



Award No. 15851
Docket No. TE-14638

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)**

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Texas & Pacific Railway, that:

1. Carrier's action of suspending Operator A. L. Laymance, Abilene, Texas, from service on October 20, 1962, and subsequently dismissing him, on charges unproven and unsupported by the facts, was unjust, unreasonable, arbitrary, capricious, and an abuse of its disciplinary powers.
2. Carrier violated Article V of the National Agreement of August 21, 1954, when it failed to deny claim for pay presented on October 22, 1962, for pay until the date of December 31, 1962.
3. Carrier violated Article 3 of the Agreement when it failed to grant a requested hearing as provided therein.
4. Because of these violations of the Agreement between the parties, Carrier shall be required to compensate A. L. Laymance for all time lost.

OPINION OF BOARD: Since the Record submitted to the Board contains more than 225 pages, we shall not attempt to comment on all of the argumentation presented. However, it should be noted that the Record was read carefully and each point of argumentation was considered.

Sometime between 2:00 A. M. and 2:50 A. M., the morning of October 20, 1962, A. L. Laymance, who was then the assigned Operator of the third shift position at Abilene, Texas, was ordered by Carrier's Assistant Superintendent, C. S. Baldwin, to stop work and go home. Mr. Baldwin accused Mr. Laymance of being under the influence of alcohol. Mr. Laymance denied this but complied with the directions given.

By letter dated October 22, 1962, Mr. Laymance was notified he was "charged with responsibility for being under influence of intoxicating beverages or narcotics while working as operator at Abilene, Saturday, October 20, 1962." In this letter, which was written by Superintendent Blassingame, Mr.

Laymance was further notified a formal investigation would be held October 26, 1962, and that the accused could bring a representative of his choice and any witnesses he desired. October 22, 1962, the General Chairman of the Organization, J. O. Dafft, wrote Mr. Blassingame a letter protesting Telegrapher Laymance's being held out of service before an investigation was held; the General Chairman alleged that Mr. Laymance had been treated unjustly; and the General Chairman made claim in behalf of Mr. Laymance for all time lost by said employe due to his allegedly unjustified removal from the service of the Carrier. Subsequently, the General Chairman asked that the investigation hearing be postponed from October 26 to November 2, 1962. This request was granted and the investigation hearing was held November 2, 1962. Mr. Laymance was present and represented by his General Chairman, Mr. Dafft. Twelve witnesses testified at this hearing, and the transcript of their testimony is a part of the Record presented. At the end of the hearing, all persons involved were asked by the Carrier official who conducted the hearing, Mr. Percy, if any of them wished to produce further witnesses or develop other facts. All responded in the negative. By letter dated November 9, 1962, Superintendent Blassingame notified Mr. Laymance that the investigation hearing established that Mr. Laymance was "guilty as charged" and that he was dismissed from the service. On November 12, 1962, the General Chairman wrote Director of Personnel, G. R. French, that the Claim presented Mr. Blassingame had been denied; that a miscarriage of justice had resulted; and that (in the last paragraph of said letter): "Please consider this letter as an appeal to Superintendent Blassingame's decision and advise." By letter dated November 19, 1962, Director of Personnel French, replied that an appeal to him was not in order at that time; that proper procedure had not been followed; and that, consequently, the appeal to him (once referred to therein as "your claim") was declined "at this time."

After the above happenings, many letters were exchanged between the Parties. These pertained to a number of matters, e.g., the semantical distinction between a "conference" and a "hearing." By letter of December 17, 1962, the General Chairman presented Superintendent Blassingame with an enlarged and somewhat different "Statement of Claim," which asked for (among other things) that Mr. Laymance be paid interest at the rate of 4½% per annum on moneys he would have earned if he had been retained in Carrier's service. By letter of December 31, 1962, Superintendent Blassingame denied the claim for pay lost.

Before this the General Chairman and Superintendent—after some previous difficulties—had succeeded in having a conference. December 29, 1962, the results of this conference were reduced to writing and the letter in this regard is quoted fully:

"Referring to our previous correspondence concerning the dismissal of Operator A. L. Laymance, and our conference today at which time we discussed this case.

As agreed in conference, Mr. Laymance will be reinstated to service effective this date with seniority rights and vacation rights unimpaired; but with the understanding you would further appeal pay for time lost.

Yours very truly,

/s/ R. H. Blassingame

ACCEPTED: /s/ J. O. Dafft
General Chairman"

We believe these officials had the proper authority to make this agreement. In so doing, however, we find that many of the previous contentions of the Parties no longer existed as issues. The Record does reveal that Mr. Blassingame promptly took action to restore the individual claimant to the service of the Carrier. There could be no money issue involved after January 1, 1963.

The main issue that remained was whether the individual Claimant was entitled to be paid for money he would have earned between October 20, 1962, and January 1, 1963 had he been permitted to work for the Carrier during that period of time.

First, we must consider the time period Mr. Laymance was held out of service. This commenced when he was relieved from duty October 20, 1962. Written charges were made, as indicated above, October 22, 1962. Formal investigation was originally scheduled for October 26, 1962 — all as stated above. It should be noted at this point that Carrier did schedule an investigation hearing within the time period required by the Agreement. This hearing was continued to November 2, 1962, but since this continuance was granted at the request of the Organization, the Carrier cannot be deemed to be at fault in this regard. Article 3 of the Agreement of the Parties expressly states an employe may be "held out of service" pending the investigation provided for in that Article. If the investigation results in an acquittal of the accused employe, he must be returned to his former position and paid for all time lost. Since the investigation hearing may result in a complete acquittal of the employe charged, we do not believe that a claim for lost earnings is in order or properly filed, if it has been presented before the investigation hearing has been held.

Secondly, we should consider the investigation hearing itself and the subsequent dismissal action taken by the Carrier November 9, 1962. The transcript of the investigation has been read many times by the neutral referee. Whether he would have made the decision made by the Carrier November 9, 1962 is not the question to be decided at this appellate level. The Board with a high degree of consistency has held that disciplinary action taken by the Carrier should be set aside, or modified, by the Board on rare occasions only. When it takes such action, we have held that justification for same should be based on the existence of especial circumstances and sound reasons.

In this case, we cannot conclude the disciplinary action taken by the Carrier was arbitrary or in bad faith. Neither can we rule that the testimony Carrier chose to accept was arbitrary or vindictive; nor can we conclude the Carrier's action was without sufficient cause, i.e., without probative evidence of substance. Although the testimony at the hearing was in conflict, three Carrier witnesses did testify — in effect — that the individual Claimant was to some degree under the influence of alcohol while on duty. See Award 10232.

In fairness to Mr. Laymance, notation should be made of Record that no evidence was offered at any time that he was working while under the influence of "narcotics." This is mentioned because the charge initially made against him referred to "intoxicating beverages or narcotics." (Emphasis ours.)

The procedural questions involved in this case are intricate. This is due to the application of Article 3 of the Agreement and Article V of the 1954 National Agreement. The Parties exchanged much correspondence, and from

time to time positions were changed or mended. The December 29, 1962 conference agreement (referred to above) in one example. Due to the confusion which developed in handling the grievance on the property, we do not believe that the Carrier should be faulted upon the basis of a procedural violation. Moreover, we do not find the Organization to be in fault in this regard.

Consequently, we find that this Claim should be denied in its entirety — for the reasons indicated above.

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 13th day of October 1967.