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 thereon;

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 evidence warrants an affirmative award.

AWARD

Claim sustained in accordance with the OPINION and FINDINGS.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 11th day of August, 1948.