

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

Don Hamilton, 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 (Lackawanna District), that:

1. Carrier violated Article 10(a) of the Telegraphers' Agreement by suspending and discharging Mr. J. J. Dwyer from service without a fair and impartial hearing.
2. Carrier shall because of such violation in paragraph (1) above, commencing on August 7, 1964 and continuing until Mr. Dwyer is reinstated in service, be required and/or compensate him for a day's wages each day suspended from service in accordance with the provisions of the agreement so long as violation exists.
3. Carrier to allow joint check of records to determine compensation due Mr. Dwyer.

OPINION OF BOARD: Claimant was working as Relief Ticket Agent-Operator at Orange, New Jersey, August 6, 1964. During the afternoon the Claimant went to the rest room and shortly after returning to his office, reported to the Chief Train Dispatcher that a box containing some \$419.35 in money and checks was missing. A hearing was conducted on August 14, 1964, and Claimant was dismissed from service on August 20, 1964 for violation of Rules 830 and 832 of the Operating Department.

Carrier alleges that there is a procedural defect concerning the manner in which the Petitioner processed its Appeal. We have carefully examined the record, and although we admit that it is somewhat confusing, we do not find the appellant procedure to be irregular. Therefore, we will limit our award to a determination of the merits of the claim.

The Organization charges the Carrier with a violation of Article 10(a), which reads as follows:

"An employee will not be suspended (except suspension pending hearing), discharged, or otherwise disciplined without a fair and impartial hearing which shall be held within ten days of the date on which the Superintendent first had knowledge of the offense for which suspended, discharged or disciplined. At a reasonable time prior to the hearing the employee will be apprised in writing the precise charge

against him. The employe shall have reasonable opportunity to secure the presence of representatives and witnesses. If a transcript of the evidence is taken at the hearing, copy thereof will be furnished to each, the employe and his representative. An employe involved in a hearing may demand that a transcript be taken."

There are three specific points raised in support of the Organization. The first point is stated as follows:

"The proceeding held on August 14, 1964 was not a hearing, per se, but was an investigation, called to develop facts and determine responsibility."

The Organization alleges that the notice to attend the August 14 session was not in the form of a charge. The notice said:

"In accordance with Article 10, you are hereby notified to report at the office of Trainmaster E. J. Whalen, Hoboken, N. J. 9:00 A.M., E.S.T., August 14, 1964, for hearing to develop facts and determine your responsibility in connection with violation of Rules 830 and 832 of the DL&W R.R. Co. Rules of the Operating Department. Regarding theft of \$415.90 reported by you at 2:30 P.M., August 6, 1964.

"At the 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.
/s/ Geo. Probst, S.S.&C.S."

We are of the opinion that the language of the notice was sufficient to reasonably alert the Claimant to the subject of the hearing and to allow him to adequately prepare a defense thereto, without being burdened by surprise or deceit.

The Organization further argues that the Claimant was not "charged" until the commencement of the hearing. It urges that the rules require the charge to be made at a "reasonable time prior thereto." The record indicates that at the outset of the hearing the Trainmaster called on the Supervisor to "state the charges." The charges were then read clearly and specifically, including a complete recitation of the rules which were allegedly violated. No objection was made by Claimant to the proceedings and in fact the transcript shows that he answered negatively when asked by the Trainmaster if there was any reason not to proceed with the hearing, just after the same had been called to order. Therefore, we hold that the Claimant waived any right to complain of an alleged error in the proceedings herein involved.

The Organization also attempts to claim error by distinguishing between "hearing" and "investigation." We are also compelled to hold that this argument was waived by the failure of Claimant to present the same at the August 14 session.

The Organization also raises an interesting point of procedure, which although, not determinative of this claim, is considered to be sufficiently important to merit comment. At the conclusion of the interrogation of Claimant by the Supervisor, The Trainmaster inquired of several persons present at the hearing if they would like to question Claimant. Even though they all

declined, we feel this is a precedent which should not be condoned and one which should not go unchallenged. There was no objection raised at the hearing, and it is therefore considered to have been waived before presentation to this Board.

However, we would take this opportunity to point out to the Carrier that these hearings are matters of serious concern to the parties involved, and they should be conducted in a manner consistent with the dignity, procedure and respect deemed appropriate for a quasi-judicial proceeding. The defendant is not to be required to present himself for interrogation by everyone who just happens to want to inquire.

The second point raised by the Organization is:

"Even if the investigation could be considered a hearing, there has been no showing of guilt on Mr. Dwyer's part."

Claimant is charged with the violation of two specific rules:

Rule 830 reads:

"Station agents report to and receive instructions from the Superintendent, and will conform to instructions issued by the Treasury, Traffic, Accounting, Car Accounting, Freight Claim, Safety and Station Service Departments."

It is our opinion that the Carrier failed to produce any substantive evidence tending to prove a violation of this rule.

Rule 832 reads:

"Agents are responsible for the Railroad property, including equipment, records, station buildings, sidings and ground; and for the care and safety of all property entrusted to the Railroad in the transaction of its business, and for the prompt and efficient discharge of duties by all employees subject to their direction."

The transcript clearly proves that the Claimant had the property of the Carrier in his custody and that he failed to act responsibly in the care, custody and treatment thereof. It cannot be denied that Claimant was negligent in protecting the money and checks which belonged to the Carrier.

We are of the opinion that such negligence is sufficient to substantiate a violation of Rule 832.

The Organization finally raises the following point:

"Even if Mr. Dwyer had been accorded a hearing to which entitled, and even if there were conclusive evidence of his guilt of the incident under investigation, the extreme penalty of dismissal would be too severe."

In this case, the Carrier has supported the allegation that Claimant violated an operating rule. One of the penalties for such violation is dismissal. The Carrier could have given a less severe penalty. However, it did not exceed its jurisdiction in that the penalty prescribed is one which is applicable if considered warranted by the Carrier. This is not a Board of equity and we will not disturb the action of the Carrier.

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 8th day of December, 1966.