

Award No. 10034
Docket No. TE-12196

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Lehigh Valley Railroad, that:

1. Carrier violated terms of the agreement between the parties hereto when on June 18, 1959, without just and sufficient cause, based on the recorded testimony of June 12, 1959, in the instant case, it dismissed or discharged Mr. C. L. Person, regular relief towerman-telegrapher at P. & L. Junction, New York.

2. C. L. Person shall be reinstated to his regular relief position at P. & L. Junction with all rights and privileges under the agreement unimpaired.

3. C. L. Person shall be made whole for all compensation lost as a result of the Carrier's improper and unwarranted action, as set forth above in Item 1.

OPINION OF BOARD: On Sunday, May 31, 1959, the Claimant, Carlton L. Person, a Carrier employe since January 1949, was working as relief towerman-telegrapher at the P & L Junction, Caledonia, New York. His weekly work schedule was as follows:

Friday—1st shift	7:59 A. M. to 3:59 P. M.
Saturday—2nd shift	3:59 P. M. to 11:59 P. M.
Sunday—2nd shift	3:59 P. M. to 11:59 P. M.
Monday—3rd shift	11:59 P. M. to 7:59 A. M.
Tuesday—3rd shift	11:59 P. M. to 7:59 A. M.
Wednesday—Assigned rest day	
Thursday—Assigned rest day	

Claimant stated that he was absent from the tower without permission from 5:58 P. M. to 6:28 P. M. on May 29, 1959 when he went out to get a banana split. The Carrier stated Claimant admitted that his actions constituted a violation of Rules E, 801 and 803 of the Book of Rules, the pertinent portion of which read as follows:

Rule E

“Employes must devote themselves exclusively to the Company's service while on duty, render every assistance in their power in car-

rying out the rules and special instruction, and report to proper official any violation thereof."

Rule 801

"Employees must not be absent from duty without permission
* * *"

Rule 803

"They must not absent themselves from duty until relieved and must notify the train dispatcher promptly should their relief fail to report at the prescribed time."

It must be noted that the Baltimore and Ohio Railroad crosses, at right angles, the Lehigh Valley Railroad at the P & L Junction and the P & L Junction towermen-telegraphers on duty handle traffic on both railroads.

The Claimant stated that before leaving the tower, he reported train BJ-2 by to Manchester Tower and reported it clear of the block at Niagara Junction but failed to report BJ-2 to Mr. Coxe, Assistant Chief Train Dispatcher.

The Claimant reportedly inquired of the B. & O. dispatcher if he had anything coming and was told by him that nothing was coming until midnight.

Mr. Coxe stated that he called the Claimant from 5:50 P. M. until 6:20 P. M.—when he stopped ringing. At 6:45 P. M. Mr. Coxe stated that he called and reached the Claimant.

On June 8, 1959, the following letter was sent to the Claimant:

"Mr. C. L. Person
Hal-bar Road
Avon, New York

Arrange to report to my office at Buffalo, New York on Friday, June 12, 1959 at 10:30 A. M. E.D.S.T. to give statement in connection with your voluntary absence from P. & L. Junction Tower during your tour of duty on Sunday, May 31, 1959.

You may have witness, counsel or representation of your own choosing (sic) if you so desire.

/S/ R. C. Becker
R. C. Becker
System Supr. Operations"

On June 12, 1959, at 10:30 A. M. E.D.S.T. the Claimant and his representative, Mr. Edgar Magee, Local Chairman O.R.T., attended the meeting in Mr. Becker's office. The Claimant answered a series of questions asked by Mr. Becker.

On June 18, 1959, the following letter was addressed to the Claimant:

"Mr. C. L. Person
Relief Towerman-Telegrapher
Halbar Road
Avon, N. Y.

Dear Sir:

This is to advise that for your absentsing yourself during tour of duty without permission, at P & L Junction, May 31, 1959, in violation of Rules E, 801 and 803 of the Book of Rules, you are hereby dismissed from the services of the Lehigh Valley Railroad.

Company property in your possession, should be turned in to Mr. R. C. Becker, System Supervisor—Operations, at Buffalo.

Yours very truly,

/S/ J. E. Crowley
Superintendent

cc Mr. R. C. Becker
Mr. F. H. Lach
Mr. E. Magee, Local Chairman, ORT."

On August 10, 1959, Mr. D. J. North, General Chairman O. R. T., addressed a lengthy letter to Mr. C. L. Wagner, Chief of Personnel, Lehigh Valley Railroad Company, which cited substantially the information set forth above, and with the three closing paragraphs reading as follows:

"It is our conclusion that the discipline in this case, based on the testimony taken by the Carrier on June 12, 1959, is excessive and that the extreme penalty was imposed by Superintendent Crowley without just and sufficient cause. Hence, our appeal to you.

In directing this appeal to you in accordance with provisions of Rule 28, paragraph (d), we request that this claim be allowed in full. We cite Rule 28, paragraph (f).

I will be glad to discuss all matters involved with you at your earliest convenience."

Under date of September 2, 1959, Mr. Wagner wrote Mr. North as follows:

"Dear Sir:

Referring to our discussion when you were here at conference, August 27th, in connection with the claim of C. L. Person for reinstatement to his regular relief position at P&L Junction with all rights and privileges under the agreement unimpaired and to be reimbursed for all compensation lost as a result of his dismissal from the service.

This will confirm my decision given you at our conference that after reviewing the record of the hearing in the case of Mr. Person I find the evidence supports the disciplinary action that was taken in dismissing him from the service for absentsing himself from the duties of his position during regular hours at P&L Junction on May 31, 1959, and that Mr. Person is not the type of person we desire to reemploy. Therefore, the claim in this case is denied.

Incidentally, about the time of the occurrence for which Mr. Person was dismissed from the service, he had been arrested on a

morals charge and I am advised he appeared in the Livingston County Court on July 27, 1959 before the Honorable George D. Newton, Livingston County Judge, and was sentenced to the Monroe County Penitentiary for a period of six months, and upon his discharge from the penitentiary he is to be placed on probation to the Livingston County Probation Department for a period of one year, whereby one of the conditions of probation will be that he continue psychiatric care.

Yours truly,

/S/ C. L. WAGNER
Chief of Personnel"

The information set forth above constitutes an accurate, chronological record of the facts and issues raised on the premises.

The question of the Carrier violating Rule 28 (b) of the Agreement was not raised until the Organization submitted its "Employes' Ex Parte Submission."

DISCUSSION: In this particular case the following questions must be answered and resolved:

1. Did the Carrier violate Rule 28 (b) of the Agreement?
2. Was the Carrier's disciplinary action too severe?

For an authoritative answer to the first question, namely, "Did the Carrier violate Rule 28 (b) of the Agreement?"—the Board properly turns, first, to the language of Rule 28 (b)—which reads as follows:

"An employe shall not be suspended (except pending hearing), discharged or have an unfavorable entry made on his record without a fair and impartial hearing; such hearing shall be held within ten days from the date charged with an offense, suspended or discharged. At a reasonable time prior to the hearing, the employe shall be apprised in writing, copy to the Local Chairman, of the precise charge against him. An employe shall have reasonable opportunity to secure the presence of representatives and witnesses, and shall be notified of any discipline assessed within ten days from the date the hearing or investigation is completed." (Emphasis supplied by the Referee.)

Next the Board will examine the letter the Carrier addressed to the Claimant under date of June 8, 1959—which letter reads as follows:

"Mr. C. L. Person
Hal-bar Road
Avon, New York

Arrange to report to my office at Buffalo, New York on Friday, June 12, 1959 at 10:30 A. M. E.D.S.T. to give statement in connection with your voluntary absence from P. & L. Junction Tower during your tour of duty on Sunday, May 31, 1959.

You may have witnesses, counsel or representatives of your own choosing (sic) if you so desire.

/s/ R. C. Becker
R. C. Becker
System Supr. Operations"

Now let us look at the language of Mr. Becker's opening remark to the Claimant—when the latter reported as requested in the above letter.

Question by Becker: "Mr. Person, we are about to take a statement from you in connection with the above occurrence. Have you been previously advised you were ordered here for the purpose of making this statement?"

Answer by Claimant: "I have."

The language of Rule 28 (b) is simple, direct and clear. It specifies that an employe shall be given "a fair and impartial hearing;" * * *; and that * * * "the employe shall be apprised in writing * * * of the precise charge against him."

The language of Mr. Becker's letter requests the Claimant to come to his office to make a STATEMENT. The word hearing is not even mentioned and neither does Mr. Becker's letter specifically set forth "the precise charge" against the Claimant. There isn't any close, knotty, or semantic problem here. There is only the undeniable fact that the Carrier failed to comply with the provisions of Rule 28 (b).

Mr. Becker's opening remark to the Claimant — as quoted above — irrefutably indicates that the Claimant appeared at Becker's office to make only a STATEMENT.

The Carrier contends that the Organization's General Chairman — in his letter of August 10, 1959 — stated that a hearing had taken place; and that the Carrier's Chief of Personnel, in his letter of September 2, 1959, referred to the "hearing in the case of Mr. Person"; and offered these comments to support its claim "that the Board doesn't have any right to interpret rules differently from the parties themselves."

To this the Board replies — that the mere reference to a "hearing" by a Carrier and by an Organization member does not — ipso facto — make it a hearing and, at the same time, make it an unassailable fact. When the parties are in error, as in the present case, it is not only the duty but also the responsibility of the Board to correct the error.

Rule 28 (b) is an essential part of the existing contract between the parties; a contract that represents a negotiated agreement by the contracting parties; a contract that accurately, simply and clearly reflects the intentions of the contracting parties; a contract that neither the General Chairman of the Organization nor the Carrier's Chief of Personnel has the right to change or amend unilaterally; a contract that may only be revised or amended jointly by the contracting parties—as provided in Rule 34 of the Agreement and which reads as follows:

"Effective Date and Changes

"(a) This agreement supersedes all agreements, practices or understandings in conflict herewith, shall be effective February 1,

1948, and shall continue in effect until it is changed as provided herein or in accordance with the provisions of the Railway Labor Act, amended June 21, 1934.

“(b) Should either party desire to revise it, thirty days’ written advance notice, containing the proposed changes, shall be given and conference held within thirty days from the date of notice unless another date is mutually agreed on.” (Emphasis ours.)

It would seem amply clear from the facts recited above that no one has the right to revise the existing contract but the contracting parties. To recognize or approve an interpretation of Rule 28 (b)—even though supported by responsible Carrier and Organization officials—that is contrary to the simple, direct and clear language of that provision would, in fact, be revising the Agreement.

In the judgment of this Referee, it is the Board’s function to interpret the Agreements between the Carriers and their respective Organizations; a function, I might add, that is supported by a mandate from the Congress of the United States.

On the second question, namely “Was the Carrier’s disciplinary action too severe?” The Board believes that the punishment was in keeping with the seriousness of the offense.

The Claimant’s position—towerman-telegrapher—is one of prime importance. To a substantial degree, the safe and efficient operation of a railroad depends upon the telegrapher’s skill and faithful adherence to job duties. Leaving his post for a thirty minute period—without authorized permission is a most serious offense. Accordingly, the Board does not believe that the Carrier’s disciplinary action was too severe.

FINDING: 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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier did violate Rule 28 (b) but the issue was not properly raised on the property.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August 1961.

**SPECIAL CONCURRING OPINION TO AWARD NO. 10034,
DOCKET NO. TE-12196**

Award 10034 correctly holds that Carrier's disciplinary action was not too severe, but it is highly improper in concluding that the Carrier violated Rule 28 (b) while at the same time holding that the issue was not properly raised on the property—hence not properly before the Board—particularly when the record shows that there was no disagreement between the contracting parties themselves concerning the propriety of the procedure followed.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen