

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway:

1. That the Carrier violated the current Agreement when it dismissed telegrapher-towerman K. J. Michau from the service on charges it could not sustain.
2. That Mr. J. J. Michau be restored to his former position with seniority, vacation and all other rights unimpaired and compensated for all monetary loss sustained as a result of the Carrier's capricious and arbitrary action.

OPINION OF BOARD: This is a disciplinary case. Carrier charged that Claimant, Towerman K. J. Michau, was sleeping on duty and delaying trains at Carrier's plant known as West Tower, Barstow, California on October 13, 1963, thus violating Carrier's Operating Department Rules 752A, 752B, and 766. The Claimant denied the charge. The investigation was set for October 16, 1961, and was adjourned until November 2, 1961, when further testimony was offered by the Carrier. On November 20, 1961, Claimant was notified by Superintendent Johnson that a decision had been reached to remove him from the service, effective immediately.

It is the contention of the Claimant that the charge preferred against him was not proven; that the conduct of the investigation was unfair and not impartial and that Claimant was deprived of his right to a fair and impartial consideration on appeal as he was required to submit his Claim to Superintendent Johnson who had pre-determined and prejudged it before he had received the Claim. There were other charges of irregularity made that we cannot consider as there is nothing in the record to substantiate them other than mere assertions.

Such portions of Carrier's Rules as are pertinent to the present discussion are:

- (1) "Employees must not be 'indifferent to duty'" (Rule 752A).

- (2) "Employees must devote themselves exclusively to their duties while on duty" (Rule 752B) and
- (3) "Negligence and unnecessary delays must be avoided" (Rule 766).

Two employes of Carrier testified at the hearing that on the morning of October 13, 1961, at 5:31 A.M., they saw Claimant seated in a chair in the tower with his head back and his mouth open; that a light was flashed on his face and remained there for about thirty seconds and that there was no response to that light from the Claimant. On the basis of those facts they testified that he was asleep. Claimant denied he was asleep.

The evidence of Carrier's witnesses was clear and consistent. It is not the province of this Board to weigh conflicting evidence. Since the record discloses ample competent evidence that support the charge made against the Claimant, we will not upset the findings of the Carrier.

We come then to a consideration of Claimant's contention that the conduct of the investigation was not fair and impartial. In our evaluation of that contention we need only to refer in the record to the question asked of Claimant and his representative and the answers they gave:

"Q. Mr. Michau, has this investigation been conducted in a fair and impartial manner and to your entire satisfaction?

A. Far as I know, however, my representative is in a better position to answer that question than I am."

* * * * *

"Q. Mr. Bellomy, has this investigation been conducted in a fair and impartial manner and to your entire satisfaction?

A. Mr. Dotson, I cannot at this time intelligently answer that question. I would have to wait until the decision has been rendered."

It cannot be seriously urged, in view of the answers given to the questions asked, that any complaint was made that hearing was not fair and impartial at the conclusion of the hearing on November 2, 1961.

The last matter for consideration is the charge that Claimant was deprived of his right to a fair and impartial consideration of his Claim on appeal as he was required to submit it to Superintendent Johnson who had predetermined and prejudged the case before he received the Claim. The fact that Superintendent Johnson notified Claimant that a decision had been reached to remove him from service did not disqualify him from receiving the Claim of complainant on appeal. He had no personal knowledge of the claim and did not testify at the hearing. Furthermore, after the denial of the claim by the Superintendent, there were successive appeals to the Assistant General Manager, the General Manager and an Assistant Vice President. There is nothing to indicate that his right of appeal had in any way been nullified. See Award 9322 — Johnson.

The Towerman's duties relate directly to safe and efficient railroad operation and we cannot, on the basis of the record before us, validly overrule the disciplinary action decided upon by the Carrier. See Awards 4683 — Stone; 6085 — Whiting; 9863 — Weston; 10440 — Rose.

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

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 31st day of July 1964.