# Award No. 5754
# Docket No. TE-5723

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Angus Munro, Referee**

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago and St. Louis Railroad, that:

(a) Carrier violated the terms of the Agreement between the parties when on June 3, 1947, without proper notice; without a fair and impartial hearing; without just cause, and without furnishing a letter stating cause, it dismissed Telegrapher Helen T. Boyle from its service.

(b) Said Helen T. Boyle, shall be restored to service of this Carrier with all rights unimpaired, and she shall be compensated for time lost as a result of such violative action.

**OPINION OF BOARD:** This claim is advanced by the General Committee of the Order for and on behalf of one Boyle, hereinafter called Petitioner. On or about June 2, 1947, Carrier acting by and through one Gallagher verbally informed and notified Petitioner of her dismissal from the service of Carrier. Petitioner avers said above mentioned act together with other hereinafter mentioned and described acts, omissions, and conditions on the part of Carrier herein to be repugnant and violative of Schedule Rule 4.

Fortunately both sides have incorporated into the record numerous exhibits which reflect the acts of the parties. The construction and meaning to be placed on said exhibits is a matter upon which the parties are not in accord.

Decision in this matter hinges over the meaning of Rule 4 and we will now proceed to discuss the same. Part (a) limits or qualifies acts of suspension or discharge by requiring Carrier to have just cause before so acting. But before Carrier can be required to disclose whether just cause did or did not exist, an obligation is imposed on the employe affected to proceed as provided in part (b). If the employe meets his obligation he in turn receives within a time certain a fair and impartial hearing. Because the rule benefits the Carrier it may be waived either expressly or by acts on the part of Carrier. With reference to the requirement the hearing be fair and impartial, that is met when an accused is informed in writing he is

charged with violation of an operating rule or rules which must be specified. The accused is entitled to an opportunity to prepare his defense and to confront adverse witnesses and cross-examine. The hearing officer must not be biased or prejudiced in favor of either side to the hearing and, unless agreed to by the parties, the same must be conducted within a time certain. The above and foregoing is intended by way of general remarks concerning the subject but for the purpose of this opinion we think they are sufficient.

Coming now to the acts of the parties subsequent to June 2, 1947, we note on January 30, 1951, Carrier wrote to a Vice-President of the Order what may be called a summary of the case. It will be noted therein that Carrier asserts Petitioner failed to comply with part (b) hereinabove referred to. Assuming but not deciding such to be the fact, this claim must fail unless it be shown Carrier waived the same. For the purpose of showing a waiver Petitioner points to her letter dated June 8, 1947 to Carrier's highest officer to whom appeals could be made and to the reply thereto by said officer dated June 11, 1947. It is earnestly and most vigorously contended by Carrier the last above mentioned letter does not constitute a waiver in that the writer thereof not being acquainted with the surrounding facts simply meant he would look into the matter. We do not agree. We think such letter properly construed is a waiver. For such conclusion we point out the writer does not assure Petitioner he (writer) will investigate but rather to the contrary the matter will be investigated. Investigated by whom? The letter states by the first individual named in the second paragraph thereof. We think the word "investigated" as used in such letter means "hearing" as that word is used in part (b) of Rule 4.

The next point to bring up we think is, has Carrier been relieved of its obligation to provide a hearing by written or other acts on the part of Petitioner? We cannot reasonably hold the claim was abandoned by the subsequent letters written on behalf of Petitioner, nor has Carrier established Petitioner acquiesced in Carrier's disposal of the claim.

By reason of the above and foregoing the Board will not inquire into the merits of the controversy.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

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

The evidence of record warrants an affirmative Award.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of May, 1952.

**DISSENT TO AWARD 5754—DOCKET TE-5723**

The majority in reaching its conclusion without considering merit, assumes totally without evidence of such intent, that a letter, June 11, 1947, from the Respondent's top officer designated for the handling of disputes for the purpose of the Railway Labor Act, addressed to claimant here, was a waiver by the Respondent of the requirements prescribed by the terms of the discipline and grievances procedures and set forth in Rule 4 of the Agreement between the parties.

The majority in reaching said conclusion completely ignore a record which shows, without contradiction, that

(a) Claimant, by a deliberate act, failed and declined to follow the discipline appeals procedure as set forth within the framework of Rule 4 of the Agreement which requires the filing of a written appeal with "immediate superior" within ten days of date of advice of discipline.

(b) Appeals in writing for a review of dismissal at next levels and such review granted by Superintendent June 28, 1947 and by General Superintendent July 14, 1947, without change in the discipline.

(c) Dormant periods, July 23, 1947 to April 5, 1948 and May 25, 1948 to January, 1951, when Respondent, by action of the General Chairman for the Petitioner, was led to believe claim was abandoned.

For these reasons the ward is in error.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ A. H. Jones

/s/ C. P. Dugan

/s/ J. E. Kemp

# NATIONAL RAILROAD ADJUSTMENT BOARD
# THIRD DIVISION

## INTERPRETATION NO. 1 TO AWARD NO. 5754, DOCKET NO. TE-5723

**NAME OF ORGANIZATION:** The Order of Railroad Telegraphers.

**NAME OF CARRIER:** New York, Chicago & St. Louis Railroad Company.

Upon application of the representatives of the employes 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:

By reason of the refusal on the part of Carrier to apply and execute said Award without first deducting outside earnings, if any, made by Claimant during that period of time Claimant was not in the service of Carrier, the Organization brings this, its request for an interpretation of said Award.

Upon hearing hereof the position and argument advanced by the Organization was similar to that mentioned by Referee Whiting in his interpretation No. 1, to Award 4607, to wit: in the submission of the case to this Board there was no claim by the Carrier that earnings in other work should be deducted from the claim if granted. So, since the automatic deduction provided for by Rule 6 is not applicable, our Award sustaining the claim for all time lost does not permit of such deduction and we may not under the guise of interpretation rehear the case and alter the Award under consideration of matters not before the Board when the Award was rendered.

With this we cannot agree, see sustaining opinion by Mr. Justice Gallagher to First Division Award 11670 wherein the learned Justice states 'in view of the fact that neither the act creating the National Railroad Adjustment Board nor the rules promulgated in connection therewith require written pleadings, it is clear that where an employe asks for reinstatement with full pay for time lost the general issue thereby presented would include the Carriers' oft-repeated assertion that in all such claims the issue of mitigation is likewise presented.'

We think the great weight of authority on this Board holds in the absence of custom on the property outside earnings may be deducted. Here both sides stoutly maintained no custom existed on the property.

Referee Angus Munro, who sat with the Division as a member when Award No. 5754 was adopted, also particpated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 23rd day of October, 1953.