

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(Western District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad (Lines West of Buffalo), that:

1. The Carrier's action in placing a fifteen day suspended sentence on the personal service record of Norman L. Arthur, pursuant to hearing held January 19, 1959, was arbitrary, unreasonable, unjust and in abuse of the Carrier's power to discipline.
2. The Carrier shall, by order of this Board, be required to remove the discipline from the personal record of Norman L. Arthurs.

OPINION OF BOARD: This claim arose from the disciplinary action of Carrier against Claimant N. L. Arthur for failure to report to his regular assignment as operator on the second trick at NC tower, Collingwood Yard.

As a result of his absence from his duty on Tuesday, January 13, 1959, without notifying Carrier, he was charged with violating Rule 725 of the Rules of the Operating Department and was notified to report for a hearing. Mr. Arthur was found guilty and given a 15 day suspended sentence which was placed in his personal service record.

The Claimant asks that Carrier be required to remove the discipline from his personal record on the grounds that Carrier's action was arbitrary, unreasonable, unjust, and abusive of its disciplinary power.

Mr. Arthur admits that he failed to report for his regular assignment, but states that the circumstances made it impossible for him to do so. He asserts that while he was walking along the street at about 1:00 A.M. on Tuesday, January 13, 1959, a Cleveland policeman picked him up because, from his wearing apparel, he appeared to be a teenager. The Cleveland police department held him for investigation from 1:00 A.M. Tuesday, January 13,

1959 to 3:00 P. M., Wednesday, January 14, 1959. During this time he was not permitted to communicate with anyone. No charge was placed against him.

Carrier takes the position that he violated Rule 725 which reads as follows:

“GENERAL RULES

B. Employees must be conversant with and obey the rules and special instructions.

Employees will be subject to discipline for any violation of the rules or special instructions or for any action of insubordination.”

“ADDITIONAL GENERAL RULES

725. No employee will be allowed to absent himself from duty without proper authority, nor will any employee be allowed to engage a substitute to perform his duties.”

It supports its finding of guilty with evidence that Mr. Arthur admitted his guilt and that his detention by the police resulted from his own action. It maintains that the penalty was reasonable and justified.

Our study of the record reveals that the unusual circumstances in which Mr. Arthur found himself made it impossible for him to notify Carrier that he would not be able to report to work. He was not responsible for the situation which led to his detention at the police station. He was taken into custody because his appearance was that of a teenager. At this time he was not charged with a violation or crime. He was detained until 3:00 P. M. the following day because he carried a large sum of money and an uncashed pay check which the police assumed he secured illegally. No charge was ever placed against him. During this time he was not permitted to make any calls. It is apparent that he was guilty of no wrongdoing, and the position in which he was placed made it impossible for him to notify his employer. We find nothing in the record which indicates that Carrier overcame these facts in the hearing. Carrier calls attention to the fact that when Mr. Arthur finally did report, he gave another reason to explain his failure to appear for his assignment. We find plausible his explanation at the hearing that because the people with whom he lives were religious, he feared they might misunderstand his being detained by the police. In any case, this point is not at issue as Carrier did not charge him with misrepresentation of the truth.

We are of the opinion that the intervening circumstances which prevented Claimant from reporting for duty or notifying the dispatcher of his inability to work were beyond his control. Such circumstances cannot be interpreted as a violation of Rule 725. We, therefore, sustain his claim that Carrier's action in placing a 15 day suspended sentence in his personal record was unreasonable and arbitrary, and we direct that the discipline be removed.

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 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

The Agreement of the parties was violated.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 19th day of June 1964.

**CARRIER MEMBERS' DISSENT TO AWARD 12666,
DOCKET TE-11503**

Award 12666 sustains the instant Claim alleging that:

“* * * Carrier's action in placing a 15 day suspended sentence in his personal record was unreasonable and arbitrary * * *”

on the basis that:

“* * * the intervening circumstances which prevented Claimant from reporting for duty or notifying the dispatcher of his inability to work were beyond his control. Such circumstances cannot be interpreted as a violation of Rule 725. * * *”

In rendering the above opinion, the majority is ignoring the governing principles established by this Board to which attention had been directed during this Division's proceedings.

1. The Board will not:

- (a) weigh evidence or resolve conflicts therein where there is positive evidence of probative value. Award 9511;
- (b) disturb the findings based thereon when there is real substantial evidence to sustain the charge. Award 9102;
- (c) substitute its judgment for that of the Carrier unless prejudice or bias is clearly disclosed by facts or circumstances of record. Awards 9936, 9449.

2. The Board may only disturb the discipline action taken by a Carrier when such is shown to be arbitrary or capricious and in the absence of substantial evidence to support an employee's guilt of the charges made. Award 9449.

3. An employee's guilt of charges must be established by evidence adduced at investigation. Award 9102.

4. Carriers have the right to promulgate and enforce operating rules. Awards 6277, 8502.
5. It is a condition essential to continued employment for an employe to obey Carrier rules. Award 4298.

Rule 725 of the "Rules for the Government of the Operating Department" states that "No employe will be allowed to absent himself from duty without proper authority, . . ." Under this rule, an employe must protect his assignment unless excused by the proper authority and the fact that Claimant placed himself in a position which allegedly resulted in his having been "incommunicado" by civil authorities does not relieve or excuse him from compliance with the rules of his employer.

See First Division Awards 12021, 14692, 14791, 14968, 18244, 19569, 19418 and Third Division Awards 11523 and 11961, involving the instant parties to this dispute.

Claimant admitted at the hearing that he had failed to report for duty, and that he failed to contact the Carrier to obtain permission to be absent on the date in question, which was in violation of Rule 725.

Therefore, the majority has obviously rendered its opinion in this case based on assumed equitable considerations, rather than on negotiated Agreement rules.

For the above reasons, among others, we dissent.

R. E. Black
R. A. DeRossett
W. F. Euker
G. L. Naylor
W. M. Roberts