

Award No. 13467
Docket No. TE-12548

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY
(Wheeling and Lake Erie District)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago & St. Louis Railroad (Wheeling and Lake Erie District), that:

1. The Carrier violated the terms of the parties' Agreement when it assessed a fifteen (15) day suspension on Extra Operator D. M. Griffiths for having failed to protect relief position, Norwalk, Ohio, on October 17, 1959.
2. The Carrier further violated the terms of the parties' Agreement in assessing a fifteen (15) day suspension on Operator D. M. Griffiths on charges not proven.
3. The Carrier shall expunge from the claimant's record the discipline assessed and compensate him for wages lost due to the Carrier's improper act.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute, effective as to rules February 1, 1952, as to rates February 1, 1951, and as otherwise amended.

D. M. Griffiths, hereinafter referred to as claimant, was, on the date involved, an extra telegrapher working pursuant to the provisions of Rule 24 (Extra Board - Assignment of Extra Employees) of the parties' Agreement. As such he was instructed by the Carrier "to cut in on the telegrapher relief position at Norwalk, Ohio, commencing October 13, 1959, and work the position until further advised."

In response to the Carrier's orders, the claimant wired in reply:

"Will accept relief position Norwalk commencing 3:00 P.M. October 13."

vacancies at points in his home area which did not involve overnight stays. Homestead, 93rd St., Norwalk and Hartland, mentioned above, are all some distance from his home.

It is the Carrier's position, therefore, that the claimant had no justifiable reason for not protecting the assignment and was, therefore, properly subject to discipline. In view of his past record, which included a 15-day suspension on a similar charge, the discipline assessed was neither arbitrary nor excessive.

The principal argument made by the General Chairman in his handling on the property (see Carrier's Exhibits F, F-1, G-1 and H) revolves around the contention that there was no proof that the claimant was not ill and that he did not receive a fair and impartial hearing.

The latter contention is completely denied by the testimony of the claimant as well as the General Chairman.

Beginning on Page 6 the claimant testified:

"Q. Now, Mr. Griffiths, have you made all the statements and submitted all the evidence you feel has a bearing on this case as far as you are concerned?

A. Yes.

Q. Do you feel that this hearing has been conducted in accordance with requirements of the working agreement?

A. Other than things brought up that were not relative to hearing I think it was conducted according to working agreement.

Q. Do you have any exceptions to take to the conduct of this hearing?

A. No."

On Page 8 the General Chairman testified:

"Q. Mr. Howes, do you feel that this hearing has been conducted in accordance with requirements of the working agreement?

A. Yes, I feel it was fair and impartial.

Q. Do you have any exceptions to take to the conduct of this hearing?

A. No exceptions."

The General Chairman's contention that the claimant was incapacitated is similarly without substance. None of his statements stand up in the light of all the evidence produced at the hearing and pointed out by the Carrier.

The claim is entirely without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 12, 1959, D. M. Griffiths, an extra telegrapher, was instructed by the Carrier to

"Cut in on the telegrapher relief position Norwalk, Ohio, commencing 3 P.M., October 13, 1959, until further notice. Answer."

Claimant Griffiths responded to this message by wire as follows:

"Will accept relief position Norwalk commencing 3:00 P.M., October 13."

The evidence is that Claimant worked the 3:00 P.M. shift on October 13, spent that night in his automobile, worked the 11:00 P.M. shift on October 14, and thereafter returned to his home in Cadiz, Ohio, for his two rest days, October 15 and 16. At 11:23 A.M., on the morning of October 16 he sent the following message to Chief Train Dispatcher Counts:

"Mark me off extra board until further notice, account cannot afford to pay for necessary accommodations to work relief position at Norwalk."

A reply was sent as follows at 11:50 A.M. the same day:

"Your message date requesting to be marked off is denied. Arrange to protect relief position at Norwalk as outlined in my message to you on October 12. No other extra man available."

Later that day, at 3:36 P.M., Griffiths, together with his wife, went to the office and sent a telegram, signed by Mrs. Griffiths, as follows:

"Mark my husband, D. M. Griffiths, off telegraphers' extra board until otherwise notified account sickness."

The following Monday, October 19, Griffiths signed up for unemployment insurance and, that same day, sent a message to Mr. Counts as follows:

"Mark me up on Extra board."

On October 21, 1959, Claimant was charged by the Carrier with failing to protect his relief position at Norwalk on October 17, 1959, as instructed. Hearing was held on October 28, 1959.

The Carrier contends that the Claimant failed to protect an assignment as ordered and, therefore, was properly disciplined. It asserts that Griffiths has a history of declining assignments and of laying off assignments, particularly when far from home; that he sought to do so in this case, pleading inability to pay, but was refused; and, that he then changed his plea to illness. It argues that testimony at the hearing showed he was not incapacitated, as he alleged, and that his failure to work October 17, 1959, was a simple case of malingering, which was properly penalized.

The Organization asserts that Griffiths acted properly in laying himself off from work on October 17, 1959. It states that he contracted cold on the night of October 13; that he expected to be able to work until he received an automobile repair bill for \$22.51 which made it financially impossible for him to report for work; and that shortly thereafter an attack of vomiting and nerves necessitated his second message forcing him to stay away from work. In view of his physical capacity, the Organization concludes, the penalty imposed is improper, and should be expunged from the Claimant's record.

This claim lacks merit. Griffiths properly sought to be released from his commitment to cover the October 17 position, but was denied in his request. What does appear to be improper is his rapid change of reason for seeking to lay off. It is possible that his personal health so deteriorated in the intervening 3½ hours that he was legitimately unable to work the following day for physical reasons. But the evidence is so strongly convincing that Griffiths was fabricating a reason for excused absence as to support the Carrier's contention of malingering.

This conclusion is amply supported by Griffiths' testimony. He sent the first message himself, yet acknowledged that he told his wife what to put on the second message and had her sign it. Furthermore, though he claimed a sudden worsening of his condition with headaches and vomiting, he was apparently well enough to go out with his wife to send the afternoon message. Although the Carrier did not initiate a medical examination of Griffiths, in view of his own past record, the specific and emphatic denial by Counts of his request for layoff on financial grounds, and the alleged rapid deterioration of his health in the early afternoon, Griffiths would have been prudent to forestall the almost certain challenge of his position by obtaining medical support for his claim of illness. This he did not do.

In view of the foregoing we find that the suspension imposed by the Carrier was proper, and the penalty imposed, in the light of his prior record, was appropriate.

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 Employee involved in this dispute are respectively Carrier and Employee 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 14th day of April 1965.