

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) The Carrier violated the Rules of the Clerks' Agreement at Nogales, Arizona, when on June 14, 1955, it dismissed Mr. Arturo Pina from service; and,

(b) That Mr. Arturo Pina shall be restored to service with seniority and all other rights unimpaired; that his record be cleared of all charges; and, that he be compensated at the rate of his position of Claim Clerk for all time lost.

OPINION OF BOARD: Claimant, seniority date of November 6, 1942, was occupying a regular assignment as Claim Clerk, Nogales, Arizona, Freight Station at the time of his discharge on June 14, 1955.

On April 26, 1955, Claimant sent the following telegram:

"Local Freight Agent SP, Los Angeles, Local Freight Agent, UP, Los Angeles. 11:00 A.M. Following from Agent FdelP Nogales, Mexico quote If SP 96317 SP 108796 and EJE 60962 charcoal exported from Vicam, Mexico made empty your station, pls wire me immediately correct freight charges so may issue prepaid only waybills covering. End quote Pls advise J 769. Julio Arias Agt. P."

On April 28, 1955, Claimant sent the following telegram:

"R. Parks Local Freight Agent UP Whittier.

"Following advise from Agent FdelP Nogales, Son. Quote Air-mailing PPO waybill FCP 37 prepayment charges SP 96317 charcoal Lazzari Vicam Sonora to Sam Jackson Whittier moving on Vicam WB FCP 1 Mar. 30, 1955 stop Also on SP 108796 and have arranged shipper broker have prepaid only waybills move with rest cars ROM 309 end quote J 777. Julio Arias. P."

The investigation notice charged Claimant as follows:

"You are hereby notified to be present at the office of Terminal Superintendent, Nogales, Arizona, 1:00 PM, May 31st, 1955 for formal investigation of your allegedly sending telegram on April 26th, 1955, symbol J-769, to Local Freight Agents of Southern Pacific and Union Pacific R.R. at Los Angeles, and on April 28th, 1955, sending telegram symbol J-777 to Freight Agent, Union Pacific R.R., Whittier, Calif., both over name of Agent J. Arias, which apparently contained false information, by quoting alleged communications from Agent FdelP, Nogales, Sonora, Mexico, of which there is no record, and authorized without authority delivery of SP-96317, SP-108796, and EJE-60962, loaded with charcoal, originating at Vicam, Mexico, covered by Ferrocarril del Pacifico SA Freight Waybills FCP 2, dated March 30, 1955, FCP 1, dated April 1, 1955, and FCP 2, dated April 11, 1955 respectively, before payment of freight charges were made, for which occurrence you are hereby charged with responsibility, and which may involve violation of the General Rules and Regulations of the Southern Pacific Co., as follows:

that part of Rule 801 reading:

'Employees who are . . . dishonest . . . will not be retained in the service.'

that part of Rule 802 reading:

'Indifference in the performance of duties will not be condoned.'

that part of Rule 803 reading:

'Any act of hostility or wilful disregard of the Company's interests will not be condoned.'

and Rule 804."

There is a contract between the parties in evidence which does not contain the above rules and regulations.

The investigation was postponed from May 31, 1955 by mutual agreement, held on June 6, 1955 and a notice of dismissal was dispatched to the Claimant on June 14, 1955 based on a violation of Rule 801 and Rule 803 which are quote above.

The record is belabored with accusations and recriminations which the Board chooses to ignore—there being no proof presented.

Subsequent to the handling of the matter on the property, both the Organization on behalf of the Claimant and the Carrier placed affidavits in the record. Because these affidavits were not presented while the case was being discussed on the property, the Board rules that they are not properly before the Board in this appeal and no consideration will be given to them. The question presented herein will be decided solely on the record itself as compiled while the parties actually presented and discussed the case prior to the appeal to the Board and while being discussed on the property. One postponement having been agreed to, surely a second in order to bring in all testimony that either the Carrier or Claimant wished to present was a matter of right if the time element was reasonable.

A reading of the transcript and the record indicates no unfairness in the matter of the conduct of the investigation nor the procedure used in the method of assessing the discipline. The investigation and record, however, reveal many disputed facts, some of which require comment.

We are aware of the rule of this Division that we do not resolve questions as to the credibility of witnesses or the weight to be given their testimony. This does not mean, however, that we are precluded from reviewing all the evidence of record to determine whether it supports the action taken. Our appellate function is necessarily limited and we should refrain from substituting our judgment for that of the Carrier in disciplinary cases unless there is an abuse of discretion or substantial error.

Transactions such as those questioned herein are usually completed on the basis of telegrams or inter-office memorandums and files in these matters contain a complete history and basis for the procedure followed.

There is no doubt that there was nothing in the files of the Agents in either Nogales, Arizona or Nogales, Sonora, Mexico, pertaining to the stated communications between the Claimant and the Agent's office in Mexico. It was testified, and that testimony was not denied, that the communications were by telephone with no recorded or filed report of such conversations. The testimony was that the telephone call came originally from an employe of the broker in Mexico who talked from the Agent's office in Mexico and in that same call an employe in the Agent's office discussed these matters within his regular duties with the Claimant.

These discussions lead to the telegrams which are the basis of the discharge. Mention is made of "PPO Waybill FCP 37" and Claimant could not have knowledge of that waybill number unless he received that information from someone who knew. The facts were that PPO Waybill 43.44 and 45 were issued do not deny that PPO Waybill 37 was the next numerical one on April 28 because they were issued on May 7, 1955, and the alleged conversations were held on April 26 or 28, 1955. Also it is apparent from the record that the broker was bonded and had either made tender of or had actually paid the freight charges on the 27th and 28th of April—the last of the two telegrams being dispatched on that latter date.

The facts in the case are herewith reviewed, not for the purpose of a review of the judgment of the Carrier as to whether or not the Claimant was guilty of a violation—he was so found—but to review the penalty assessed by the Carrier as to whether or not that penalty was warranted, whether or not it was a "miscarriage of justice" or whether or not the Carrier acted in an "arbitrary and capricious manner."

Rule 801 reads "Employees who are . . . dishonest . . . will not be retained in the service."

Rule 803 reads "An act of hostility or wilful disregard of the Company's interests will not be condoned."

Because the Claimant's wife was in business and the shipments in these cars were her shipments the facts will be scrutinized very carefully.

In reviewing the record, the Board finds no act of dishonesty—no intention to steal or convert to one's own use or to enrich one's self at the expense of the Carrier or to use a position with the Carrier for personal gain. There is no doubt that the Claimant was over-zealous in his desire to release the

cars and surely was negligent in not keeping full and complete records in the files of all matters and conversations pertaining to the complained of acts.

This rule says "will not be condoned." The Board in such a case holds that the penalty there is discretionary and not mandatory, and should be based on all attending circumstances.

The Board in following its practice as expressed in many awards will not substitute its judgment for that of the Carrier in finding that the acts of the Claimant constitute a violation of company rules. However, the Board is of the opinion that dismissal from the service was drastic and arbitrary and the Claimant shall be returned to service with rights unimpaired but with no pay for time lost.

FINDINGS: The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier's assessment of discipline was arbitrary and drastic to extent indicated in Opinion.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of October, 1958.