

Award No. 14276

Docket No. TE-15288

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

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

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Gulf, Colorado and Santa Fe Railway, that:

1. Carrier violated the Agreement when on or about November 26, 1963, it imposed the harsh, severe and arbitrary discipline of dismissal from service upon the person of Agent-Telegrapher Mr. G. V. Wheat, following a formal investigation held November 12, 1963.

2. Carrier failed to accord Mr. Wheat a fair and impartial investigation for the reason that, (a) he was deemed guilty on hearsay evidence, (b) he was denied the right to face his accusers, (c) the investigation was not conducted promptly, (d) his guilt was prejudiced when Carrier official attempted to coerce Mr. Wheat into resigning rather than face a formal investigation.

3. Carrier shall now reinstate Mr. Wheat to his position as agent-telegrapher at Valley Mills, expunge his record of the alleged charges, restore his seniority and all other rights.

4. Carrier shall be required to pay Mr. Wheat a day's pay at the rate of the Valley Mills agency, each day beginning November 26, 1963, forward.

OPINION OF BOARD: Claimant was dismissed from service effective with the close of service on November 26, 1963, for alleged violations of Carrier's Rules 752 (A) and 752 (B), Rules of Operating Department, 1959.

The material facts are not in dispute. Claimant was employed by Carrier as an Agent-Telegrapher at Valley Mills, Texas. On October 1, 1963, Claimant appeared at a hearing before the Texas Employment Commission on behalf of another individual who was attempting to secure unemployment compensation as a former employe of a customer of the Carrier. Claimant's testimony at said hearing was to the effect that he was under the impression that the individual was an employe of the Carrier's customer.

This action by Claimant precipitated an investigation by Carrier culminating in the Claimant's removal from service. Prior to the Claimant's receipt of formal notice of hearing in this matter, Carrier's representative suggested to Claimant that he consider relinquishing the position at Valley Mills and taking the "extra board." Claimant declined the suggestion and under date of November 7, 1963, received written notice of a formal investigation which thereafter was held on November 12, 1963. The notice, advising Claimant of the pending investigation, did not specifically charge Claimant with any rule violation but referred directly to his attendance at the Texas Employment Commission hearing as well as "... apparent conduct which has subjected the railroad to criticism and loss of good will ..."

Carrier's Trainmaster, who previously had suggested that Claimant consider moving to the "extra board," presided at the investigation. The record discloses that Claimant was absent between 11:00 A. M. and 12:00 noon on October 1, 1963, with the permission of the Train Dispatcher, who did not know that the purpose of the excused absence was the Claimant's voluntary appearance before the Texas Employment Commission. Despite Claimant's contention that he was on his regular lunch hour, he personally certified that on the disputed date he went to lunch between the hours of 1:00 and 2:00 P. M. Hearsay evidence, adduced through a representative of the Carrier at the investigation, was submitted in support of Carrier's contention that Claimant's behavior antagonized customers and rendered him personally unacceptable.

Following the formal investigation, Claimant received written notice of his removal from service because it was developed at the investigation that Claimant had violated Rules 752 (A) and 752 (B) Rules of Operating Department, 1959. The instant claim was duly filed and appealed through normal procedures to the highest official of the Carrier designated to consider such appeals on the property and is properly before the Board for determination.

The rules cited by the Carrier as allegedly being violated are found in Carrier's, Rules Operating Department, 1959 and are as follows:

"752(A). Employees must not be careless of the safety of themselves or others, indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or vicious. They must conduct themselves in a manner that will not bring discredit on their fellow employees or subject the railroad to criticism and loss of good will.

752(B). Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other.

Employees must not enter into altercations, play practical jokes, schuffle or wrestle on Company property. Employees must devote themselves exclusively to their duties while on duty."

Employees contend that the investigation afforded was unfair because of several procedural defects. We find no merit in this contention. The notice was broad enough to include the cause and specific enough to alert the Claimant as to the matters to be inquired into at the investigation. The provisions of the Agreement, Article V, provide no specific time limit for the holding of an investigation and the lapse of time found here, though substantial, does not seem unreasonable in view of the existing circumstances. No language

in the effective Agreement describes the type of evidence which may or shall be adduced and there was no obligation on the part of Carrier to produce the authors of statements at the hearing. Hearsay evidence is admissible in these proceedings for what ever probative value it may have, however the absence of the best evidence must be considered in determining the weight to be given it. Other procedural deficiencies alleged by the Employees, which we think unnecessary to reiterate, surely could not be said to be shown to be prejudicial to the rights of Claimant or to be in error sufficient to void the proceedings. (First Division Awards 15370 and 17007)

A careful examination of the record, including the applicable provisions of the effective Agreement, supports Employees' contention that this dispute is restricted solely to the incident which occurred on October 1, 1963, when Claimant appeared before the Texas Employment Commission and does not extend to other incidents alluded to during the investigation. Unsubstantiated hearsay testimony from Carrier's representative at the investigation concerning Claimant's reputation among customers of Carrier does not constitute probative evidence.

It is apparent that at least one customer of the Carrier was incensed by Claimant's appearance at the hearing before the Texas Employment Commission on behalf of an individual who was seeking unemployment insurance based upon his alleged employment with said customer of the Carrier. The displeasure of the customer was the initial basis for the investigation and subsequent disciplinary action against the Claimant. Carrier has cited numerous Court decisions and Awards concerning the contractual obligation of employees. We take no exception to any of these and agree that every contract of employment implies an engagement on the part of the employee to be faithful to his employer's interests and loyal to his employer. However, these decisions and Awards are readily distinguishable from the instant dispute.

Here, the Claimant voluntarily appeared before the Texas Employment Commission as an individual and not as an employee of the Carrier. His testimony was related to the status of another person, who claimed to have been an employee of a Company, which also was a customer of the Carrier. Neither the nature of the Claimant's appearance nor the substance of his testimony directly or indirectly involved the Carrier. Although there is disagreement between the parties as to whether or not the Claimant's appearance occurred during his lunch period, it is conceded that he had permission to be absent from the premises of the Carrier on personal business.

Perhaps the Claimant should have known that his appearance before the Texas Employment Commission would cause embarrassment and suffering to the Carrier, however, the record contains no competent evidence supporting Carrier's position that Claimant's appearance per se constituted a disloyal and provocative act.

Although there may have been some cause for reprimand by the Carrier, we find no cause for dismissal under the applicable rules. Claimant had no obligation to accept Carrier's qualified offer of reinstatement and no duty to mitigate damages as suggested by Carrier. However, in determining compensation due Claimant under the Award, earnings received by him since November 26, 1963, shall be deducted from his total monetary Claim.

The Claimant should be reinstated to his former position or a comparable position in accordance with his full seniority rights, the alleged charges ex-

punged from his record and he be compensated for the difference between the amount earned while out of service or while otherwise employed and the amount he would have earned had he not been held out of service.

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 Carrier's assessment of discipline imposed was arbitrary and unreasonable and without just cause.

AWARD

Claim sustained in accordance with Opinion and Findings.

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.