Award No. 11344

Docket No. TE-13153

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, 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 the Agreement between the parties when acting arbitrarily and capriciously it dismissed Donald E. Stuwe from the Company's service.

2. Carrier shall reinstate Donald E. Stuwe to his former position of second telegrapher-clerk at Hugo, Colorado with seniority rights unimpaired and with pay for all time lost commencing December 31, 1960 and continuing until such reinstatement is made.

OPINION OF BOARD: The Claimant, former occupant of the second-telegrapher-clerk position at Hugo, Colorado, was dismissed from the service of the Carrier on January 18, 1961, for the alleged violation of certain Rules of the Carrier (hereinafter set forth) on the 31st day of December, 1960.

For clarification, the Rules referred to are:

"General Rule B:

Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority for an explanation.

General Rule G:

The use of intoxicants or narcotics is prohibited. Employes must not have intoxicants or narcotics in their possession while on duty.

"Operating Rule 700:

Employes will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their obligations."

The Record reveals that Grievant had a full and complete hearing; that he and representatives of his own choosing participated therein; that his right of cross-examination was not restricted; and that he had ample opportunity to present testimony, evidence, and argumentation in his behalf.

The charges against the Grievant were supported by the testimony of only one witness; however, this testimony was subjected to vigorous cross-examination; it was lucid and forceful; it was not adequately refuted; and the man who gave it was not discredited.

Although the proof offered was not free from weaknesses—e.g., it is unfortunate that a major decision of this type must be predicated upon the allegations of one person—a careful study of the Record leads us to the following conclusions: that Claimant had a fair trial; that he was not deprived of any of his rights in the realm of due process; and that there was sufficient evidence to justify the conclusion of the Carrier that Grievant was at fault as charged. Consequently, we cannot agree with the contention that Carrier's determination in this regard was either arbitrary or capricious.

There remains for our consideration the matter of the discipline imposed, viz., outright dismissal, the most severe penalty the Carrier could assess. We are quite reluctant to disturb the decision in this regard, for the Rules referred to above are vitally important, and we are aware of the fact that the Carrier has great responsibilities in this area.

The Board has been prudently cautious in mitigating Carrier discipline, and on a number of occasions it has declined to consider whether the punishment imposed was too severe—the extent of the penalty in cases of this type usually being a Carrier prerogative. On the other hand, a substantial number of our Awards uphold the principle that we are empowered to and should reduce punishment in what we consider to be a proper case: Award 5752 (1952); Award 8477 (1958); Award 9865 (1961); and Award 10953—(1962)—among others.

Here, we believe we are confronted with one of the rare situations which justifies us in reducing the penalty imposed.

The Record shows that Grievant had been without interruption, except for a period of service in the Armed Forces, an employe of the Carrier for more than a decade; that except for the one instance of the alleged violation of Rules on the 31st day of December, 1960, his record as an employe is without blemish; and that he was remarkably well-respected in the community where he worked and resided.

In view of all of these circumstances, we are of the opinion that Carrier's application of the penalty of dismissal was sufficiently harsh to warrant our granting a measure of relief.

We are of the belief that this Claim should be settled and adjusted by reinstatement of the Claimant, with seniority unimpaired, but without pay for time lost.

We so hold.

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 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

That the Claim should be sustained in part and denied in part—as shown and indicated.

AWARD

That Claimant be restored to the service of the Carrier with seniority unimpaired.

That he be reinstated to said service without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April, 1963.

DISSENT TO AWARD NUMBER 11344, DOCKET NUMBER TE-13153

With due respect for the finding of the majority that the Claimant here had a fair hearing and was guilty as charged, we dissent to the action of the majority in usurping management prerogative in determining whether or not an employe should be reinstated on a leniency basis. All of the Divisions of the Board have recognized that this Board does not have the power or jurisdiction to reinstate an employe on a leniency basis.

At the time the 1934 Amendments to the Railway Labor Act were being considered, Mr. Joseph B. Eastman, Federal Coordinator of Transportation under the Emergency Railroad Transportation Act of 1933, stated in hearings before the Senate Committee on Interstate Commerce:

> "Take the questions of discipline, for example. It seems to me that such a national board, if it were wise, ought to make it perfectly clear at the outset that it will not interfere in matters of discipline unless it has an exceedingly good case, and all doubtful cases after it has made that policy clear would not be referred, I assume, to the national board."

/s/ T. F. Strunck

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ G. C. White