



Award Number 17588

Docket Number TE-18235

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

PENN CENTRAL, NEW HAVEN REGION

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on The New York, New Haven and Hartford Railroad, that:

1. Carrier improperly dismissed Mr. J. F. MacDonald from service effective June 13, 1968, as a result of charges presented against him at an investigation held June 6, 1968, which did not warrant dismissal. Carrier's action in dismissing Mr. MacDonald was arbitrary and the discipline imposed was excessive.
2. Carrier shall now restore Mr. MacDonale to service with his seniority unimpaired and compensated for all time lost since May 29, 1968.

OPINION OF BOARD: The record discloses that Claimant had been in service of the Carrier since October 31, 1955 in various capacities but with no experience as "Agent". Prior to May 29, 1968, Claimant was successful bidder on a permanent vacancy in the position of "Agent-Operator" at Hyannis, Mass., with responsibility for the operation of five (5) stations covering between 35 and 40 miles of Carrier's lines on Cape Cod. Because of his inexperience in this new position, Carrier assigned Claimant to "post" on the position for 20 days in order to qualify. On May 28, 1968 Claimant reported to the Relief Agent at Hyannis and worked his assigned hours (7:00 A.M. to 4:00 P.M.). He then returned to his home in Hull, Mass. some 90 miles from Hyannis. On the date in question, May 29, 1968, Claimant arrived at Hyannis station about 6:30 A.M. and immediately departed. At about 11:30 A.M. the relief agent received a telephone call from Claimant. The call was referred to Trainmaster Neville who inquired as to the whereabouts of Claimant. After a short discussion, Trainmaster Neville informed Claimant that he was out of service and would receive a notification as to when the investigation would be held. The notice of investigation, read in part "* * * to determine your responsibility, if any, in connection with your alleged failure to cover your posting assigning freight agent at Hyannis, on May 29, 1968 * * *". The investigation was held on June 6, 1968 and in a notice dated June 13, 1968, Claimant was informed that as a result of the investigation, he was dismissed from service because of violation of Rule "0" and Rule 731 of the Operating Book of Rules. Rule "0" is as follows:

"RULE 0

"Employees are prohibited when on duty from reading newspapers, books or periodicals, engaging in games or unnecessary conversation, sleeping, using unauthorized radio or television sets on Company property or in other manner having their attention diverted from their duties. Gambling in any form is forbidden on Company property.

"Employees must devote themselves exclusively to the Company's service during prescribed hours, reside wherever required and obey instructions from the proper authority. They must not absent themselves from duty, exchange duties with, or substitute others in their place, nor engage in other business which interferes with the proper performance of his duties as an employee or which is detrimental to or in competition with the Company."

Rule 731 is as follows:

"RULE 731

"Employees must report for duty at the required time, and those in train service will assist in making up their trains when necessary."

Claimant contends that the action of Carrier in dismissing him from service was arbitrary and the discipline imposed was excessive. The Organization contends Claimant was deprived of a fair and impartial hearing; that no violation was proven; and that Carrier failed to notify Claimant of his dismissal within 10 days from the date of investigation as required by Article 27(b) of the Agreement. Claimant further contends that on the date in question, he was on duty in the process of familiarizing himself with the area.

This Board finds that this Claimant was adequately apprised of the nature of the charge placed against him by Carrier. This Board further finds that Claimant's failure to object to any procedural defect constituted a waiver of any possible defects. See Awards 14444 (Dolnick); 14573 (Stark); 15020 (Hamilton); 15574 (Ives); and 16121 (Friedman).

Also, this Board finds that Claimant was afforded a fair and impartial hearing at the investigation. He was given ample notice prior to the hearing; he was given the right to present witnesses; he was represented at the hearing; and he was given the right to cross-examine witnesses. Claimant also testified that he understood the nature of the charge placed against him and that he had no complaint relative to the manner in which the investigation had been conducted.

The contention of the Organization that Carrier violated Article 27 by notifying Claimant of the discipline assessed is without merit. If the notice was actually posted in the U. S. mail in an envelope bearing the address of Claimant within the ten days prescribed, Carrier has satisfied the provision contained in Article 27 regarding notice of discipline assessed. The record discloses that such notice was properly mailed within the ten days but was not received by Claimant within the ten days. The date of posting in the U. S. mail governs; not the date of receipt. See Awards 10254 (Rose); 13219 (Coburn); 12001 (Dolnick).

This Board further finds that under the evidence adduced at the Investigation, Carrier was justified in finding Claimant guilty of an unauthorized absence. The Record is void of any showing that Carrier acted arbitrarily or capriciously. However, because of extenuating circumstances brought about by

the necessary change of Claimant's residence and the small amount of unauthorized time Claimant was absent, this Board finds that Claimant should be restored to his position without loss of Seniority rights, but without restoration of compensation for time lost.

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 violated in accordance with the Opinion.

A W A R D

Claimant be restored to service with seniority rights unimpaired but without restoration of compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Shulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.