

Award No. 5191

Docket No. TE-5186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana,

(a) That the carrier was capricious, arbitrary and unfair in the disciplinary action taken against Telegrapher C. L. Phillips, Jr., as a result of investigation held March 8, 1948.

(b) That the carrier's action in removing C. L. Phillips, Jr., from service on March 22, 1948, was improper after it had dismissed him from service on March 14, 1948, and on the following day reinstated him in service by instructing him to protect his former assignment until relieved.

(c) That C. L. Phillips, Jr., shall be reinstated to his position in the carrier's service with seniority unimpaired and paid for all time lost commencing March 22, 1948, until reinstatement becomes effective.

OPINION OF BOARD: C. L. Phillips, Jr., was employed as a Telegrapher on the third trick at Vanderbilt. He was charged with refusing to check repetition of train orders and using profane language on Dispatcher's telephone February 26, 1948, in violation of Rules 211, 222, 702 and 703. Upon a hearing being held, he was dismissed from service. On March 14, 1948, notice of dismissal was sent to Phillips with an acknowledgment of its receipt to be signed by him. Phillips receipted for the dismissal on March 15. Thereafter, but on the same day, the Carrier requested Phillips to "arrange to protect third trick Vanderbilt until relieved". Mr. Phillips then continued on his regular assigned hours and performed the work of his trick until March 22 when he was relieved. He has been out of service since that date.

The contentions of the Petitioner are that the Carrier acted arbitrarily and unfairly when it found Phillips guilty of the charges and dismissed him; that, in any event, when the Carrier requested him to protect his position, it reinstated him or reemployed him on March 15; that it violated Rule 2 of the current Agreement when Phillips was relieved on March 22.

The Carrier contends that there is no provision of the Agreement to the effect that temporary retention after dismissal operated as a reinstatement in service; that Phillips was free to leave at any time after receiving his notice of dismissal and that there is no contractual obligation to notify an employe of his dismissal within any given time, and that they could have withheld notice of dismissal until relief was available.

We have carefully examined the report of the investigation and have concluded that there was evidence supporting the finding of the Carrier

that Phillips was guilty of the charges. We cannot weigh conflicting evidence; nor, in reference to the penalty, in the absence of a showing of a manifest abuse of discretion, substitute our judgment for that of the Carrier.

The question arises: Was Phillips reinstated or reemployed? The customary and usual prerequisite to reinstatement of an employe is an intention to ameliorate a penalty of dismissal by reducing such to a suspension and restoring the employe to his former position and all his rights. Such action could only be taken by the officer, or one of higher authority, who had the right to order dismissal. The telegram that requested Phillips to continue his trick until relieved was from the Trainmaster. It is asserted, and not denied, that the Trainmaster did not have authority to reinstate an employe. Further, the wording of the message to Phillips does not show an intent to reinstate him with all his former rights.

If he was not reinstated, the Petitioner then contends that he was reemployed with seniority dating from March 15. It is admitted by both parties that there was no obligation on the part of Mr. Phillips to continue performing the duties of his position after he received and acknowledged receipt of the notice of dismissal. On the other hand, there is no provision in the Agreement that limits the time within which the Carrier must give notice of dismissal, after a hearing. The Carrier could have withheld the notice until an operator was available for relief on Phillips' position; but it did not do this.

But did the message to Phillips to continue his trick until relieved constitute a postponement of the effective date of the dismissal? Admittedly, the message was received after the dismissal notice had been signed and receipted. The dismissal was then complete and it was no longer possible to postpone it. At that time there was no status of employment existing which could be continued. When, therefore, Phillips resumed his assignment, it could not be on the basis of continuing or resuming his former position, but was, in fact, a new status of employment. The Carrier requested him to work and he filled a regular position under the current Agreement; and as Phillips became so reemployed, he again acquired the protection afforded employees covered by it. Thus he could not be dismissed or suspended from service except in accordance with the rules. This the Carrier did not do. Not having dismissed Phillips on March 22 in accordance with the rules, the Carrier violated the Agreement and Phillips is entitled to reinstatement with seniority as of March 15, 1948, and compensation for time lost, less credit for any earnings Phillips may have received during this period.

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 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

The Carrier violated the Agreement.

AWARD

Claim (a) denied.

Claim (b) sustained.

Claim (c) sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January 1951.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Interpretation No. 1 to Award No. 5191

Docket No. TE-5186

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: Missouri Pacific Lines.

Upon application of the representatives of the employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Organization requests an interpretation of that part of the award reading, "Claim (c) sustained in accordance with the Opinion and Findings."

The pertinent portion of the Opinion to which claim (c) relates, reads as follows:

"Not having dismissed Phillips on March 22 in accordance with the rules, the Carrier violated the Agreement and Phillips is entitled to reinstatement with seniority of March 15, 1948, and compensation for time lost, less credit for any earnings Phillips may have received during the period."

It is the contention of the Organization that the phrase "less credit for any earnings", insofar as it relates to claim (c), is limited to credit for earnings of Phillips while employed by the Carrier, and under the circumstances here presented is limited to the amount received as unemployment compensation under the provisions of the Railroad Unemployment Insurance Act. The contention of the Carrier is that the above quoted phrase relates to earnings received from any employer.

The Organization advances the argument that in sustaining claim (c) it was the intent of the Board to make Phillips whole and that this may be done only by limiting "any earnings" to such as were received from the Carrier; that if not so construed Phillips will lose certain benefits that may accrue to him in the future under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The Organization contends that this is particularly so because the claim which the Board sustained was for "compensation for time lost", and that this is distinguishable from a claim for "monetary loss".

In its essence claim (c) is for damages for breach of an employment contract. In the absence of a provision in the contract for liquidated damages or penalty, the damages sustained when an employee is wrongfully discharged is his loss of wages; and this is so whether the claim is for "compensation for time lost" or for "loss of wages" or "monetary loss". There is no real distinction between such claims. In any case the damages are measured by the loss that directly flows from the breach of the Agreement. But it is a well recognized rule of law that on the breach of a contract for personal

services the party wronged must use reasonable efforts to obtain other employment in order to minimize damages; and the amount which he earns in this manner will be excluded in the assessment of damages for the wrongful discharge.

It is contended by the Organization that this does not recognize Mr. Phillips' rights under the Railroad Retirement Act and Unemployment Insurance Act which may be diminished by crediting earnings from other employers.

The measure of damages for a breach of a contract of employment is the loss which directly and proximately results from the wrongful discharge. Such damages do not include any loss which is indirect, remote or speculative. Without determining whether, in a proper case, this Board might construe or interpret the provisions of the Railroad Retirement Act or the Railroad Unemployment Insurance Act, nevertheless the future value of Mr. Phillips' rights under such provisions of the law are, at this time, remote, conjectural and speculative in their nature. For this reason such loss, if any, may be excluded in determining the damages sustained by Mr. Phillips as a result of his wrongful discharge.

We therefore advise the parties that it was the intent of the Board to award Mr. Phillips compensation he would have earned from the Carrier for the period from the date of his wrongful dismissal to the date of his reinstatement or to the date established by allowing seven days after receipt of the notice of his reinstatement, whichever is the earlier, less earnings received during said period from any employer, including employers other than the Carrier, and payments he received by reason of benefits accruing to him under the Railroad Unemployment Insurance Act.

Referee Robert O. Boyd, who sat with the Division as a member when Award No. 5191 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of July, 1951.