Award No. 12322
Docket No. TE-14386

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad, that:

1. Carrier violated the Agreement between the parties when on August 13, 1962, it dismissed from service V. C. Russell, Agent-Telegrapher, Snow Lake, Arkansas, and has refused to reinstate him to service and pay him for time lost.

2. Carrier shall compensate V. C. Russell, five days per week, eight hours per day, at the rate of Agent-Telegrapher position at Snow Lake, Arkansas, beginning with August 13, 1962 and continuing until such time as he is restored to service.

OPINION OF BOARD: Mr. V. C. Russell, the Claimant, was the assigned Agent-Telegrapher at the Carrier's location in Snow Lake, Arkansas. At the time of this action, he had been at this position for almost three years and had been employed by the Carrier for thirty-four years.

The following letter was addressed to the Claimant on April 14, 1962, by Superintendent J. C. Love:

"Arrange to report to Agent's office at Helena, Arkansas, 10:00 A. M. Friday, February 16, for formal investigation to determine facts in connection with your personal conduct which resulted in your arrest on January 24, 1962, from which you were released after making cash bond.

Arrange for representative of your choice as provided in schedule agreement and any witnesses desired.

/s/ J. C. Love

Superintendent"

Due to postponements requested by Claimant, which were duly and properly noticed, the hearing took place on August 8, 1962. By letter of August 13, 1962, the Carrier dismissed the Claimant on the following grounds: . . . "your

personal conduct which resulted in your arrest on January 24, 1962, violation of first paragraph General Rule B, second paragraph General Rule N and 509(4) of Uniform Code of Operating Rules." (Letter of L. H. Miller, Superintendent)

The record shows the following background to the dismissal:

The Claimant was taken into police custody on January 24, 1962, by a State Police Officer and a Deputy Sheriff, acting on information received by school teachers who had stated that they had intercepted two notes addressed to two girl students of 14 and 15. These notes were signed "V" and were attributed by the teachers and the police to the Claimant. They refer to a night which the two girls had spent at the writer's home and mention sexual intimacies which had taken place between the writer and one of the girls.

Testimony at the investigation hearing from State Police Department Lieutenant Dwight Galloway, the arresting and investigating officer, was:

1. The two girls had submitted signed statements saying among other things that both of them had spent the night at the Claimant's home alone with him, that one of them had there engaged in uncompleted sexual act with him at his urging, that both had been given whiskey and beer by the Claimant, that he has given them presents and money from time to time and had told them he planned to run away with them and another girl to Mexico.

2. When he was apprehended, the Claimant had immediately admitted orally all of the acts mentioned in the note attributed to him.

Testimony was also given by Carrier investigators that the Claimant had admitted in detail the actions stated in the letter.

It is undisputed that the home of the Claimant is owned by the Carrier and is furnished to him as living quarters as part of his employment terms, that the house is 200 to 300 feet from the depot at Snow Lake and is on land owned by the Carrier, that the Claimant was 57 years old at the time of these events, that Claimant is married and his wife was residing in Marianna, Arkansas; that at the time of the event charged the Claimant was on vacation from his job and that the charges made against the Claimant were not carried through to trial by the authorities. (The record does not show the manner in which they were dropped or dismissed.)

In his testimony, the Claimant denied the allegations made against him of improper sexual advances and activities. He did, however, admit that:

1. He had known the two girls involved for some time.

2. He had picked them up by pre-arrangement on the night in question, had driven them around, had bought them sandwiches and soft drinks at a cafe (denying he had given them beer or whiskey).

3. He had taken them to his house.

4. They had stayed overnight sleeping on the floor while he lay for a period on a couch opposite them and then on a bed in the other room.

Two procedural objections are raised by the Claimant: defective notice and improper investigation procedure.

The requirements of Rule 16(b) for advance notice "in writing of the precise charge" need not be met by a "bill of particulars" giving in explicit detail the case which has been marshalled against the defendant. Nor must it, as the employe argues, include the names of witnesses, what they will say, identification of documentary exhibits and a description of their contents.

Our understanding of the purpose of this stipulation in Rule 16 is that it is meant to give the employe unmistakable advance notice of that with which he is charged and which is deemed by the Carrier to merit discipline, if borne out by the hearing.

In the matter before us, this purpose was achieved by reference, rather than by descriptive statements. The notification of investigation asks the Claimant to appear "for formal investigation to determine facts in connection with your personal conduct which resulted in your arrest on January 24th, 1962, from which you were released after making cash bond." The test of compliance is whether the Claimant could know, from this statement, precisely what he was charged with.

The facts established at the hearing show that there could be little uncertainty in the mind of the Claimant concerning the exact nature of the subject of investigation. His testimony and that of others shows that he was arrested on the specific charges of unlawful personal conduct which were the subject of hearing. It is true that he denied at one point in the hearing that his detention and incarceration subject to bond should properly be termed an "arrest" because "no warrant had been served on me." But this is an obvious misstatement or inaccuracy on his part; it does not detract from the clarity of the reference to the "arrest." He admitted that he was apprehended by two law officers, that he had then and there been orally informed of the essential charge against him, that he was placed in a jail, subsequently charged formally, and released on bond to await trial. He identified the charge against him as "two charges of molesting minors and two charges of indecent exposure." He also made it quite clear in his testimony that the arrest concerned "the girls coming to my house" and throughout his testimony showed familiarity with the details of the allegations.

The testimony shows also that the Claimant had the full benefit of ample time between the explicit advance notice of the nature of the charges against him and the date of the hearing.

Our position should not be misunderstood as that of holding that the "precise charge" requirement is met by a mere assumption that the accused employe may be relied on to reconstruct from his memories or experiences an hypothesis of the subject matter of the investigation, inasmuch as "he knows what he did." Thus, in Award 6213, the employer defended the meagerness of its charge on the grounds that inasmuch as the Claimant had been involved in a police action, he should have been counted on to know what was at issue without further specification. The Board rightly found against the Carrier, because the notification and charge in that case stated only that the employe was being charged with "conduct unbecoming a Bureau employe." There was not in that statement as there was in the present one, a reference to a specific arrest on a specific date for "personal conduct" which had been the subject of investigation by both law officials and Carrier investigators, who

put before the accused the same detailed, specific allegations which he was to encounter at the investigation and part of which he there admitted.

And in Award 4473, the Board rightly found the charge defective because no offense was charged. In the matter before us, although there is no reference in the charge to an Agreement or rule proviso, it is nevertheless clear that the employe is to be answerable for "your personal conduct," unmistakably identified by reference to the arrest. Award 2806 dealt with a situation in which the Claimant was palpably deprived of notice, specification, opportunity to prepare and opportunity to defend. It cannot be reasonably compared to the instant matter, but it is a useful example of the kinds of abuses, not present in kind or degree here, which such Rules as Rule 16 are meant to prevent.

We wish also to take cognizance of the obvious danger that cryptic characterizations of charges, whether by reference to other events or otherwise, may deprive an employe of the advance information which Rule 16 intends him to have. Our general course is to discourage such tendencies. However, in the instant matter, the Carrier must be sustained in this respect by the criteria stated in this Division's Award No. 5933, because "Claimant was never deceived as to the nature of the charge and — suffered no prejudice because of any lack of definiteness in the notice."

The second procedural point raised by the employe's Organization has to do with the conduct of the investigation hearing. It is contended that the Claimant's rights were violated in that the manner in which the proceedings were conducted denied him the opportunity to defend himself with adequate procedural safeguards.

The Board will deal best with this procedural complaint by its determination of the extent to which, if any, there was adequate support for the charges and the extent to which it justifies the disciplinary action imposed. This will meet the heart of the complaint: — that the Carrier acted improperly on insufficient evidence.

Our evaluation of the believable facts which were adequately supported start with those admitted to by the Claimant. In his testimony, he admits that he took two girls, 14 and 15, to his home, a house owned by the Carrier, situated on Carrier property 200 to 300 feet from the depot, and permitted them to spend the night there with him, without inquiry or concern as to their parents' wishes or knowledge.

Other statements in the testimony of the Claimant display, to say the least, a generally casual attitude towards moral proprieties or concern for the fact that he was the Agent of the Carrier in a small community and the effect on his employer of his activities in a house owned by the railroad on railroad property, a short distance from the station.

There emerges from the statements of the Claimant a mixed air of evasion, disdain and moral casualness which makes less believable his denials of the statements which had been attributed to him by the State Police Officer and the Carrier Security Officers.

We agree that the investigation failed to utilize original witnesses to the extent they could have been available and we greatly discount signed statements, submitted in photocopy in one case, and in the other in a purported transcript copy.

Nevertheless, taking all this into account, our judgment of the record convinces us that the Claimant was guilty of serious moral improprieties which come within the meaning of the "immoral" behavior stipulated in General Rule N as subjecting the violator to dismissal and further of having subjected the railroad to "criticism or loss of good will" within the meaning of the same Rule.

We have given careful consideration to the question of whether the Claimant should be held responsible and answerable to discipline for acts committed during his vacation time. We have come to the conclusion that under the circumstances of the acts having occurred in a Carrier house, on Carrier land so close to the depot and considering the unavoidable conspicuous identification of the Claimant with the Carrier during off hours and on as its Agent, the Carrier has the authority to protect itself by disciplinary action.

The fact that the civil prosecution was not carried through by the community officials is irrelevant to the issue we confront:—or whether there is sufficient evidence to justify a dismissal on the grounds on which the Carrier has acted. We find that there is.

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 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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March 1964.