

Award No. 12986
Docket No. SG-14508

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN
THE TEXAS AND PACIFIC RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Texas and Pacific Railway Company:

On behalf of V. N. Long for restoration to his former position as Signal Maintainer at Melville, Louisiana, and compensation for all time lost, with seniority and all other rights unimpaired.

[Carrier's File: T-33428]

EMPLOYES' STATEMENT OF FACTS: Claimant V. H. Long, with over thirty (30) years service, was dismissed from his position of Signal Maintainer at Melville, Louisiana. We contend that he should be restored to his former position and paid for all time lost since his dismissal, with seniority and all other rights unimpaired.

The record will show, among other things, (1) that Carrier did not comply with Rule 50 of the Signalmen's Agreement, which prescribes the procedure to follow in discipline cases (Mr. Long was not apprised in writing, prior to the investigation, of all charges against him), (2) that Carrier failed to recognize and/or apply the principle that agreement rules prevail over unilaterally-imposed Carrier rules, (3) that Carrier did not sustain that portion of the charge (made prior to the investigation) that was shown as the reason for the dismissal, (3) that Carrier was so inconsistent that it is still questionable about just what reason or reasons it had for dismissing Mr. Long, and (5) that Mr. Long's action on the date of the alleged offense was not contrary to any established practice that had been followed by monthly rated signal maintainers for more than twenty (20) years.

Under date of January 31, 1963, Carrier advised Mr. Long to attend an investigation, and that he was "charged with responsibility for failure to properly protect your assignment, being absent without permission, while working as signal maintainer Monday, January 28, 1963". Carrier has advised that it intends to reproduce the transcript as an exhibit to its ex parte submission. The copy of the transcript in our file consists of a total of seventeen pages — a front cover page and sixteen other pages numbered 1 through 16.

The investigation, held on February 12, 1963, involved the following witnesses:

(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 ten days from date of advice of the decision to the officer appealed with copy to the officer whose decision is appealed. On such appeals, hearings where considered necessary and/or requested, shall be given and decisions thereafter rendered as promptly as possible.

(f) If the discipline assessed against the employe is not sustained on the appeal, the record shall be cleared thereof, and if suspended or dismissed he will be returned to his former position and compensated for the actual wage loss, if any, suffered by him.

(g) Employes shall have the right to be represented at investigations, conferences or hearings on appeals by their chosen representatives.

(h) Nothing herein shall abridge the right of the Management to reinstate to service employes that may have been relieved from active service for just cause, however, their seniority displacement rights will be subject to negotiation and agreement as between the Management and General Chairman.

(i) An employe who considers himself unjustly treated shall have the same right of hearing and appeal as herein provided if written request therefor is made to his immediate superior.

(j) Prior to the assertion of grievances as herein provided and while questions of grievances are pending, there will neither be a shutdown by the employer or suspension of work by the employes."

Each and every contention, made on the property by the petitioner, was fully refuted on the property by the carrier, and these contentions and refutations are set out in the attached Exhibits of the correspondence which occurred on the property between the parties. We are not re-stating these points here, because we believe that the Board will be able to evaluate them more easily by examining them in the context and sequence in which they arose and were disposed of.

The Carrier submits that it has complied with all of the requirements of Rule 50, and with all other rules in the Agreement; that no violation of the Agreement by the Carrier has been or can be shown in connection with this case; and that there is no basis for sustaining the claim in this case, in whole or in part. Accordingly, the Carrier respectfully requests the Board to dismiss or deny in all respects all claims involved in this case.

(Exhibits not reproduced.)

OPINION OF BOARD: Under date of January 31, 1963, Carrier advised Claimant, who held position as Signal Maintainer at Melville, Louisiana, that he was "charged with responsibility for failure to properly protect your assignment, being absent without permission, while working as signal maintainer Monday, January 28, 1963." Pursuant to notice and in compliance with the Agreement, investigation was held on February 12, 1963, the transcript of which is included in the record.

At the investigation Claimant testified that he had been properly notified of the investigation. The transcript supports the conclusion that Claimant

was given a fair hearing. Therefore, the only issues before this Board are whether: (1) Claimant was guilty as charged; and (2) the disciplinary action imposed, if the holding as to (1) is affirmative, was fair, just, equitable—otherwise stated, was it reasonable?

There is no dispute as to the material and relevant facts.

Claimant, at the time of the incident, had been in Carrier's service for about thirty (30) years. The position which he held was monthly rated with regularly assigned hours from 8:00 A.M. to 5:00 P.M. Melville was the headquarters or home station of the position. For some time prior to the incident, when Claimant was in Melville, he would absent himself from Carrier's property during his regularly assigned working hours. By arrangement with the Agent, if Claimant did not notify the Agent that he would be elsewhere than Melville during his absences from the property, the Agent would understand he was in Melville. Melville being a town with a population of about 500, the Agent would track down Claimant if there was need for his presence on the property.

The incident which gave rise to this Claim occurred on January 28, 1963. Claimant had previous knowledge that on that date the Signal Supervisor and Signal Inspector would be in Melville to fix a water purifier to make battery water. Notwithstanding this knowledge Claimant absented himself from the property starting at about 11:00 A.M. The two Supervisors arrived at Melville at about 1:00 P.M. and upon inquiry to the Agent were informed that Claimant was not on the property but was probably at his home or elsewhere in Melville and could be located by telephone. The Supervisors declined to seek out or have the Agent seek out Claimant. At about 3:00 P.M., at which time the Supervisors were in the town of Melville, getting a cup of coffee, Claimant drove his automobile alongside that of the Supervisors' and then proceeded to accompany them back to the property with the objective of testing the water purifier. For his failure to be on the property during his regularly assigned working hours between 11:00 A.M. and 3:00 P.M. on January 28, 1963, Claimant was charged as set forth above.

Claimant's defense is: (1) it had long been the practice for Claimant to absent himself from the property during regularly assigned working hours subject to call from the Agent; (2) since he was a monthly rated employe subject to call at any hour during his regularly scheduled workweek, he was not required to be on the property during the bulletined regularly assigned working hours of his position except to the extent his services were required.

A reading of the Agreement fails to support the defense.

The Agreement makes clear that it was the obligation of Claimant to be on the property with his whereabouts known during his regularly scheduled working hours, except for absence by permission; also, that he was obligated to hold himself reasonably available for call during off-duty hours. These obligations could not and cannot be evaded by arrangements made between employes and a history of working according to such arrangements. Contractual obligations can be divested only by termination or amendment of the contract. We find, therefore, that Claimant in leaving the property was guilty as charged.

Certain mitigating circumstances must be weighed in considering whether the penalty assessed—discharged from the service on February 19, 1963—was excessive. These are: (1) Claimant's long years of service; (2) Claimant's

mistaken belief that because of the long continuing arrangement between him and the Agent, the arrangement satisfied both the Carrier and the provisions of the Agreement. We must also weigh the fact that Carrier offered Claimant reinstatement on December 3, 1963 to become effective on December 16, 1963.

Weighing the factors in the paragraph immediately above, we find that the penalty assessed — discharge from service — was excessive. We find, also, that Claimant, being guilty as charged, by refusing to accept offered reinstatement on December 16, 1963, acted at his peril.

In our Award we will provide that: (1) Carrier offer Claimant reinstatement without impairment of his seniority and other rights vested by the Agreement; (2) Carrier make Claimant whole for any loss of wages he suffered in the period from February 19, 1963, to December 16, 1963, less any earnings in that period from employment or self-employment; (3) Claimant shall not be made whole for any loss of wages in the period from December 16, 1963 to the date he is offered reinstatement.

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 penalty assessed by Carrier against Claimant was excessive within the contemplation of the Agreement and should be reduced as set forth in the Opinion, above.

AWARD

Claim is sustained in part and denied in part as follows:

1. Carrier shall offer Claimant V. H. Long reinstatement without impairment of his seniority or other rights vested by the Agreement;

2. Carrier shall make Claimant whole for any loss of wages he suffered in the period from February 19, 1963, to December 16, 1963, less any earnings Claimant had in that period from other employment including self-employment; and

3. Carrier shall not make Claimant whole for any loss of wages he may have suffered in the period from December 16, 1963, to the date he is offered reinstatement by Carrier in compliance with 1, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1964.