Award No. 11256

Docket No. TE-13297

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD

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

CLAIM NO. 1

1. Carrier violated the Agreement between the parties when it failed to observe Rule 16(e) of the Telegraphers' Agreement following investigation held in the alleged disqualification of Erich Albrecht, Telegrapher.

2. Carrier shall void the disqualification, reinstate and pay Claimant Erich Albrecht for all time lost because of the failure to observe this rule.

CLAIM NO. 2

1. Carrier violated the Agreement between the parties when it suspended from service Erich Albrecht on February 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16 and 17, 1961, and each succeeding work day of his regular assignment, so long as he is denied working the position assigned to him under the rules of the Agreement, that of Assistant Chief Operator, on the Late Night Shift, "GM" Telegraph Office, St. Louis, Missouri.

2. Carrier shall pay Erich Albrecht 8 hours at the pro rata rate of pay of his regular position for each work day, beginning February 1, 1961, until he is restored to service on that position.

CLAIM NO. 3

1. Carrier violated the Agreement between the parties when it suspended from service Erich Albrecht on March 1, 2, 3, 4, and 5, 1961, and thereafter 5 days per week, Wednesday through Sunday, and denied him the right to occupy and be paid for working his position as Assistant Chief Operator on the Late Night Shift in "GM" Telegraph Office, St. Louis, Missouri.

2. Carrier shall pay Erich Albrecht 8 hours at the pro rata rate of pay of his regular assigned position for each work day beginning March 1, 1961, until he is restored to that position.

A careful study of their testimony will reveal no facts developed which in any manner whatsoever refutes the testimony of the Witness Clem, Werner and Ginn as to the unsatisfactory performance and low output of Claimant Albrecht, nor will it reveal any justifiable reason why the claimant has failed to satisfactorily perform the duties of his position and his failure to move the telegraph message file at a satisfactory rate.

The Organization seems to rely heavily upon the fact that the Missouri Pacific Employes' Hospital Association, through the report of Dr. L. B. Harrison, concluded that the claimant was "physically and psychologically qualified to continue work, but has offered no facts to explain why, if this be so, Claimant Albrecht has failed to satisfactorily perform the duties of his position and failed to move the telegraph message file at a satisfactory rate, it being clearly established that his average has fallen far below the normal quantity of work handled by relay telegraph operators; this normal rate having been established by relay telegraph operators in "GM" Office.

There is absolutely nothing contained in the testimony of Witnesses Welch and McDonald and Claimant Albrecht to support the contention of the Organization that the Carrier violated the Agreement between the parties when it suspended Claimant Albrecht from service on March 1, 1961, for the reason that he is disqualified to continue work as a relay telegraph operator.

For the reasons fully discussed above,

Claim No. 1 must be dismissed;

Claim No. 2 must be declined;

Claim No. 3 must be declined.

All matters contained herein have been the subject in conference or through correspondence between the parties on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: In this case, the Grievant, who had been an employe of the Carrier for over fifty years, was directed by the Carrier to submit to a physical examination in the early part of February, 1961. He complied with this request, and such examination showed him to be physically and phychologically fit for employment.

Soon thereafter Grievant was notified to report for a formal investigative hearing in reference to a sufficiently precise charge that he was not performing his work as a relay telegraph operator adequately. This hearing commenced February 20 and was concluded February 23. Grievant appeared in person and with representatives of his own choosing. The transcript of the hearing is a document consisting of 47 pages.

Subsequently on March 1, Grievant was notified in writing that he was "disqualified" from the service of the Carrier effective as of February 1, 1961. On March 2, a second letter was sent to him by the Carrier officer involved (Mr. Macomber, General Superintendent of Communications) stating that the February 1, 1961 date shown in the notice was due to inadvertence and that the actual date of the disqualification of the employe was March 1, 1961.

We pause here to conclude that by virtue of the official action immediately

referred to above that that part of Claim 2, supra, covering the period from February 1 to February 28, 1961, both inclusive, should be sustained. Grievant was available for his usual work throughout this time period—had he not been complying with the requirements of the Carrier, including the submission to a prolonged physical examination which he passed, as aforesaid. The Carrier took no official action to declare Grievant held out or discharged from service prior to the said March letters—the latter of which we hold is binding upon the Carrier.

The March 2 decision was appealed on March 4 to Mr. Smith, the Chief Personnel Officer of the Carrier; but this official did not make a decision on the appeal until May 1, 1961.

In our opinion, the failure of this official to make a prompt decision on said appeal constituted a violation of the Agreement of the Parties.

Rule 16 of the Agreement of the Parties is so vitally important that we quote it fully in pertinent part:

> "Rule 16.(a) An employe who has been in the service more than 60 days, or whose application has been formally approved, shall not be disciplined or dismissed from the service without first being given an investigation.
>
> (b) Prior to the investigation he shall be notified in writing of the precise charge sufficiently in advance of the time set for investigation to permit of his having reasonable opportunity to secure the presence of necessary witnesses. Except by mutual agreement between the management and employe, or his representative, investigation will be set for hearing within five days following date the employe is apprized of the charge. He may, however, be held out of service pending such investigation.
>
> (c) A transcript of the record of the proceedings of the investigation, when taken in writing, will, after having been attested to by both parties, upon request, be furnished to the employe and his representative.
>
> (d) Decision to the employe, with copy thereof to his representative who assisted him at the investigation, will be rendered in writing within seven days after completion of investigation.
>
> (e) An employe dissatisfied with the decision shall have the right to appeal in succession up to and including the highest officer designated by the management to handle such cases, provided notice of such appeal is filed within five days from date of advice of the decision to the officer appealed to with copy to the officer whose decision is appealed. **On such appeals, hearings, where considered necessary, and are requested, shall be afforded and promptly thereafter (within five days, if feasible) a decision shall be rendered.**
>
> (f) If the discipline assessed against the employe is not sustained on appeal, the record shall be cleared of the charge; **if suspended or dismissed, the employe shall be reinstated to his former position unless otherwise mutually agreed, and compensated for the wage loss, if any, suffered.**
>
> (g) The employes shall have the right to be represented at in-

vestigations, conferences and or hearings by their chosen representatives, and the right of appeal of employes or their representative in the regular order of succession, and in the manner herein prescribed, up to and including the highest official designated by the railroad to whom appeals may be made, is recognized." (Emphasis ours.)

This Rule gave Grievant the right to make the appeal that was made. It also required "the highest officer designated by the management" to render a decision on such an appeal promptly—"within five days, if feasible."

No reason appears of record to show a "feasible" justification for the delay in the making of the top-level decision. It seems that the Chief Personnel Officer believed in good faith that Article V of the National Agreement of 1954 (to which these parties are signatory) controlled the timing of his action; and that, furthermore, Rule 16 of the Agreement had been superseded in all respects.

Article V of the National Agreement provides time limits for presenting and progressing claims or grievances.

In our opinion, it was not designed to and does not abrogate contractual rights of Employes distinguishable from the specifice subject matter it covers, e.g., the following rights of an employe granted by said Rule 16: the right to be afforded an investigation prior to dismissal; the right to have a transcript of the record of the proceedings of the investigation; the right to have a written decision rendered within seven days after the completion of the examination; and also the right to appeal this particular type of decision to the highest officer of the Carrier designated to act upon same, who must render a decision thereon promptly and, if feasible, within five days.

The contractual provisions referred to above are designed to give a measure of employment security to the Employes who are entitled under the rules of the Agreement to receive them.

Under these provisions an employe (unless he acquiesces in the first dismissal decision—and the Grievant herein did not) has the right to prevent finalization of his dismissal until the highest officer designated by the Carrier has made a decision upon the dismissal. This is a pillar of employment security to an agreement-covered employe, and we do not believe said Article V was designed to deprive him of it.

In fact, if contractual provisions exist such as those set forth in said Rule 16, it might well be argued that a dismissed employe could not have a valid "claim or grievance" until he had availed himself of his rights under the Agreement governing his employment. In our view, exhausting one's remedies under rules such as these is an important prerequisite to the presenting of a claim or grievance in the first instance.

In a factual situation involving the particular circumstances herein, we do not believe that the provisions of Article V come into effect until:

1. The highest designated officer of the Carrier has made a timely ratification of the dismissal; or

2. Such officer fails to make any decision in this regard in the prompt manner required by the Agreement of the Parties.

We hold that the Employes complied with the provisions of both the Agreement of the Parties and the National Agreement of 1954.

We hold that the Carrier breached the provisions of said Rule 16 in the particular instance referred to above; otherwise, we find that the Carrier did not violate the agreement.

We do not agree with the contention of the Employes that there was a violation of "due process' 'at the hearing given the Claimant. We find that he was adequately apprised of the charges against him; that he was ably represented by representatives of the Organization, who were given full latitude in the area of cross-examination; and that the Organization was not unduly restricted in presenting testimony, evidence, and argumentation in his behalf. Carrier's Hearing Officer, Mr. French, who did not act as a judge in passing on the decision of dismissal (this first step decision having been made by Mr. Macomber, another Carrier officer) conducted the hearing in a commendably courteous and fair manner. This is pointed up by the statement of the Grievant's representative, which was entered into the record of the hearing immediately prior to the conclusion of same:

> "As to the manner and mode of conducting the hearing, we are and I speak for all the representatives of the Organization, as well as the employe, appreciative of the kindness and patience shown by the hearing officer and desire to let the record show that we are grateful for the courteous treatment accorded the employe and his representatives in this hearing."

As to the Carrier decision made on the facts brought out in the course of the hearing, the referee has mixed feelings. The case against the Grievant was not without weaknesses—as the Employes pointed out, and as was forcefully argued in their behalf in the panel discussion; however, the referee resolved the issues in this regard in favor of the Carrier, whose judgment in regard to the efficiency and qualifications of employes is entitled to considerable respect. The dismissal of the Grievant was not an arbitrary affair devoid of factual justification.

It is well argued by the Carrier and on behalf of the Carrier that the Grievant herein was "disqualified," not "dismissed," however, it appears quite clear in the present case that the Grievant was actually discharged from the service of the Carrier because of inefficiency. For all practical purposes, he was utterly dismissed (or discharged) from said service by the letters of March 1 and 2, 1961, as he would have been if these notices had contained the word "dismissed" instead of the word "disqualified."

It was also contended by the Carrier and in behalf of the Carrier that the proceedings had in reference to the Grievant were not disciplinary in nature and that, consequently, Rule 16 of the Agreement was not applicable.

The referee is of the opinion that discharge based on inefficiency is a type of industrial discipline; however, this is obiter dictum, for Rule 16 of the Agreement of the Parties plainly states that it covers discipline or dismissal. See first paragraph thereof. The rule then proceeds to spell out the rights of the employes in regard to either or both situations.

The record before us shows that the Carrier itself meticulously abided by the provisions of Rule 16, except in the one respect referred to above—which makes it more difficult to comprehend the logic of Carrier argumentation that Rule 16 is inapplicable.

While we believe that the Carrier violated one requirement of Rule 16, we do not believe that the Grievant was materially prejudiced thereby. The breach of contract which occurred was insufficient (in the light of all of the circumstances) to make it mandatory upon us to declare all action taken by the Carrier to be void.

Therefore, we believe that this Claim should be adjusted by directing that Claimant be compensated for financial loss, if any, arising from the said violation of the Agreement—recompense being limited to the period of time from March 1, 1961 to May 1, 1961—the latter date being the one on which the Chief Personnel Officer of the Carrier made a late ruling upon the appealed dismissal decision.

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 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

I. That Claimant is entitled to his pro rata rate of pay for the period of time from February 1, 1961, to February 28, 1961, both inclusive.

II. That a violation by the Carrier of Rule 16 of the Agreement has been proved and must be sustained.

III. That Claimant be compensated for financial loss, if any, arising from said contractual violation—damages being limited to the period of time between March 1, 1961 and May 1, 1961.

IV. That other relief prayed for by the Claimant is denied.

AWARD

Claim sustained in part and denied in part—as above shown and indicated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March, 1963.

DISSENT TO AWARD 11256, DOCKET TE-13297

The Award here is in error in that it equates disqualification with dismissal and on that basis concludes that Rule 16 captioned "Discipline and Grievances" controls. This result is arrived at by the Referee as he states in the Opinion ". . . for Rule 16 of the Agreement of the Parties plainly states that it covers **discipline** or **dismissal.** * * * (Emphasis ours) and

he continues, "For all practical purposes he was as utterly dismissed (or discharged) from said service by the letters of March 1 and 2, 1961, as he would have been if those notices had contained the word 'dismissed' instead of the word 'disqualified'." If this reasoning were valid, then it could be said that any employe who is determined to be physically incapacitated from further service is likewise "dismissed" within the meaning of that word as used in Rule 16.

The Referee is further in error in his application of Rule 16(e), the part he says was violated here. Rule 16(e) reads:

> "An employe dissatisfied with the decision shall have the right to appeal in succession up to and including the highest officer designated by the management to handle such cases, provided notice of such appeal is filed within five days from date of advice of the decision to the officer appealed to with copy to the officer whose decision is appealed. **On such appeals, hearings, where considered necessary, and are requested, shall be afforded and promptly thereafter (within five days, if feasible) a decision shall be rendered.**" (Emphasis ours)

It will be noted that the five-day Time Limit starts to run after the conclusion ("thereafter") of an appeal hearing. No appeal hearing was asked for or held in the instant case so the Time Limit violation found by the Referee is improper even if Rule 16 did in fact control.

The confusion of disqualification with dismissal found in this Award is error which if followed would lead to serious distortion of the intent and meaning of the rules of the Agreement and is contrary to many precedent awards of this Division, and we therefore register our dissent to it.

/s/ D. S. Dugan

/s/ P. C. Carter
/s/ W. H. Castle

/s/ T. F. Strunck

/s/ G. C. White