

Award No. 10348
Docket No. TE-12373

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers of the New York, Chicago & St. Louis Railroad, that:

1. The Carrier violated the agreement between the parties hereto when on September 8, 1960, it dismissed Telegrapher C. W. Julian without an investigation as provided by Rule 31 of the Telegraphers' Agreement.

2. The Carrier shall restore Telegrapher C. W. Julian to the Carrier's service covered by the Telegraphers' Agreement with all rights unimpaired and compensate him for wages lost by reason of the Carrier's violative act.

OPINION OF BOARD: The Organization filed this claim contending that the Carrier violated the terms of the Telegraphers Agreement when it discharged Claimant Julian. At the time of his discharge, he was working as an extra Train Dispatcher and was a member of both the Order of Railroad Telegraphers and American Dispatchers Association, holding seniority as a dispatcher as of August 29, 1950 and as a telegrapher as of April 26, 1949.

The record shows that Claimant Julian was working August 21, 1960, as an extra train Dispatcher in the Carrier's Frankfort, Indiana office. On August 22, 1960, Claimant was notified by letter from the Chief Train Dispatcher to attend a formal hearing on August 30, 1960 to determine his responsibility, if any, for failure to clear Train 90 with Order 226, Charleston Yard, approximately 12:15 A. M., 1960. The letter further stated, "You may have witnesses and/or representatives if you so desire."

The hearing was held August 30, 1960. Claimant being present and at his request he was represented by Mr. D. L. McBride, General Chairman of the Dispatchers Organization and the transcript discloses that Mr. M. J. Hayes, General Chairman of the Telegraphers' Organization was also present during the hearing.

A full and complete hearing was given Claimant, with opportunity to present his witnesses and all procedural requirements of the Rules were complied with and at the close thereof, both Claimant and his representative stated in the record that neither had any exceptions to the conduct of the hearing and

both stated it had been conducted in accordance with the Rules of the working Agreement.

Article 8 of the Dispatchers' Agreement is the Rule under which said proceedings were held and it reads as follows:

“(a)—DISCIPLINE

“Train dispatchers in service over 60 days will not be disciplined, demoted or dismissed without proper hearing as provided for in this Article 8. They will not be suspended pending investigation for minor offenses.

“(b)—HEARINGS

“A train dispatcher who is charged with an offense which might result in his being disciplined shall be notified thereof in writing by the superintendent or the chief train dispatcher. Such notice shall set forth the precise charge against him and shall be served on the train dispatcher within ten days from date the alleged offense becomes known to the superintendent or chief train dispatcher, depending upon officer serving the notice. He shall be given a fair and impartial hearing on such charge or charges by the superintendent or his designated representative within ten days from date of such notice. He shall have the right to be represented by the representative of his choice and be given a reasonable opportunity to secure the presence of necessary witnesses. His representative shall be permitted to hear all oral and documentary testimony at said hearing and have the right to examine witnesses. The decision shall be rendered within 15 days from close of hearing.

“(c)—APPEALS

“If the decision is not satisfactory to the train dispatcher, the case may be appealed in succession up to the highest officer designated by the management to handle such cases, provided written notice of appeal is given the official appealed to and the official rendering the decision appealed from within 15 days from the date the decision is issued, otherwise the charges will be considered sustained. Decision on appeal will be rendered within 30 days from date of appeal, or from date of conference if one is had thereon, otherwise charges will be considered unsustained. Decisions of the highest designated officer shall be considered final and binding unless within 60 days from date of such decision, he is notified in writing that it is not accepted, in which event the case shall be considered closed and barred unless it is referred to the appropriate tribunal provided by law within nine months from the date of the decision of the highest designated officer.

“(d)—TRANSCRIPTS

“A transcript of the proceedings at the original hearing and on appeal shall be furnished the train dispatcher or his representative, if requested.

“(e)—REINSTATEMENTS

“If the decision on the original hearing or on appeal be in favor

of the train dispatcher, his record shall be cleared of the charge, and if suspended, disqualified, or dismissed, he shall be reinstated and compensated for the net wage loss suffered by him.

"Except as provided in this Article 8(e), a train dispatcher who has been dismissed or disqualified will not be reinstated without the written approval of the general chairman.

"When as a result of disciplinary action an assigned train dispatcher has been disqualified or dismissed from service, his position shall be bulletined and filled in the manner hereinbefore provided, and if such train dispatcher is subsequently reinstated, he may exercise seniority in accordance with the provisions of Article 4(e).

"(f)—CLAIMS

"A train dispatcher who considers himself unjustly treated shall present his claim in writing direct or through representative of his choice to the chief train dispatcher within 30 days from date of occurrence on which it is based, otherwise claim is barred. The decision of the chief train dispatcher shall be rendered within 30 days from the date claim is received or from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Article 8(c). If decision on appeals is not rendered within 30 days, claim will be considered sustained, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

"(g)—PAY CLAIMS NOT ALLOWED

"When a claim for compensation is made in writing and such claim is disallowed, the employe making the claim shall be notified in writing and reason for disallowance given. Employes who are short in their payroll voucher an amount equal to one day's pay or more will be given a voucher within five days, if requested."

A full, fair and impartial hearing was had on the charges made and on September 8, 1960, the hearing officer notified Claimant that he was dismissed from service of the Carrier. Progressive appeals were made by General Chairman McBride of American Train Dispatchers Association to Chief Train Dispatcher and Superintendent, then to General Superintendent and finally to Director of Personnel, who denied the appeal and an appeal for leniency on the merits. The Train Dispatchers Association did not progress the appeal further.

Concurrent with the handling of this case by General Chairman McBride of the American Train Dispatchers Association, General Chairman Hayes of "The Order of Railroad Telegraphers," also appealed the dismissal of Claimant, by an appeal to the Superintendent of Carrier and upon the latter's denial of the claim, to the Carrier's General Superintendent and upon denial to Carrier's Director of Personnel and after conference the Director of Personnel, he denied the claim and this was followed by the submission to this Board by the Organization of The Order of Railroad Telegraphers.

It is the position of the Organization and Claimant that, under Rule 7 of Telegraphers' Agreement, the latter had accumulated and earned seniority as a Telegrapher and that seniority cannot be taken away from him for something that occurred while performing service as a train dispatcher: and

cites Rule 7, last paragraph of Rule 12, Rule 26 and Rule 31 in support thereof, said Rules read as follows:

"RULE 7—SENIORITY

"(a) Seniority on the respective rosters shall date from the date and hour of the last time entering service and commencing work under pay on a position covered by this agreement. If two or more employes commence work at the same hour, the employing officer shall determine their seniority standing. This rule will not apply to students, nor will it affect seniority established prior to the effective date of this agreement.

"(b) Applications for employment under this agreement may be rejected within 60 days and such rejection shall not be considered as a dismissal in connection with Rule 31. An employe who enters the service of the Carrier shall not acquire a permanent place on the roster until his application has been accepted. If not notified to the contrary within 60 days, he shall become an accepted employe.

"RULE 12—COPIERS—QUALIFYING FOR TRAIN DISPATCHER

"Telegraphers so qualifying or working as extra dispatchers shall continue to hold their former telegrapher position but when appointed to regular dispatcher position, their former position will be advertised.

"RULE 26—PROMOTION TO TRAIN DISPATCHER—OFFICIAL OR SUPERVISORY POSITIONS

"Employes promoted to official positions with the Grand Division of The Order of Railroad Telegraphers or employes now filling or hereafter promoted to positions of train dispatchers, supervisory or official positions of any kind with the Carrier, who hold seniority rights under this agreement, shall retain and accumulate such rights provided that seniority lost under the rules in effect prior to the date of this agreement will not be restored.

"In the event their positions are abolished or they are displaced from such positions by other employes through no fault of their own, they may exercise displacement rights under Rule 20 or assume the status of an extra employe, providing that if such employes have seniority rights under an agreement covering the class to which promoted, they must first exhaust any rights they may have under such agreement.

"Employes disqualified after having been promoted to train dispatchers, supervisory or official positions, or demoted for cause, or who voluntarily relinquish such positions, may assert seniority only by establishing themselves on the extra list and thereafter exercise seniority rights under these rules. Except by agreement between the Carrier and the Organization, the provisions of this rule shall not apply to employes with less than one year's seniority accumulated under rules of this agreement.

"RULE 31—DISCIPLINE

"(a) An employe shall not be disciplined or dismissed (except in

the case of disapproved application as provided in Rule 7) without a fair and impartial hearing. He may, however, be held out of service pending such hearing. The hearing shall be held within ten days after the date when charged with the offense or held from service.

“(b) At a reasonable time prior to the hearing the employe will be apprised in writing, with copy to the local chairman, of the charge against him and shall have reasonable opportunity to secure the presence of representatives and/or witnesses. A transcript of the evidence taken at the hearing shall be furnished the employe or his representative, upon request. He shall be notified of any discipline assessed within ten days from the day of completion of hearing.

“(c) The right of appeal by employes or representatives in the regular order of succession and in the manner prescribed, up to and including the highest officer designated by the railroad to whom appeals may be made, is hereby recognized. Appeals, if made, and decisions on appeals shall be governed by the time limit provisions of Rule 32.

“(d) If the final decision decrees that charges against the employe are not sustained, the record will be cleared of the charge. If the employe has been suspended or dismissed, he shall be returned to former position and paid for all time lost, less any amount he may have earned in other employment; in the event his former position does not exist, he shall be permitted to exercise his seniority in accordance with this agreement. If actual suspension has been imposed and the final decision decrees that employe was at fault and such suspension was proper, all time held off duty shall be counted as part of suspension time.

“(e) An employe who considers himself unjustly treated in matters other than discipline shall have the same right of hearing and appeals as provided in this rule, if written request is filed with his immediate superior within 30 days after the occurrence giving rise to the grievance.

“(f) The word ‘representative’ as used in this rule means the representative designated in accordance with the provisions of the Railway Labor Act, as amended.”

Carrier contends that the Claimant had a full, fair and impartial hearing as is contemplated by both Agreements, that it was fairly conducted and Claimant was found to be at fault and in view of his record, the discipline given was not oppressive.

Briefly stated it is the contention of the Telegraphers that in order that any discipline be assessed Claimant, it would have to be in proceedings against him for violation of the Rules applicable to his work as a telegrapher and that his violation of rules as a train dispatcher could not affect his rights as a telegrapher.

Organization has cited several Awards which it claims sustains its position, but a reading thereof discloses that most or all of them involve cases where employes who had certain seniority rights but were occupying excepted positions at the time, have been discharged without any pretense of a hearing or investigation of any kind and it has been uniformly held that such employes could assert and maintain their seniority rights in the craft wherein such rights were held.

Award No. 6250 (Elkouri) held that a conductor who was discharged while occupying an excepted position be reinstated with seniority rights unimpaired, but "in view of Claimant's admission of guilt which is not denied in the record, pay for all lost time is denied. (Emphasis ours.) In this case, no charges were filed in the Claimant's Organization and there is no record of any formal investigation or hearing. In Award 8681 (Lynch) a Master Carpenter, an excepted position, held seniority as a B&B foreman. He was discharged by Carrier and was offered a position as a Carpenter in the B&B forces. Claimant protested no investigation was held, upon notice such investigation was held and prior order sustained. This investigation was not held in accordance with the Rules of Brotherhood of Maintenance of Way Employees. The Maintenance of Way Organization requested a transcript of the hearing and the matter was progressed to this Division. The Award (8681) sets forth that there is an admission in the record that the Organization considered the investigation had been conducted in an orderly manner. This Board held: "We will, therefore, hold that Carrier's action, here complained of, was disciplinary in nature and there being no charge of any procedural defects or impairment of Claimant's rights to a fair investigation, or of an arbitrary or capricious action, we will not substitute our judgment for that of the Carrier."

We agree with the conclusions as set forth in Award 9974 (Webster). While it is true in that case both telegraphers and dispatchers had a similar safety rule which Claimant had violated. It is inconceivable that a telegrapher dispatcher could violate a safety rule or fail so to perform his duties as a dispatcher, that human lives and property might be endangered and the Carrier would be helpless to discipline him as a telegrapher because the telegrapher rules did not cover such a situation.

It is our judgment that Claimant had a full, fair and impartial investigation, such as he was entitled to.

That the action of the Carrier was not arbitrary or capricious.

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 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of February, 1962.