Award No. 10258

Docket No. TE-12427

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ben Harwood, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ARKANSAS & MEMPHIS RAILWAY BRIDGE AND TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Arkansas & Memphis Railway Bridge and Terminal Company, that:

1. Carrier improperly dismissed E. E. Mathis from its service on October 27, 1960.

2. Carrier shall be required to:

(a) Restore him to the service of the Carrier with seniority, vacation and all other rights restored.

(b) Clear his personal record of all reference to the incident which led to formal investigation of October 17, 1960.

(c) Retroactive to the date dismissed, October 27, 1960, and on a continuing basis until he is reinstated to service, pay him for any and all compensation he would have earned had he not been improperly dismissed, plus reimbursement of all expense he may have sustained as a result of said dismissal.

OPINION OF BOARD: Between the above named parties there is an Agreement, effective March 1, 1959, to which reference will be made hereinafter. The Arkansas & Memphis Railway Bridge and Terminal Company owns and operates a railroad bridge across the Mississippi River between Memphis, Tennessee, and Briark, Arkansas. This bridge is used by the Missouri Pacific, Cotton Belt and Rock Island railroads. Total mileage operated is 7.15 miles. Telegraph offices, to handle train orders, are located at each end of the bridge company property and are manned 24 hours a day.

The occurrence which gave rise to the claim here considered arose on September 21, 1960 while Claimant E. E. Mathis was filling a vacancy on the second trick telegrapher's position at Briark, Arkansas. While on duty Claimant mishandled train orders. As a result westward bound Rock Island freight

train No. 31 did not receive train order No. 592, a slow order, and operated at an unsafe speed over that portion of the line to which the slow order applied.

As a consequence, and because of concurrent negligence of Rock Island dispatcher A. B. Morton, a joint notice to Mathis and Morton by the Rock Island was issued on September 26, 1960 setting time and place for investigation concerning mishandling of train orders and clearances which resulted in train No. 31 departing from Briark, Arkansas on September 21, 1960 without Order No. 592 as above mentioned. Time for investigation, originally set for September 30, 1960, was postponed twice at request of Rock Island Dispatcher Morton and it was finally held on October 17, 1960. However, prior to the holding of the investigation, Claimant Mathis on October 4, 1960, wrote to Mr. N. N. Hopkins, Vice President and General Manager of the Bridge Company, stating that having completed his vacation work he was reverting to the furloughed list and expressing a desire to waive being present at any investigation that might be later held by the Arkansas & Memphis Railway Bridge and Terminal Company. He said he would attend the Rock Island investigation and would request that a copy of said investigation be sent to Mr. Hopkins, leaving to him any decision as to discipline of Claimant. Following receipt of transcript of Rock Island investigation, Claimant was advised by Carrier under date of October 27, 1960 of his dismissal from service.

On November 2, 1960 the General Chairman for the Telegraphers wrote Carrier that he was appealing Claimant's dismissal on the ground that above mentioned decision had not been rendered within 7 days pursuant to Rule 15(b) and on the further ground that the penalty of dismissal as to telegrapher Mathis was discriminatory, unfair and unjust in view of the fact that Rock Island dispatcher Morton received only a 30-day suspension for violation of operating rules in the same incident. The closing paragraph of the General Chairman's letter stated as follows:

> "In view of the fact that Mr. Mathis honestly and forthrightly admitted infraction of operating rules, and mishandling of the train order in question, I am willing to agree that he should suffer the same 30-day suspension as Mr. Morton. With that understanding, and for the foregoing reasons, I request that your dismissal notice of October 27 be rescinded. Kindly advise."

November 21, 1960 the Carrier reaffirmed original decision of dismissal.

Thereafter, on November 26, 1960, the Organization notified the Carrier that further appeal would be taken and on December 8, 1960 wrote Carrier alleging that Claimant was improperly dismissed and presenting the following claims in his behalf:

> "1. He be restored to the service of the Carrier, with seniority, vacation and all other rights restored.
>
> 2. His personal record shall be cleared of all reference to the incident which led to formal investigation of October 17, 1960.
>
> 3. Retroactive to the date dismissed, October 27, 1960, and on a continuing basis until he is reinstated to service, payment of any and all compensation he would have earned had he not been improperly dismissed, plus reimbursement of all expense he may have sustained as a result of said dismissal."

On December 20, 1960 Carrier wrote the Organization denying above claims and on December 27, 1960, the latter gave notice of further appeal. Following advance notice served January 12, 1961, Employe's Ex Parte Submission dated January 24, 1961 was received with covering letter of January 31, 1961 and was filed in this Division February 1, 1961.

What are the issues to be decided by this Board? In Employes' Reply to Carrier's Ex Parte Submission it is stated: "The issues on the property were the default on the time limits in rendering a decision and the severity of the discipline assessed. The same issues are the only ones now before your Board." In other words, we have for consideration:

> (1) Did Carrier, the Railway Bridge Company, violate Rule 15(b) by not rendering decision within 7 days of the investigation held by the Rock Island on October 17, 1960?
>
> (2) Was the penalty of dismissal, by way of discipline, arbitrary and unjust in view of the fact that the train dispatcher received from a different employer, the Rock Island Railroad, a much lesser punishment, to wit 30 days' suspension?

At the outset it should be noted that here there is no question as to the innocence or guilt of Claimant. His dereliction of duty was freely admitted by him and the Organization.

But it is said by Claimant that Rule 15(b) was violated by the Carrier, the Railway Bridge Company, in not announcing decision as to discipline within 7 days of the Rock Island investigation, which was held October 17, 1960; in other words that Carrier, the Railway Bridge Company, was 3 days late in announcing said decision on October 27, 1960.

The Agreement, Rule 15, sections (a) and (b) read as follows:

> "(a) An employe will not be disciplined or discharged from service without just cause and until after a fair and impartial investigation; if suspended, pending investigation, or if he considers himself unjustly treated, he shall have a fair and impartial hearing provided written request is presented to his immediate superior within five (5) days of date of advice of discipline and a hearing shall be granted within ten (10) days thereafter.
>
> (b) A decision will be rendered within seven (7) days after completion of hearing. If an appeal is taken, it must be filed with the next higher officer and a copy furnished the official whose decision is appealed within seven (7) days after date of decision. The hearing and decision on the appeal shall be governed by the time limit of the preceding section."

Claimant's assertion, that above mentioned 10 day interval between Rock Island's investigation and the Arkansas & Memphis Railway Bridge and Terminal Company's announcement of discipline of employe Mathis is fatal to the latter Carrier's decision and that said decision is null and void, is countered in argument of the claim by Carrier as follows:

> (a) Claimant waived his right to an investigation such as provided by the Agreement of the parties. (Awards 2339; 7042; 6740). He not only waived investigation by the employing Carrier, the Rail-

way Bridge Company, but agreed that an investigation by the Rock Island should suffice and volunteered to request that "a copy," (or transcript) of said investigation be sent to his employer to be used as basis for determining discipline of Claimant. He therefore waived the procedural requirements of Rule 15.

(b) Under the Agreement the terms "hearing" and "investigation" as used in Rule 15 are not synonymous and the seven day time limit applies to a hearing and not to an investigation. The Rule (a) does not specify the time within which an investigation must be held following the occurrence upon which based nor the time within which discipline must be assessed following an investigation. But as to hearings a written request therefor is required within five days of advice of discipline and a hearing shall be granted within 10 days thereafter. And under (b) of Rule 15 it is provided (in part) that "A decision will be rendered within seven (7) days after completion of hearing." Thus there is a clear distinction made within the rule between an "investigation" and a "hearing."

(c) Transcript of Rock Island investigation was not received by Carrier, the Railway Bridge Company, until October 22, 1960; accordingly, decision by latter on October 27, 1960 was well within seven day period of Rule 15(b).

Considering these contentions of Carrier in reverse order:

(c) We do not believe this averment can properly be availed of by Carrier. Nowhere can we find in the Docket any evidence of the date when Carrier received the transcript of the Rock Island investigation—merely the assertion on the last page thereof that "Mr. Anderson, the Superintendent of the Rock Island who held the investigation, mailed Mr. Hopkins a copy of the investigation on October 21, 1960, four days after the investigation was held, which Mr. Hopkins received on October 22, 1960. Mr. Hopkins made his decision on October 27, 1960, less than seven days from the date he received the copy of the investigation." Had these facts been brought to light during the early discussions of the claim on the property, they might well have been conclusive as to the alleged violation of Rule 15. However, they were not mentioned even as late as March, 1961 when sections (a) and (b) of Rule 15 were exhaustively discussed in Carrier's Statment of Facts and, as mentioned above, were only brought to our attention for the first time in Carrier's final Rebuttal, June 14, 1961.

(b) While not free from difficulty, Carrier's argument in support of this point is persuasive. A careful reading of Rule 15(a) indicates a separation and a distinction between the requirements leading to an investigation and those to be found present before a hearing is to be granted. The first portion of Rule 15(a) requires "a fair and impartial investigation" before an employe is disciplined or discharged. Then the rule specifies:

> ". . . if suspended, pending investigation, or if he considers himself unjustly treated he shall have a fair and impartial hearing provided written request is presented to his immediate superior within five (5) days of date of advice of discipline and a hearing shall be granted within ten (10) days thereafter." (Emphasis ours.)

Then the first sentence of Rule 15(b) provides:

"A decision will be rendered within seven (7) days after completion of **hearing.**"

Again the distinction appears in the first line of Rule 15(c):

"At **investigations, hearings** or on **appeals**, . . ."

Thus we find no hard and fast time limit provided by Rule 15 as to decisions concerning discipline following **investigations** and we so hold, and further, inferentially, that the only requirement would be that such decisions should be rendered within a reasonable time after the close of the investigation. (Award 5228). We believe that ten days under the circumstances present in this case was no more than reasonable time in which to have transcript of investigation prepared and forwarded by Rock Island to Carrier here concerned, giving the latter proper opportunity to study said transcript and come to a decision with reference to proper discipline of its employe Mathis pursuant to his request. (Emphasis ours.)

(a) In view of our conclusion as to Carrier's contention (b) last above, we will not analyze at length Carrier's contention (a) i.e. Waiver by Claimant of procedural requirements of Rule 15. We agree and believe that the full intendment of Claimant Mathis' letter of October 4, 1960 to Mr. Hopkins, Vice President and General Manager of the employing Carrier, was to waive the requirements of Rule 15 and submit the record, or transcript, of the Rock Island investigation for study by employer and decision (by inference, within a reasonable time) as to discipline of the writer, Mr. Mathis. And, we so hold as to this contention.

We will now examine the Organization's claim that the penalty of dismissal as to telegrapher Mathis was discriminatory, unfair and unjust in view of the fact that Rock Island dispatcher Morton received only a 30-day suspension for violation of operating rules in the same incident. In this regard the "Position of Employes" states:

"The train dispatcher involved transgressed two rules and his responsibility was, at the very least, equal to that of Telegrapher Mathis. When two employes involved in the same incident are equally responsible, there is no justice in assessing one a thirty day suspension, held in abeyance pending compliance with rules for one year which may or may not be served, and assessing the other the supreme penalty of dismissal."

It should be borne in mind at the outset that this Board may not substitute its judgment for that of a Carrier as to what is a proper penalty (Awards 7363, 7139 and 9045), The Board's review is restricted to a determination of whether the penalty is so harsh and excessive as to amount to an abuse of Carrier's discretion. The facts in this case are undisputed. Claimant employe mishandled train orders and failed to deliver a slow order to the crew of train No. 31 which resulted in its travelling at an excessive speed through an area where the slow order was to apply. A disastrous train wreck could have resulted. Many Awards of this Board have held that negligence on the part of employes in the handling of train orders is ground for dismissal. (Awards 10112, 4169, 9033, 8502, 8488 and 8478).

But the Organization here complains that the penalty of dismissal is excessive and unjust because another employer, the Rock Island, did not mete out the same punishment to its train Dispatcher Morton who, as above mentioned, was involved in the same incident. As Carrier points out in its brief:

"This Division has consistently recognized that the amount of discipline given to one employe is an improper guide to determine the amount of discipline due another." (Awards 9935, 9444, 7423, 4069 and 4165).

And further:

"In making this argument, the Organization has totally ignored the fact that this Train Dispatcher was an employe of another Carrier and that his degree of responsibility was much less.

Compare Award 3036 (Shake):

'Much of the Petitioner's presentation is devoted to a discussion of the relative duties and responsibilities of the Pullman Conductor, the Claimant and the other Porter. These matters are, in our judgment, wholly beside the issue. The Carrier may well have imposed concurrent obligations upon these employes to guard against such incidents as occurred here. In any event, the other parties are not on trial here and the Conductor could not have been since he is under another agreement and is represented by another Organization.'"

Carrier's Brief also points out correctly that Claimant's major error was in annulling the wrong train order; that

"No other employe, including the Rock Island Train Dispatcher, was even remotely involved in this error. The only negligence on the part of the Train Dispatcher that affected this case in any manner was that he improperly heard Claimant read No. 592 instead of No. 593 in clearing train No. 31 and that he did not use the same wording on the train orders to the other stations. Hence, it is obvious that both employes were not guilty to the same degree."

Probably of considerable if not great weight in deciding discipline to be assessed Rock Island dispatcher Morton by that Carrier was Morton's 52 years of satisfactory service, whereas Claimant, in the words of his employer, "as a new employe of the Bridge Company had not earned the same consideration. Here a basic fault was revealed soon after Claimant was first employed. He does not meet the standard for telegraphers on this property."

It is the considered judgment of this Board that Claimant has not maintained the burden of proving that dismissal in his case was an excessive punishment in view of the very serious nature of his negligent inattention to duty nor that such punishment was so arbitrary or capricious as to warrant reversal. Accordingly, the Board rules in favor of the Carrier and denies the Claim.

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 Employe involved in this dispute are respectively Carrier and Employe 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1961.

DISSENT TO AWARD 10258, DOCKET TE-12427

In my opinion the majority erred in several respects, and I cannot agree with any of the conclusions stated in the "Opinion of Board".

I disagree particularly with that portion of the "Opinion of Board" which purports to hold that the claimant waived the requirements of Rule 15 in his letter of October 4, 1960, addressed to Mr. Hopkins. It is well settled—by no less an authority than the Supreme Court of the United States—that an individual employe may not waive the provisions of an agreement collectively bargained in accordance with the Railway Labor Act.

In **Order of Railroad Telegraphers vs. Railway Express Agency**, 64 S. Ct. 582, 321 U.S. 342, decided February 28, 1944, the Supreme Court reversed the Circuit Court of Appeals' decision which had been based on the proposition that individual agreements contrary to the terms of the collectively bargained contract were valid. With respect to the Carrier's contention that such individual agreements were valid and proper the Court said:

> "If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually."

With enunciation of this principle the Supreme Court terminated litigation growing out of the Carrier's challenging Award 548 of this Division, which held that:

> ". . . in the claim at issue the facts are evidenced that the joint railway-express agents on the lines of the Seaboard Air Line Railway were working under a collective agreement which had been properly negotiated between and ratified by the carrier, or the Express Company, and its successors, and the organization of which they formed a part. So long as these joint railway-express agents were employed by the carrier in such capacity, they were working under the rules of that agreement and were bound by its specifications and requirements; and any other supplementary individual agreement or contract made or entered into that would in any manner change or modify, invalidate or set aside, or that was at varience, was invalid and a

violation of the principles of that agreement unless negotiated and ratified between the principles of the original agreement."

Award 2602 of this Division dealt with a claim growing out of an arrangement between the Carrier and an employe whereby the latter agreed to waive certain provisions of the governing collective agreement relating to a lunch period. The carrier contended that under such circumstances it was not liable.

The Board, Referee Shake speaking, said:

> "The Carrier's argument is highly persuasive and would appeal to the conscience of the referee, if he had any discretion in the matter. It appears, however, that no less an authority than the Supreme Court of the United States, has declared in the case of The Order of Railroad Telegraphers v. Railway Express Co. (No. 343, decided February 28, 1944) that where collective bargaining agreements exist their terms cannot be superseded or varied by special voluntary individual contracts, even though a relatively few employes are affected and these are specially and uniquely situated. The Court based its decision upon the fundamental proposition that if it were otherwise 'statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.' The decision is precisely in point, clear, positive and unequivocal, and we have no other choice than to apply the law of the land, as declared by the nation's highest tribunal. The Carrier will have to find whatever solace it can in the thought that it was motivated by a generous humane impulse, for the benefit of an unfortunate employe."

Many of our awards have reached the same result. See, for example, Awards 218, 522, 524, 548, 732, 765, 946, 1214, 2217, 2731, 3785, 4461, 4924, 5444, 5460. There are many others.

Award 10258, being contrary to established precedents and in at least one respect contrary to the law of our land, is palpably wrong and I hereby register dissent.

J. W. WHITEHOUSE
Labor Member