

Award No. 9855
Docket No. TE-11750

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, St. Paul, Minneapolis and Omaha Railway, that:

1. Carrier improperly dismissed D. M. Wagers from the service on March 16, 1959 without just cause.
2. Carrier shall be required to reinstate D. M. Wagers with all rights unimpaired and pay him for all wages lost.

OPINION OF BOARD: Claimant D. M. Wagers, the regularly assigned second shift telegrapher-clerk at St. James, Minnesota, filed a number of time claims based on his opinion that various rules of the Telegraphers' Agreement, including a special memorandum agreement relating to integrated data processing service (IDP), prohibit the performance of IDP work by the occupant of a "star agent" position. These were filed with Mr. Wagers' superior officer, the Chief Dispatcher. And they were denied.

On March 9, 1959 the person whose action had been questioned by Claimant, Agent Lanzen, and Assistant Superintendent DeVol called Wagers into Mr. DeVol's office to question him about the filing of these claims. Since the claims had already been denied by the Chief Dispatcher, Claimant resented the manner of the questioning by Lanzen and DeVol. In the course of the discussion, Wagers made some remarks about Lanzen having engaged in "scabbing". Following the unpleasant exchange in DeVol's office, Wagers received the following telegram from Superintendent Alsop from the St. Paul office, under date of March 11, 1959:

"St. Paul, Minn.,
March 11, 1959

"Mr. D. M. Wagers
Telegrapher-Clerk
St. James, Minn.

"You will arrange to appear for hearing as indicated below:

DATE: Friday, March 13, 1959

TIME: 1:00 PM

PLACE: Office of Asst. Supt., St. James, Minn.

CHARGE: Your responsibility in connection with your conduct unbecoming an employe, in that you were insolent, arrogant and belligerent to the Agent at St. James on the evening of Monday, March 9, 1959, in the office of Assistant Superintendent at St. James, Minnesota.

"You may be accompanied by one or more persons of your own choosing, subject to the applicable rules of your schedule, and you may, if you so desire, produce witnesses in your own behalf, without expense to the Railway Company.

"Please acknowledge receipt.

/s/ J. W. Alsop
Superintendent"

The hearing was held on March 13, as scheduled. At the conclusion of the hearing, Mr. DeVol told Wagers that he was out of service.

On March 16, 1959, Superintendent Alsop notified Wagers that he was being dismissed from service because of his conduct "unbecoming an employe" in that he had behaved in an "insolent, arrogant and belligerent" manner in the office of the Assistant Superintendent at St. James, Minnesota, on the evening of Monday, March 9, 1959.

In negotiations between the parties during the next few weeks, attempts were made to settle the dispute which arose from this dismissal notice. On April 27, 1959, Director of Personnel, T. M. VanPatten indicated a willingness to reinstate Wagers "on a leniency basis" and without compensation for lost time. This offer was rejected on the ground that Wagers had not been afforded a "fair and impartial hearing" in that certain evidence which he sought to introduce was not permitted to be entered in the record. This evidence was intended to show that Agent Lenzen actually performed work which Wagers might have regarded as improper.

In short, the Organization contends that Wagers was denied due process in that he was not given a fair and impartial hearing.

A copy of the transcript of the investigation hearing is before us. At this investigation Claimant Wagers was charged with having violated Rule 704 on the evening of March 9, 1959 in the office of the Assistant Superintendent at St. James, Minnesota. This rule is as follows:

"Civil, gentlemanly deportment is required of all employes in their dealings with the public, their subordinates and each other. Courtesy and attention to patrons is demanded. All employes are prohibited from entering into altercations with any persons regardless of provocation. They will make a note of the facts, if necessary, and report to their immediate superior. Employes must re-

frain from talking or the use of profane or vulgar language at stations or on or about trains."

There is no evidence of record that Claimant used any profane or vulgar language when he was called on the carpet about the time claims which he had filed, and which had already been denied. In the course of the discussion with Agent Lenzen and Mr. DeVol, he did state as his opinion that a certain trip of Lenzen to a location which was being picketed was "scabbing". But at the investigation hearing all attempts on the part of Claimant Wagers' representative to put into the record evidence which might throw some light on this subject and thus explain the provocation of such a statement as Wagers made, was suppressed by the officer who was conducting the investigation.

A careful study of the record before us leads us to conclude that Wagers was not afforded a fair and impartial hearing. There may have been cause for some reprimand in the first instance; but there was no cause for dismissal. The Carrier has already acknowledged this in offering reinstatement on a conditional basis.

The claim must be sustained. See Award 7107.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of March, 1961.

DISSENT TO AWARD NUMBER 9855, DOCKET NUMBER TE-11750

Award 9855 erroneously implies that an explanation of the provocation might be acceptable as a license for Claimant's conduct, and thereupon proceeds to violate the time honored principle that this Board will not substitute its judgment for that of the Carrier in the matter of discipline.

Furthermore, Agreement Rule 25 does not intend that Carrier be liable for pay for time lost due to the employee's own decision to remain out of service after Carrier has offered to reinstate him. (Award 19880, First Division, same date as Award 9855).

For these reasons, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ W. H. Castle