Award No. 4521
Docket No. TE-4340

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile & Ohio Railroad Company, that swing relief agent, operator-leverman C. J. Ryan who was arbitrarily and capriciously dismissed from the service by the Carrier on September 11, 1947, in violation of Rule 25 of the Telegraphers' Agreement without hearing, and who was later, on June 8, 1948, restored to the service and his former position with seniority rights unimpaired, shall be compensated for all wage loss suffered during the period, September 15, 1947, through June 8, 1948, in which he was improperly held out of service and physically able to perform work.

OPINION OF BOARD: Claimant C. J. Ryan, Telegrapher at Jacksonville Tower, was charged by Carrier with failure to perform his duties on August 18, 1947 causing 30 minutes' delay to one train and 10 minutes' delay to another. He was given notice by the Chief Dispatcher to attend an investigation on that charge at 9:00 A. M. Saturday, August 30th. Copy of said notice was given to the General Chairman prior to the date of the investigation. Claimant failed to attend the hearing and Carrier proceeded therewith. The record of the investigation showed that the officer in charge considered correspondence concerning the alleged failure to perform duties on August 18, 1947 and Claimant was subsequently notified of his discharge from the service on the ground that the evidence presented at the investigation conclusively proved that he was guilty of causing delay to the trains above mentioned. Subsequently, the Claimant was restored to service on a leniency basis with seniority rights unimpaired. Hence, this claim merely concerns wage loss suffered during the period September 15, 1947 through June 8, 1948, the date he was restored to service.

The Employes contend that Ryan was arbitrarily and capriciously discharged without being afforded a reasonable opportunity of a hearing in violation of Rule 25, and that the most discipline which could be assessed against Ryan was ten demerits as provided by Rule 25 (b). The Discipline Rule as contained in the Agreement between Carrier and Employes, effective June 16, 1944 and which is applicable in this situation provides as follows:

> "(a) Except as otherwise provided in this rule an employe will not be disciplined or discharged before being given a hearing, and may have one or more of his duly accredited representatives of The Order of Railroad Telegraphers present at such hearing if he so desires.

(b) Hearing in advance of discipline will not be required in minor cases which are investigated by correspondence, and in which the discipline assessed does not exceed ten (10) demerit marks, unless the employe requests hearing.

(c) Copy of charges will be furnished the employe when notified of hearing.

(d) Should an employe be dissatisfied with the decision he shall have the right within fifteen (15) days to appeal the case, with written statement, to the next higher officer, copy to be furnished to the officer whose decision is appealed. Conference on appeal will be granted within fifteen (15) days to the aggrieved employe, who may be represented by one or more of his duly accredited representatives of The Order of Railroad Telegraphers. Decision on appeal will be rendered within fifteen (15) days after date of conference.

(e) Appeals may be made to the higher officers in succession up to and including the highest officer designated to handle such matters, provided each appeal is taken within the time limit and in the manner specified in the preceding paragraph.

(f) In case punishment is inflicted, which at the hearing or on appeal is found to be unjust, the record of the employe shall be cleared of any discipline imposed, or, if discharged, he shall be reinstated and paid for all time lost.

(g) If the employe is discharged and appeal is taken, his position will not be bulletined as a permanent vacancy until after the final appeal is acted upon."

In the submissions of both parties, the words "Investigation" and "hearing" are used interchangeably so that it is clear that both parties have treated the two as being synonymous. Hence, there is no doubt that although the Carrier in its notice to Claimant used the phrase "to appear for investigation", the notice was considered by both parties as a notice of hearing.

Notice to attend the hearing was given to the Claimant on August 27, 1947. He failed to appear at the appointed time and at the request of the General Chairman, who was present on time, the investigation was postponed until arrival of the next train (No. 28), but Claimant did not arrive thereon and Carrier proceeded with the hearing. There is conflict in the record with respect to whether or not the General Chairman returned to the hearing room after the arrival of train No. 28. Carrier insists that he did not, and the General Chairman states that he did and request a postponement of the hearing, which was denied. We believe, however, that there is no need for us to reconcile these conflicts of evidence for there is sufficient in the facts upon which there is no disagreement to base an Award.

Employes have asserted that Ryan could not attend the hearing scheduled for August 30, because of illness. This, however, was not asserted by the Employes until October 11, 1947, when the second step in the appeal procedure set forth in Subsection (e) above was made. Employes have submitted as proof of Ryan's illness a physician's certificate, the veracity of which is attacked by Carrier on convincing grounds. This certificate reads as follows:

"G. O. Webster, M.D.
218 West College Ave.
Jacksonville, Ill.

Nov. 13, 1947.

On Aug. 27, 1947, I saw Mr. C. J. Ryan—at that time he was confined to his bed with an attack of influenza.

He stated that the was to make a trip to Bloomington on August 30-47, but I advised against this on account of his illness."

Now then, whether or not Ryan was sick, from this certificate it appears that he knew on August 27, 1947 that he was to appear for a hearing. Ryan had had experience with disciplinary proceedings before, so it is reasonable to conclude that he also knew, that the General Chairman would receive a copy of this notice. Yet, nowhere in the record does it appear that Ryan made the slightest attempt to communicate with either the General Chairman or Carrier. Certainly, the alleged illness was not of such a nature that that small mental or physical exertion was beyond his strength at the time. If Ryan had the slightest interest in obtaining a postponement or the slightest respect for the valuable time of the General Chairman, it is a reasonable conclusion that he would have notified either party of his inability to attend the hearing or to make a showing of some effort in that direction. Under the circumstances here present, we cannot say that Ryan was not given reasonable notice of the charge against him and we do not believe that he can now be heard to complain of the holding of the investigation in his absence. Were we to hold that under Rule 25, an employe could not be disciplined or discharged without his actual presence at a hearing, that would lead to the absurd result that an employe by willfully absenting himself from a hearing could avoid discipline. No such result is contemplated by the rule.

The correspondence introduced in evidence at the hearing clearly established Claimant's guilt of the dereliction charged. Guilt of the offense charged and his previous bad record justified the quantum of discipline imposed. We find no basis upon which to disturb the action taken by Carrier.

As to the contention that under Rule 25 (b) because all the evidence adduced at the investigation consisted of correspondence and hence the discipline should not exceed ten (10) demerit marks, we are of the opinion that such a contention is without substance. Here the Carrier gave the Claimant notice of hearing. That he was not present is attributable to his own neglect. If he were present and challenged the truth of such correspondence and were denied an opportunity to cross-examine the writers in a proper case, there might have been ground for complaint. That however does not furnish any basis for a holding that the Carrier may not consider unchallenged correspondence in a disciplinary proceeding under Rule 25 (a) or that because that is all the evidence relied on after default in appearing pursuant to proper notice discipline must be limited to ten demerits.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon,
Acting Secretary

Dated at Chicago, Illinois, this 11th day of August, 1949.