

Award No. 14346

Docket No. TE-15648

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arnold Zack, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYES UNION
(FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)**

ERIE LACKAWANNA RAILROAD COMPANY

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

1. Carrier violated the parties' Agreement when on September 16, 1964, it dismissed Operator V. I. Johnson from service without a fair and impartial hearing as provided in the Agreement.
2. Carrier shall be required to reinstate Mr. Johnson in service with all rights unimpaired and pay him for all time lost and for any expenses incurred.
3. Carrier shall permit a joint check of records to ascertain the amounts due Mr. Johnson.

OPINION OF BOARD: Mr. V. I. Johnson, Operator-Clerk at "DY" Office, Youngstown, Ohio, with 15 years seniority, holds seniority both as telegrapher and as train dispatcher. On the morning of August 4, 1964, while working as third trick train dispatcher (extra), Johnson was informed by the Operator at SN Junction of a hot box on ore train extra, engine 1157. Johnson notified the operator at DeForest that the ore train had "a hot box or brakes sticking," and if necessary to give the train crew the hot box sign. The DeForest Operator sighted the hot box and gave the proper hot box hand signal to the trainmen in the caboose and OS'ed the train past DeForest at 6:35 A.M. Shortly thereafter first trick dispatcher Gibson learned of the hot box and instructed Agent-Yardmaster Driscoll at Niles to stop the train. The hot box signal was given, but before the train could be brought to a stop, the train derailed resulting in \$250,000 damage. An investigation was held on August 17, 1964 at which time Johnson elected to be represented by the Dispatchers Organization. A second investigation was held on September 8, 1964, following which, on September 16, 1964, Johnson was notified of his dismissal for violation of Operating Rules B, E, L, and 808. On November 10, 1964 the Order of Railroad Telegraphers filed a claim contending that the Carrier violated Rule 32 of the parties Agreement by dismissing Johnson as a Telegrapher without hearing, following investigations that had no relation to his service or seniority as a telegrapher.

The Organization contends that Johnson's dismissal as a dispatcher should not jeopardize his position as a Telegrapher, since his work then was not telegraphers work, since the offense could not be committed by a telegrapher and since he was not charged, prior to the investigation with any violation of the Telegraphers' Agreement. It argues that Rule 34 (c) provides that an employee who is promoted to dispatcher positions, and who is disqualified therefore, shall return to service covered by the scope of the Telegraphers' Agreement and will assume the status of an extra employee. The action of the Carrier in dismissing Johnson from his position of Telegrapher at the same time as he was dismissed from his position as dispatcher, according to the Organization thus constitutes a dismissal without hearing as required by Rule 32 of the parties Agreement. It seeks Johnson's reinstatement as a telegrapher on the extra list, and compensation for all earnings lost to him as a telegrapher by virtue of this improper dismissal.

The Carrier argues that Johnson was properly dismissed from its employment for failing to stop the train in question, and thus contributing to the accident. It asserts that he was properly notified of a pending investigation, that he was given the opportunity to chose his representative at the investigation, and that having chosen the Dispatchers Organization to represent him, he was bound by the determination of that investigative body. It argues that his dismissal from employment was a termination, and not a disqualification, and that therefore he may not elect to return to employment on the extra list under Rule 34 of the Telegraphers' Agreement. Such a result would vitiate the discipline imposed on him under the Dispatchers' Agreement, the Carrier concludes.

At issue in this case is whether an employe having seniority under two Agreements may retain his rights under one, after he has been discharged in accordance with the terms of the other. Clearly when the infraction being penalized is a violation that could be committed in either capacity, the Claimant loses his rights under both agreements. (Award 9974—Webster). But the infraction in this dispute was one that could not be committed by one employed exclusively as a telegrapher. Nonetheless, the penalty of dismissal can not be equated to disqualification as that term is used in Rule 34 (c).

Rule 34 (c) is applicable to "Employees promoted * * * who are disqualified * * * therefor * * * returning to service covered by the scope of this Agreement * * *" In this rule "returning to service covered by the scope of this Agreement" is a prerequisite to assumption of status as an extra employee. Johnson was terminated from service following a full and impartial hearing even though he did not designate the Telegraphers Organization as his representative. He can not be construed as returning to service since his term of service with the Carrier was severed. This also severed his rights under the Telegraphers' Agreement. The purpose of Rule 34 (c) is not to reinstate terminated employes who hold seniority on two rosters, but rather to clarify the status of those employes who have been promoted and then disqualified for the higher position on their return to telegraphers service. Any seniority rights due to Johnson as a telegrapher on the extra list under Rule 34 (c) required his continuation in the Carrier's employ.

We agree with Referee Dorsey in Award 12104:

"Seniority rights are vested contingent upon the continuation of the employer-employe relationship. In the event that an employe * * * (is) discharged for cause, in the absence of express provi-

sion in the agreement to the contrary, his vested seniority rights at the time * * *, are dissolved. We do not feel that this principle is affected where the employe may have had seniority rights under more than one collective bargaining agreement to which the Carrier is party."

"* * * The dismissal from service terminated the employer-employe relationship. The dissolution of the relationship dissolved the rights enjoyed by Claimant as an employe."

Again as reasoned in Award 10348 (LaBelle):

"* * * It is inconceivable that a telegrapher dispatcher could violate a safety rule or fail so to perform his duties as a dispatcher, that human lives and property might be endangered and the Carrier would be helpless to discipline him as a telegrapher because the telegrapher rules did not cover such a situation."

Accordingly the claim must be denied.

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 Carrier did not violate the Agreement.

A W A R D

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
BY Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 22nd day of April, 1966.