

Award No. 14814
Docket No. TE-13592

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Eastern Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway, that:

1. Carrier violated the terms of the Agreement between the parties and acted in a discriminatory manner when it removed D. R. Shepard from a Student Wire Chief position after he had occupied the Position satisfactorily for approximately 19 months.

2. Carrier shall now be required to compensate D. R. Shepard for eight hours' pay at the rate of the Student Wire Chief Position each work day, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the Student Wire Chief Position, plus actual expenses incurred as a result of such violation, beginning June 6, 1961.

3. Carrier shall now be required to compensate G. A. Noll for eight hours' pay for each work day held off the 3:45 P. M. to 11:45 P. M. Printer Clerk Position, Argentine, Kansas, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the 3:45 P. M. to 11:45 P. M. Printer Clerk Position, Argentine, Kansas, beginning June 6, 1961.

4. Carrier shall now be required to compensate B. F. Stimach for eight hours' pay for each work day held off the Relief Position, Argentine, Kansas, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the Relief Position, Argentine, Kansas, beginning June 6, 1961.

OPINION OF BOARD: The facts, which are not in dispute, are that Claimant had spent approximately 19 months in training as a Student Wire Chief when he was released by Carrier from said training program. During said 19 month training period, Claimant was originally assigned as Student Wire Chief in Chicago, and returned to Chicago after a temporary stay in

Topeka, Kansas; and while on his last assignment was assigned to Relief Wire Chief Position No. 9301 at Chicago from February 23, 1961 to June 6, 1961. He had relieved regularly assigned Wire Chiefs previously from January 30, 1961 to February 23, 1961. Claimant was released by Carrier from the Student Wire Chief training course on June 6, 1961. He was paid Wire Chief's pay for June 7 and 8, 1961. On June 9, 1961, Claimant requested in writing a formal investigation in accordance with Section 12, Article V of the Telegraphers' Agreement on the grounds that he was unjustly treated. Thereafter, Claimant displaced on the Printer Clerk position at Argentine, Kansas as of June 16, 1961.

It is the Organization's position that Claimant was arbitrarily removed from the Student Wire Chief training program without cause, and was therefore disciplined and punished without a formal hearing as required by Article V of the Telegraphers' Agreement; that the Carrier failed to sustain the burden of showing that Claimant was not making satisfactory progress in said Student training program.

The Carrier's contention is that paragraph 2 of the October 19, 1945 Memorandum of Agreement authorized Carrier to release Claimant if he failed to make satisfactory progress in the Student Wire Chief training program at any time prior to the expiration of the two year training program; that the release of Claimant amounted to a disqualification rather than an assessment of discipline; and that Carrier has the sole right and is the sole judge, by virtue of said Memorandum of Agreement, in determining whether or not Claimant was making satisfactory progress.

The pertinent provisions of Memorandum of Agreement of October 19, 1945, governing the parties to this dispute, reads as follows:

"2. . . . If a Student Wire Chief fails to make satisfactory progress, he may be released from the training course at any time, but if retained for the full period of two years, will be graduated and promoted to any existing vacancy in the Wire Chief class for which no bids have been filed by senior employees; . . ."

A close examination of the record discloses that Carrier, in its ex parte submission to this Board, stated at record page 47:

"While Mr. Shepard may have made satisfactory progress while working as Student Wire Chief insofar as learning the art and techniques required of a Wire Chief, . . ."

Further, in its ex parte submission at record page 46, Carrier says:

"The instant case was brought about due to the claimant attempting to collect additional compensation while absent on vacation, which is not provided for by Agreement Rules or otherwise."

This is evidently the sole basis for Carrier's determination that Claimant was not making satisfactory progress as a Student Wire Chief that can be considered by this Board, inasmuch as the reference made by Carrier to an incident involving the taking of an auto ride rather than a train ride as Claimant had advised Carrier he was taking to the fulfillment of an assignment away from home in Kansas, was not raised on the property, and therefore it cannot be considered by this Board in the determination of this dispute.

In rebuttal to any implication or inference that Claimant's claim for expenses while on vacation was in any way made dishonestly or frivolously, the Organization has presented and shown to this Board in its oral panel discussion that the claim for expenses for vacation is now pending before this Division for determination in Docket No. TE-13591.

In support of its contention, Carrier has cited Award No. 13855, wherein the Claimant therein was disqualified without a hearing upon the grounds of failure to perform her duties in a satisfactory manner and this Board sustained Claimant's disqualification on the grounds that the Claimant's rights under the Discipline Rule involved therein were not violated and that Carrier's action was not unreasonable or arbitrary. We agree with Carrier that Award No. 13855 is analagous to the instant case in that neither one is a discipline or dismissed charge.

The facts, however, in said Award No. 13855, can be distinguished from the facts in the instant dispute in that in said Award No. 13855 there was un rebutted testimony of Claimant's unsatisfactory performance of her duties on five separate occasions given at a hearing at which Claimant was properly represented. We have no such evidence of unsatisfactory progress in the instant case.

However, while it is the sole function of management to place employees with fitness and ability and train them for important positions, there must be a reasonable basis for denying promotion to an employee on the grounds that he lacks fitness and ability, or in the instant case for releasing Claimant from the said training program for failure to make satisfactory progress. See Award No. 6877.

We do not agree with Carrier's contention that the pertinent provisions of the Memorandum of Agreement herewith concerned gives them the absolute right to summarily release Claimant from the Student Wire Chief training program. Rather, the question is, did the Carrier have sufficient evidence before it to sustain a finding that Claimant failed to make satisfactory progress as a Student Wire Chief during the two year training program?

The Claimant has shown by the evidence in the record that he had performed his duties as Student Wire Chief and in fact had worked as a Relief Wire Chief without complaint from Carrier in regard to the arts and techniques required of a Wire Chief. Further the single instance of Claimant filing a claim for expenses while on vacation, and which claim is presently pending before this Board for decision, is, in our opinion, not sufficient evidence to sustain a finding that Claimant failed to make satisfactory progress as a Student Wire Chief, and that Claimant has sustained his burden of proving that he was making satisfactory progress in said training program.

Therefore, it is the conclusion of this Board that the preponderance of evidence in this case warrants a conclusion that the Carrier acted arbitrarily, capriciously and unreasonably when it dismissed Claimant from the Student Wire Chief training program and the claim must be sustained.

In regard to damages, the Claimants are entitled to damages sufficient to make them whole, or in other words Claimants are entitled to receive what they would have been paid under the Agreement had there been no violation.

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 violated.

AWARD

Claim sustained in accordance with the Opinion.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of October 1966.

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

(Supplemental)

INTERPRETATION NO. 1 TO AWARD NO. 14814**DOCKET NO. TE-13592**

Name of Organization:**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION**
(Formerly The Order of Railroad Telegraphers)**Name of Carrier:****ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY**
(Eastern Lines)

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

This request for interpretation arises from the Organization's position that 1. Carrier is attempting to wrongfully deduct overtime earnings of Claimant Shepard. 2. Claimant Shepard is entitled to damages based on Student Wire Chief position pay until he would have completed his Student Wire Chief training program, then Assistant Wire Chief position pay until March 13, 1963, and thereafter Wire Chief position pay. 3. Claimant Shepard is entitled to expenses at the rate of \$3.00 per day until the date he would have completed the training program. 4. Interest should be paid on sums due from date of this Board order, December 1, 1966. 5. Claimant Shepard should have been given the option of returning to the Student Wire Chief position at Topeka, Kansas.

This Board, in its Award No. 14814, stated: "In regard to damages, the Claimants are entitled to damages sufficient to make them whole, or, in other words, Claimants are entitled to receive what they would have been paid under the Agreement had there been no violation."

First, in regard to determining what earnings of Claimant Shepard can be deducted as a setoff against what he would have received if there was no contract violation, we find that in Interpretation No. 1 to Award No. 1224 this Division, in discussing proper measure of damages for breach of a contract for personal services, said:

"What constitutes the proper measure of damages for breach of a contract for personal services is a question of law. The general rule of law is that the proper measure is the difference between what the employee would have earned under the contract and what he may have earned in the exercise of ordinary diligence in some other employment. The rule applies whether or not the contract provides for the payment of 'all time lost' as here, or for 'wage lost', 'earnings lost' or any similar contract language. (See Award 1638, Second Division; Award 15767, First Division, Referee Carter). The rationale of the courts in requiring mitigation of damages seems to be that the employee who suffers a loss from the breach of the Agreement should be compensated therefor in the amount needed to make him whole, but not to the extent that he would receive a windfall amounting to a penalty payment for such breach."

Therefore, in view of the general law of damages in regard to a breach of an employment contract that this grievant so damaged is entitled to an amount he would have earned under the contract less such sums as he in fact earned, we find that the Carrier was entitled, in addition to Claimant Shepard's regular pay, to deduct any overtime pay that he actually earned in his other gainful employment.

Second, the Organization contends that if Claimant Shepard had been permitted to complete the Student Wire Chief training program, he would have been eligible for Assistant Wire Chief position pay, and eventually, Wire Chief position pay, and therefore these positions' pay rate should be applied in determining the amount he would have earned under the contract had there been no violation.

This Board has repeatedly held that it has no authority under the guise of interpretation to alter, amend, modify or enlarge upon the scope of an Award, and that this Board can only explain and interpret the Award in the light of the circumstances that existed when the Award was rendered. See Interpretation No. 1 to Award No. 12456.

In the initial claim, Petitioner requested that Carrier compensate Claimant Shepard as the Student Wire Chief position pay only, and was silent as to Assistant Wire Chief or Wire Chief position pay. It raises a new issue which cannot be considered by this Board. As was stated in the Interpretation to Award No. 11675: "If an Award should be changed because of subsequent events, there could be no finality." Further, it would amount to "speculation" and "conjecture", if this Board were to determine that Claimant Shepard would have eventually been eligible for an Assistant Wire Chief position or Wire Chief position. Therefore, Carrier is entitled to compensate Claimant Shepard pay at the Student Wire Chief position rate of pay less any earnings earned in other employment.

Third, in regard to the Organization's contention that Claimant Shepard is entitled to expenses at the rate of \$3.00 per day while away from home until the Student Wire Chief training program was completed, we find that in the original claim, Petitioner asked for "actual expenses incurred." There being no showing that Claimant Shepard did actually incur any expenses, it was not improper for Carrier to refuse to pay him any expenses.

Fourth, the Organization holds that interest should be granted Petitioner on the amounts owing them from December 1, 1966. The Organization

admits that no request was made in the Statement of Claim for any interest payment. This is a new issue, and cannot be considered by this Board at this time.

Fifth, as to Claimant Shepard's contention that he should have been offered a Student Wire Chief position at Topeka, Kansas, rather than at Chicago, we find that this Board is without authority to give Claimant the option to accept an offer of being reinstated in the Student Wire Training Program at Topeka.

Referee, Paul C. Dugan, who sat with the Division, as a neutral member, when Award No. 14814 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of October 1967.