Award No. 7832
Docket No. TE-8747

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware and Hudson Railroad, that:

1. Carrier violated the Agreement between the parties hereto when on the ninth day of October, 1954, without just cause, it suspended Ralph E. Davies from his regular assignment of Agent-Telegrapher, Ausable Forks, New York.

2. Carrier violated the Agreement between the parties hereto when on April 29, 1955, without just cause, it discharged Ralph E. Davies.

3. Carrier shall restore Ralph E. Davies to service with seniority rights unimpaired and compensate him for all time lost including express commissions.

OPINION OF BOARD: Claimant here was dismissed from service and is here seeking reinstatement with seniority rights unimpaired and compensation for all wage loss, including express commissions.

Claimant here was about 60 years of age at the time a chain of events started that eventually led to his discharge. He had some 42 years seniority, without an apparent blemish on his record when he was placed under arrest on August 2, 1954, on the charge that he molested a child on July 24, 1954. Between August 5, 1954, and October 5, 1954 he was in the New York State Hospital. When released on October 5, 1954, he was declared sane. He was admitted to bail on October 7, 1954. On October 9, 1954 Claimant advised Respondent of his availability, and was advised, under date of October 20, that he stood suspended, as of August 2, 1954, said suspension to be effective until further notice. Claimant was subsequently indicted on three counts, namely, (1) carnal abuse of a child (2) assault in the second degree and (3) impairing the morals of a child. Claimant was tried on the above charges on January 7, and was found "not guilty" on all three counts of the indictment.

On March 4, 1955, Claimant was notified that a hearing would be held to determine Claimant's responsibility for violation of Rules 810 and 812 of the operating Department rule 1 of Instructions to Station Agent, as well as conduct unbecoming an employe, on Saturday July 24, 1954.

This notice read as follows:

"THE DELAWARE AND HUDSON RAILROAD CORPORATION

Albany, N. Y., March 4, 1955

"Mr. Ralph E. Davies,
Agent-Telegrapher,
Ausable Forks, N. Y.

"This is to notify you that an investigation-hearing will be conducted in the office of Assistant Superintendent, Plattsburg, N. Y., at 2:30 P. M., Tuesday, March 15, 1955, for the purpose of determining your responsibility in connection with your alleged violation of Rule 810, seventh paragraph, and Rule 812 of the rules for the government of the operation department, also Rule 1 of the book of instructions for the government of station agents, also conduct allegedly unbecoming an employe, at Ausable Forks, N. Y. on Saturday, July 24th, 1954.

"You may be assisted at this investigation-hearing in accordance with Article 20 of the agreement between The Delaware and Hudson Railroad Corporation and The Order of Railroad Telegraphers, effective July 1, 1944, and the provisions of the Railway Act, as amended.

"Miss Gail Barber, her father and mother, have been requested to be present at this investigation-hearing as witnesses.

"Please acknowledge receipt of this notification on the attached copy, and arrange to be present at the time and place designated.

Superintendent,
Signed A. J. SHEEHY

"I acknowledge of the above notification. March 6th, 1955 5 P. M.
(sgd) Ralph E. Davies Date"

The last of the charges named concerned the above charges of which the claimant had been found Not Guilty by a jury. The other charges in the Notice of Hearing had reference to the presence of three children in the office who had no business being there.

Rule 20 of the Agreement provides as follows:

"ARTICLE NO. 20—DISCIPLINE AND APPEALS:

"(a) When entries of discipline are made against an employe's record he will be notified of the same and employes will be furnished an abstract of their records on request.

"(b) Employes will not be suspended or discharged except in serious cases where fault is apparent beyond reasonable doubt, until they have a hearing before the proper officials and during such hearing they may be assisted by their duly accredited representative or representatives.

"(c) When decision is rendered, if such employe believes it to be unjust his case may be taken on appeal to the highest authority, and if found innocent, he shall be paid the amount he would have earned had he remained at work.

"(d) Hearings, decisions, and appeals will be handled with as little delay as possible.

"(e) Grievances, other than appeals on time claims, not presented within sixty (60) days from date alleged to have occurred, are barred from consideration. Time claims must be presented in writing to the designated officer to be entitled to consideration, and any payment claimed will, if allowed, be restricted to a period commencing not earlier than thirty (30) days prior to date so presented."

Hearing on the above charges was held on March 22, 1955 and on April 29, 1955 Claimant was notified that he stood discharged. This Notice of Discharge read as follows:

"THE DELAWARE AND HUDSON RAILROAD CORPORATION

Albany, N. Y. April 29, 1955
011.18

"Mr. Ralph E. Davies,
Agent-Telegrapher,
Ausable Forks, N. Y.

"Effective with receipt of this letter, you are dismissed from the service of the Delaware and Hudson Railroad Corporation for your responsibility in connection with violation of Rule 810, seventh paragraph, and Rule 812 of the Rules for the Government of the Operating Department, and Rule 1 of the Book of Instructions for the Government of Station Agents, and for conduct unbecoming an employe at Ausable Forks, New York, New York, on Saturday, July 24, 1954.

"Please acknowledge receipt of this notice on the attached copy.

/s/ A. J. SHEEHY
Superintendent

"I acknowledge receipt of the above notice:
/s/ Ralph E. Davis

May 2, 1955
Date"

It is alleged that the Respondent's actions were arbitrary and capricious in that Claimant was tried and found guilty of the same charges for which he had been tried and found "not guilty" in a Court of Justice. It was pointed out that while Claimant's suspension pending the aforesaid trial was in all likelihood proper, there was no justification for a hearing on the property after Claimant's innocence of the same charges contained in the Notice of Hearing had been established. In connection with the charge that Claimant had allowed individuals in parts of the station where they should not have been, the Organization pointed out that this condition was present at all small stations on the property, and no discipline had ever been imposed on any employe for permitting such conditions to exist. It was asserted that while Claimant was admittedly guilty of violation of existing instructions, their (instructions) non-compliance with did not in and of itself justify more than a written reprimand, and most certainly not the discharge of an employe with a perfect record for 42 years.

The Respondent asserted that this hearing and subsequent discharge of Claimant had been accomplished in strict accordance with Article 20 of the effective Agreement but that this claim was not presented in accordance with paragraph (e) of Article 20 or Section 3 first (i) of the Railway

Labor Act. The Respondent took the position that the initial suspension and subsequent discharge of Claimant was justified by substantial evidence adduced at the hearing held on the property on March 22, 1955. It was further asserted that a fair and impartial hearing had been conducted and this Board could not properly vacate the discharge of Claimant because such act would have the effect of substituting the Board's judgment for that of Management.

An examination of the Record does not disclose any material variance with the requirements of Section 3 first (i) of the Railway Labor Act during the handling of this dispute on the property. Suffice to say the Record fails to reveal that Respondent raised the point or voiced objections to the method of proceeding on the property. As to the contention that paragraph (e) of Article 20 was not complied with it is noted that Claimant requested that he be returned to service for the first time on October 9, 1954. While a similar request was made by Claimant or the Organization at several steps while the matter was under discussion. It is noted that the declination and the subsequent Notice of Appeals therefrom was within the time specified in paragraph (e) of Article 20.

We likewise cannot find that Respondent violated either the letter or intent of paragraphs (b) and (d) of Article 20. The suspension of Claimant as of August 2, 1954 was not, in light of the seriousness of the charges against Claimant, a violation of paragraph (b). It is noted that paragraph (d) contains no time limitations. The only requirement is that each step in the proceedings will be handled with as little delay as possible. It is noted that both parties either requested or acquiesced to a delay in the hearing that was finally conducted on March 22, 1955. Neither parties' rights were prejudiced by the delay, and neither party received or secured any advantage thereby.

Thus we proceed to the propriety of the discipline imposed as the result of the investigation held on the property, on March 22, 1955, in so far as it concerns the charge of conduct unbecoming an employe. This conduct concerns the alleged guilt of Claimant on the same grounds that were the subject of Claimant's indictment and trial before a Jury which resulted in a verdict of not guilty. It is again noted that this investigation was held after the trial above mentioned. The record thereof contains many excerpts of the testimony presented at the trial. We can find no evidence of record to indicate guilt of claimant that was not adduced at said trial.

The Respondent asserts that inasmuch as they determined that substantial evidence was present which warranted the imposition of the discharge, we, this Board, should not substitute our judgment for that of Management.

Both the Respondent and this Board owe the public an assurance that no employe of a Carrier, who is guilty of the conduct in question will remain in service. Likewise this Respondent and this Board has in its hands the responsibility for the future welfare, economic and otherwise, of this Claimant.

We are of the opinion, and so find and hold that the discharge of Claimant on the charge of conduct unbecoming an employe was unwarranted and beyond authority of the governing agreement, and therefore arbitrary and capricious. This finding is predicated on three grounds, namely (1) no new evidence of guilt was presented at the investigation, (2) the Jury which heard substantially the same evidence had an opportunity of observing the demeanor of all witnesses and pass upon their credibility, and (3) the Respondent in effect substituting its judgment for that of the Jury.

In so far as the charges that Claimant violated rules of the Carrier when he permitted individuals to enter portions of the station contrary

to instructions, the record indicates that Claimant freely admitted this dereliction of duty. While some discipline was justified for this violation, a penalty of discharge would be excessive and unreasonable, particularly in view of the Claimant's previous 42 years of service without a blemish.

The record indicates that the delay in conducting the investigation was due in part to either a specific request of one or the other of the parties, or by a silent but tacit agreement that additional time was needed to marshal facts. In view of this fact, together with the admitted guilt of Claimant, we cannot find that the retroactive features of Claim 3, as set out above, should be made valid as of October 9, 1954. Rather we conclude, and so find and hold that all compensation paid Claimant should be retroactive only to March 22, 1955, such date being the date of hearing; accompanied with the restoration to service of Claimant to service with seniority and all other contractual rights unimpaired.

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 the Carrier violated the Agreement to the extent indicated in the above Opinion.

AWARD

Claim sustained to the extent indicated in the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April, 1957.

DISSENT TO AWARD 7832, DOCKET TE-8747

The finding of the Majority is tersely stated in the following paragraph of the Opinion of Board:

> "We are of the opinion, and so find and hold that the discharge of the Claimant on the charge of conduct unbecoming an employe was unwarranted and beyond authority of the governing agreement, and therefore arbitrary and capricious. This finding is predicated on three grounds, namely (1) no new evidence of guilt was presented at the investigation, (2) the Jury which heard substantially the same evidence had an opportunity of observing the demeanor of all witnesses and pass upon their credibility, and (3) the Respondent in effect substituting its judgment for that of the Jury."

The findings announced above are contrary to fact and to law. At page 41 of the transcript appears Question 507 of the investigation hearing, put by the victim's mother, Mrs. Barber, to the Claimant's Attorney, Mr. Allen Light:

"By Mrs. Barber:

507. Q—Well, Mr. Light, I have a question to ask you now. I want the people to hear. This is a quotation from a conversation that was overheard by four people: 'Well, Allen, you know that these two children are perfectly normal children. Yes, I know that they are perfectly normal children.' 'I think you have got us.'

" 'Well you know, Allen, he is guilty.'

" 'I have to go up to Ausable Forks to prove he was in Wilmington at the time, I hate to see a man punished if he is not guilty but the old s . . of b . . . . is as guilty as hell.' "

Obviously such testimony even if it were attempted to be introducted at the criminal trial, would have been barred by the hearsay rule of evidence but criminal rules of evidence do not govern disciplinary hearings conducted by the Carrier and hence it was admissible there. Consequently, contrary to what the Majority found as the first ground upon which to predicate its award, there was new evidence bearing directly upon the Claimant's guilt which was presented at the investigation, but which was not heard at the criminal trial. The astounding fact is that Mr. Light did not even so much as question the truth of the above quotation. Furthermore, Mr. Light, the Claimant and the General Chairman all attested that the investigation hearing was fair and imparial. (p. 169)

The third ground upon which the majority relies to support its findings is that the Carrier substituted its judgment for that of the Jury. First of all, we again remind the parties of the law on such a proposition.

Adams v. Southern Pacific Co., 226 Pac. 541 (Supreme Ct. of Calif.)

"An employe is not entitled to have a jury decide whether or not his infraction of the rules established by his employer warrants dismissal."

Secondly, the Carrier could not have substituted its judgment for the Jury's because the Carrier did not consider the same question as the Jury. The Jury had before it the question of the Claimant's criminal responsibility. The Carrier would have exceeded its authority if it had attempted to conduct a criminal trial.

The second ground upon which the decision of the Majority rests overlooks a very fundamental point. First, we must recognize that the Carrier did not participate in the Claimant's criminal trial and was barred, as a matter of law, from conducting the same, that being a function of the States Attorney's office. Secondly, the Award foists upon the Carrier, as final and binding, the decision of the Jury. Accordingly, the decision of the Majority robs the Carrier of its fundamental right to judge the competency of its employes. Therefore, the Award is incomplete unless it also absolves the Carrier of the correlative duty upon which that right is based, viz., its duty to its patrons, as well as to those engaged in the operation of its railroad, to take care to employ only those who are careful and competent and to exclude the unfit from service. **(M. St. P. & S.S. Ry. Co. vs. Rock,** 279 U. S. 410).

The Majority has summarily dismissed the fact that the Claimant did not timely present his claim within the 60-day time limit (Article 20 (e) of the controlling agreement) from the date (most favorable to him) when his claim arose, viz., October 9, 1954 when the first requested to return to work.

In imposing the standard of proof required in criminal proceedings upon the Carrier, the Referee has completely reversed the position he took in Award 7774, just recently issued.

Furthermore, the Majority have assumed the right to determine the measure of discipline to be imposed upon the Claimant for his admitted violation of three of its Operating Rules.

The Award is not only contrary to law, but also is in conflict with principles established by many previous awards of this Board.

For these reasons this is an improper award and should be so considered.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen