

Award No. 10953

Docket No. TE-12576

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY (EASTERN DISTRICT)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad (Eastern District) that:

1. Carrier violated Agreement between the parties when, on the 12th day of August, 1960, without just cause, it discharged C. E. Manbeck.
2. That C. E. Manbeck shall be reinstated to position of Agent, Manhattan, Kansas, and compensated for all wages lost from August 12, 1960, until reinstated to service.

OPINION OF BOARD: Claimant was Carrier's Agent and ranking supervisory officer at Manhattan, Kansas. On July 27, 1960, at 5:10 P.M. an automobile collided with a switch stand in the vicinity of the station at a time when Claimant was at his home. The damage to the switch stand was slight and was promptly repaired by the Section Foreman, who approved it for service. Cost of repair was termed by Carrier's officer as inconsequential. Burton, a telegrapher-clerk, who saw the accident, called Claimant on the phone at about 5:25 P.M. when everything was clear, and told him of the accident and asked him to come down to the station and get the names and license number. Smith the Roadmaster's Clerk, later talked with Claimant on the phone. The exact content of this conversation is not clear. Claimant says Smith said that the accident did not amount to much, had been taken care of and it was not necessary for Claimant to come down. Smith says he told Claimant of the accident; does not remember telling him it was not necessary to come down. He did, however, tell Claimant that the switch was O.K. for service but asked Claimant not to do anything about it until the rest of the section force had come in. Smith did not tell Claimant he would make a report. Claimant did not come to the station and never made any report of the incident. Burton made no report. The following day Carrier's Special Agent investigated the matter and made a report to the Superintendent. On August 1, 1960, Claimant was charged with failure to make a wire report of the incident to the Superintendent as required by General Rules F and L and Operating Rules 108, 702, 704, 714, 901 and 908, and notified to attend an investigation. This was held on August 8th and on August

12th, 1960, Claimant was advised that the charge against him was sustained and he was dismissed from service. Request for reinstatement was refused and the claim was denied by the Carrier at all stages on the property. At the time of his dismissal Claimant was 67 years of age and had been in Carrier's employ for forty-eight years.

The Organization contends that Claimant was not given a fair and impartial hearing because Carrier withheld from the investigation certain material facts; that under the particular circumstances of this case, the Rules did not require a report from Claimant; and lastly that even if a report was required, the penalty assessed for failure to make it was unreasonable and excessive for the offense involved.

The Carrier asserts that the various rules listed, especially Rule 908, imposed upon Claimant a duty to promptly report the accident by wire to the Superintendent, and that Claimant's failure to make a report promptly after being advised of the accident was a violation of the rules, justifying disciplinary action by Carrier; that the measure of discipline assessed is the prerogative of the Carrier and not a proper subject of Board inquiry; and in any event, the discipline was reasonable under the circumstances involved and Claimant's past record.

The Organization's contention that Claimant was not afforded a fair hearing is based upon the failure of Carrier to introduce the report of its Special Agent or call him as a witness. This does not show that the hearing was unfair. Carrier is not required to put the Report in evidence. Claimant was afforded a full opportunity to call any witnesses he desired and to examine all witnesses called. Furthermore, Claimant failed to make any such objection at the hearing.

The contention that no report was required of Claimant in this situation is based upon the following reasoning: The responsibility for maintenance and repair of the switch stand rested with the Maintenance of Way Department under supervision of the Roadmaster and that Claimant did not have supervision over the work or employes of that Department; that the Roadmaster's Clerk had already made the necessary arrangements before Claimant was aware of the incident and that any report then made would have been useless and unnecessary. In the Board's view, this position is not well taken. Rule 908 requires a prompt wire report to the Superintendent of any unusual occurrences in the vicinity of the station. This was such an occurrence. Since the Rule does not say who is required to make the report, we must assume that it is clearly the responsibility of the top supervisory official to make the report regardless of who has the primary responsibility for maintenance and repair of the stand. Claimant, himself, admitted in his testimony that the Rule required a report from him. The fact that Claimant may have thought, from his conversation with the Roadmaster's Clerk that the switch had been repaired and in operation did not relieve him of his duty to make the report. Nor does the fact that the damage was slight and the cost of repair small negate his duty. The requirement of such a report is a reasonable one and cannot be said to be useless or unnecessary. We find, therefore, that Claimant failed to discharge his responsibility under Rule 908.

There remains for our consideration the matter of the discipline imposed for Claimant's dereliction. The Carrier's asserted prerogative in assessing discipline is not absolute. While the Board is not warranted in

disturbing the penalty imposed merely because it might have assessed a different penalty, awards of this Board clearly show that the Board will not hesitate to reduce or remove discipline which it regards as excessive or unreasonable. Among others are the following awards: 4722, 4829, 4942, 5849, 6074 and 6994. One of the factors to be considered is the seriousness of the offense. Here the offense was a relatively minor one. The damage to Carrier's property was slight, repairs were quickly made and at a nominal cost. There was no interference with Carrier's operations. There was also an apparent misunderstanding on the part of Claimant according to testimony of the Roadmaster's Clerk. Another factor worthy of note is that no discipline was assessed against the telegrapher-clerk who saw the incident and who made no report, and who had been charged with failing to make a report. While the failure of others to perform their duties does not excuse Claimant's failure to comply with the rules, the fact that Carrier took no action against others does lend some support to the Organization's contention that Carrier seized upon this incident to get rid of Claimant.

In an attempt to justify its dismissal of Claimant, Carrier has emphasized his past record, including a prior dismissal and demerits. It appears, however, that all of the instances except one occurred before Carrier placed Claimant in the responsible position of Agent at Manhattan, a position for which he was recommended by Carrier's Traffic Manager and General Manager. Under the circumstances it must be taken as fact that Carrier considered Claimant well qualified for that position and is, therefore, estopped from relying on prior acts of Claimant to support its action here. The only entry on Claimant's record after he was made Agent at Manhattan was some demerits for failure to report certain cars.

Carrier has here imposed the most severe punishment within its power—outright dismissal—for a relatively minor dereliction of duty. Under all the circumstances of the case, we regard the discipline assessed as excessive, unreasonable and an abuse of discretion on the part of the Carrier. We do not, in any way, condone the Claimant's failure to observe a reasonable rule of the Carrier and we agree that some discipline was warranted. But, in our judgment, a suspension of sixty (60) days would have been the maximum discipline justified for the dereliction involved. Claimant will, therefore, be restored to service as Agent at Manhattan as of October 11, 1960, with seniority rights unimpaired. Claim for monetary loss from October 11, 1960, is sustained, with the right of the Carrier to deduct all amounts earned by Claimant in other employment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 disciplinary action was warranted but that dismissal from service was excessive under the circumstances.

AWARD

Claim sustained to the extent indicated in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December 1962.