

Award No. 14272
Docket No. TE-15186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie-Lackawanna Railroad (Erie District), that:

1. Carrier violated the provisions of Rule 32 of the parties' Agreement because it dismissed Mr. Peter G. Hasler from service without benefit of a fair and impartial hearing as contemplated in said rule, and upon an unfounded charge that he falsified his time card for February 29, 1964.
2. Carrier shall now be required to restore Mr. Hasler to duty with seniority and other rights undisturbed as a result of the wrongful action, that his record be cleared of all charges in connection therewith, and that he be paid for all wages lost during the period held out of service.

OPINION OF BOARD: This is a discipline case. Claimant was regularly assigned to a Relief position and his duties included working Newark Drawbridge on first trick (hours 6:45 A. M. to 2:45 P. M.) on Saturday and Sundays.

There is no disagreement between the parties concerning the basic facts involved in this dispute. On Saturday, February 29, 1964, Claimant absented himself from duty from 6:45 A. M. to 11:15 A. M. without permission. An extra man was ordered to report to work after the Carrier discovered that the Claimant was absent. When the Claimant finally reported for duty at 11:15 A. M., he reported by telephone to the Chief Dispatcher and was sent home. Although Claimant was not permitted to work his assignment at Newark Drawbridge on Sunday, March 1, 1964, he was permitted to resume his regular relief assignment on Monday, March 2, 1964 at another location.

Under date of March 5, 1964 the following letter was addressed to the Claimant:

"In accordance with Rule 32 of Agreement between Erie Railroad Company and The Order of Railroad Telegraphers you are hereby

notified to report at the office of Trainmaster, Room 5, Hoboken, N. J. at 10:30 A. M., Thursday, March 12, 1964 for hearing to develop the facts and determine your responsibility in connection with your alleged violation of Rule O-1, Rules of the Operating Department of the former Erie Railroad Company on February 29, 1964 when you were assigned as First Trick Operator at Newark Drawbridge.

At the investigation-hearing you may have present any witnesses or representation you desire without expense to the Company.

If unable to attend you should contact the undersigned, giving the reason, as failure to report at the time and place stated will be considered an admission of guilt and grounds for discipline. (Emphasis ours.)

/s/ J. R. Canfield
Trainmaster."

Thereafter, a hearing was held as scheduled and on April 3, 1964, Claimant was informed in writing of his dismissal from service by the Superintendent. The pertinent language contained in the written notice of dismissal reads as follows:

"Dismissed from service for your acknowledged violation of Rule O-1, Rules of the Operating Department and falsification of time card when assigned to Newark Drawbridge, February 29, 1964 as determined at investigation conducted March 12, 1964."

On April 13, 1964, Employees' Local Chairman notified the Superintendent in writing that the dismissal of Claimant would be appealed.

On April 25, 1964, the General Chairman notified the Superintendent that the dismissal would be appealed and on that date filed an appeal with the Carrier's Vice President-Labor Relations. Although the appeal under Rule 32 of the Agreement between the parties should initially have been addressed to the Superintendent, this procedural deficiency was effectively waived by the Carrier when the appeal was accepted and considered by the highest officer designated by the Carrier to handle disciplinary matters. Moreover, the Superintendent was fully advised in writing by Employees of their intention to appeal the disciplinary action on behalf of the Claimant.

On August 25, 1964, Carrier denied said appeal after one or more conferences between the parties concerning the dispute and the instant claim was duly filed with the Carrier on September 10, 1964.

Carrier's contentions that the claim should be dismissed because of procedural and jurisdictional deficiencies, including the manner in which the appeal was handled on the property, have been reviewed and found to be without merit. The Carrier's own conduct during the consideration of the claim precludes dismissal on either procedural or jurisdictional grounds. The principle of estoppel is applicable.

Essentially, this controversy is not here on the merits but upon the proposition the Claimant was dismissed from service of the Carrier without proper notice and hearing in violation of Rule 32 of the current Agreement. Employees assert that the notice was materially defective because it contained no

specific charges and erroneously stated that failure to report for the hearing would constitute "an admission of guilt and grounds for discipline." Secondly, the Employees contend that Carrier improperly used the "hearing" provided for in Rule 32 (a) as an investigation of the Claimant's activities not within the purview of the defective Notice. In support of this contention, Employees point out that the dismissal notice specifically refers to both violation of Rules O-1, Rules of Operating Department and falsification of a time card by Claimant. Evidence of the falsification of the time card was obtained for the first time by the Carrier during the "hearing" from the Claimant's own testimony.

The Carrier's defense is that (1) the notice of "hearing-investigation" was proper and sufficiently advised the Claimant concerning the nature of charges against him; (2) the Claimant at the hearing admitted he was absent from duty without permission in violation of Rule O-1, Rules of the Operating Department, from 6:45 to 11:15 A. M., February 29, 1964; (3) the Claimant's testimony at the hearing indicated his realization that a falsification of his time card had occurred; and (4) Claimant waived any possible defects in procedure when he acknowledged proper notice of the investigation at the hearing, declined an opportunity for representation at the hearing and conceded that the investigation was conducted in a fair and impartial manner.

The pertinent provisions of the current Agreement between the parties are as follows:

"RULE 32.

DISCIPLINE — HEARINGS — APPEALS

(a) An employe shall not be suspended (except pending hearing) or dismissed (except in case of disapproved application as set forth in Rule 39) or have discipline recorded against him without a fair and impartial hearing.

If circumstances permit, such hearing shall be held within ten (10) days from the date charged with an offense or suspended. At a reasonable time prior to the hearing, the employe will be apprised in writing of the precise charge against him.

A transcript shall be made of the evidence taken at the hearing, and a copy of same shall be furnished to the employe or his representative. An employe shall have reasonable opportunity to secure the presence of representatives and/or witnesses and shall be notified of any discipline assessed within thirty (30) days from date of completion of hearing except in case of dismissal; a decision will be rendered at the earliest practicable date.

(b) The right to appeal is recognized and all appeals shall be handled through the proper official designated by the Carrier to handle discipline matters. Appeals from the decision, if made, must be filed with the designated higher official within sixty (60) days following receipt of previous decision. The decision of the highest officer to whom the appeal may be taken shall be final and binding, unless within sixty (60) days after written notice of such decision said officer is notified in writing that his decision is not accepted.

(c) If the final decision decrees that charges against the employee are not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee will be returned to his former position and paid for all wages lost, less amount earned in any other work; provided that no employee held out of service shall be required to seek other work for the purpose of mitigating damages; and those who do have earnings from other work may deduct from these earnings necessary additional expenses incurred in securing and performing the work.

(d) Failure of an employee to appear at hearing after receipt of proper notification as provided in this Rule, except when prevented by cause beyond his control, shall constitute forfeiture of seniority under this Agreement.

(e) An employee who considers himself unjustly treated in matters other than discipline and money claims covered by Rule 36 shall have the right of hearing provided he makes written request to the proper officer of the Carrier within sixty (60) days following date of occurrence on which complaint is based. When such request is made, hearing shall be held within ten (10) days from date request is received by said official if circumstances permit. The employee may bring to the hearing representatives and/or witnesses of his choosing. Decision shall be given within thirty (30) days from date of completion of hearing. Paragraph (b) of this Rule shall be applicable for appeals and decisions."

Rule O-1, Rules of the Operating Department reads as follows:

"Employees must not absent themselves from duty nor provide a substitute without proper authority.

Time must not be shown on time slip, time book or payroll except for work actually performed by the person named."

Employees' Ex Parte Submission to the Board contains an additional matter not considered on the property based upon the Carrier's suspension of the Claimant on March 1, 1964. It is a well established practice of the Board to refuse consideration of matters not raised on the property and for this reason we do not pass on the question.

The notice received by Claimant specifically referred to Rule O-1, Rules of the Operating Department which had been violated by him and the Claimant was thoroughly familiar with the circumstances surrounding his unauthorized absence. The Awards cited by Employees in support of its position clearly set forth the general premise that an employee is entitled to notice of the specific charge against him prior to a trial. However, these Awards are readily distinguishable from this dispute. Here, the applicable Rule was designated in the notice and Claimant was fully familiar with the charge against him. He was neither deceived nor misled and had ample opportunity to prepare his defense (Award 12492). As to the use of the words "hearing-investigation" in the notice, the existing agreement does not preclude the Carrier from holding a combined investigation and hearing so long as the charge and notice are in the manner required by the rule in order to conduct a proper hearing as provided by its terms.

The erroneous statement in the notice that failure to report for the hearing would constitute "an admission of guilt and grounds for discipline" does not constitute a material defect which would warrant dismissal of the charge. Rule 32 (d) of the Agreement provides that failure to appear at a hearing after receipt of proper notification, except when prevented by cause beyond an employee's control, shall constitute forfeiture of seniority under the Agreement. Hence, the ultimate penalty is present in the Agreement in case of willful failure to appear at a hearing, whether or not such unexcused absence constitutes an admission of guilt.

The hearing was fair and impartial. The record contains no evidence of probative value rebutting any of the Claimant's admissions, nor has it been shown they were made under compulsion or duress. (Award 11609). However, additional evidence was obtained by the Carrier at the hearing from the testimony of the Claimant concerning the possible falsification of time cards. Carrier's inclusion of an additional violation on the part of the Claimant in its dismissal notice, not within the purview of the charge, was improper. If facts developed at an investigation are sufficient to justify charging an employee with an offense the specific charge thereof must then be made against him. (Award 4473.) Therefore, the only valid basis for the dismissal of the Claimant in this controversy was his admitted absence from duty without permission on February 29, 1964.

The violation was deliberate and premeditated as alleged by the Carrier. The citation of an additional infraction of the Rule in the dismissal notice not encompassed within the initial charge does not disturb the validity of the proceeding with respect to the violation of Rule O-1, Rules of the Operating Department. Unauthorized absences from duty, if proven, are serious offenses and often result in dismissal from service. The punishment cannot be said to be arbitrary, capricious or unsupported by the record and in accordance with the broad latitude given Carriers by this Board in the matter of assessing discipline, we will not upset its punishment decided upon by the Carrier. (Award No. 12438 and others cited therein.)

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 Employees involved in this dispute are respectively Carrier and Employees 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 31st day of March 1966.

Keenan Printing Co., Chicago, Ill.

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