

Award No. 16074
Docket No. MS-16851

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

R. S. PLUM

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of R. S. Plum, employe of the Chicago, Milwaukee, St. Paul and Pacific Railroad that:

1. Carrier acted arbitrarily and capriciously when it failed and refused to allow all of the evidence to be presented at investigation of R. S. Plum on July 9, 1966 and,
2. Carrier was discriminatory, unreasonable, and in abuse of the Carrier's discretion when it dismissed R. S. Plum on July 18, 1966.
3. R. S. Plum shall be restored to service and paid for each day held out of service since his dismissal July 18, 1966, plus expenses incurred and general damages.

OPINION OF BOARD: The Claimant, R. S. Plum, was employed as an extra agent-telegrapher by the Carrier on July 6, 1964. He worked as an extra telegrapher on the Rocky Mountain Division, where he held seniority. He was also on a "loan" basis on the Musselshell and Coast Division from July 6, 1964, until July 18th, 1966, when, after a hearing, he was dismissed from Carrier's service.

The record discloses that in the latter part of June, 1966, the Claimant was working a vacation relief position for the telegrapher at Harlowton, Montana. Under date of June 21, 1966, he was advised by the Chief Dispatcher that upon completion of his work, on the vacation relief vacancy at Harlowton, Montana, on July 5, 1966, he should relieve the agent at Harlowton, Montana, for the agent's vacation that was to commence on July 7, 1966 through August 3, 1966. The Claimant refused to comply with the request of the Chief Dispatcher that he protect the agency position at Harlowton, advising the Chief Dispatcher that he was going to exercise his seniority rights, under the provisions of Rule 3(g) of the Agreement, and displace the junior employe at Square Butte, Montana, effective July 5, 1966.

That portion of the rule that concerns us is as follows:

"RULE 3.

SENIORITY AND PROMOTION

(g) The senior extra employe shall have preference to all extra work if available and competent but cannot claim extra work in excess of forty hours in his work week if a junior extra employe who has had less than forty hours' work in his work week is available. Under this rule, extra employes must accept the work to which entitled.

Extra work will be assigned in accordance with this rule, and the extra employe, if qualified, will perform service on the position vacated.

Temporary assignments will be considered as extra work except when filled by an employe assigned to a permanent position."

By reason of the Claimant's failure to comply with the direction of the Chief Dispatcher that he protect the agency position at Harlowton on July 5, 1966, the following was sent to the Claimant:

"Deer Lodge
July 5, 1966
File: 075.01

Mr. R. S. Plum
917 South Ralph
Spokane, Washington

Formal investigation will be conducted at 10 A.M., July 9, 1966, in the Superintendent's office at Deer Lodge, Montana for the purpose of establishing cause and to place responsibility for your failure to protect the Agent's position at Harlowton, Montana, commencing 6 A.M., July 5, 1966, as per instructions of the Chief Train Dispatcher and Trainmaster H. J. McGuin in violation of Operating Rules General Notice, General Rule B, 700 and 702.

You may be represented by an employe of your choice.

Acknowledge receipt on duplicate copy of charges attached and return in the self-addressed stamped envelope.

Arrange to be present.

/s/ W. F. Plattenberger

Att.
WFP/o

cc: Messrs: H. J. McGuin
C. E. Cornwall
W. E. Beaulieu"

The hearing was held as scheduled before W. F. Plattenberger, Superintendent. The Claimant was present at the hearing and was represented by J. P. Shannon, District Chairman of TCEU.

Under date of July 18, 1966, the Superintendent, W. F. Plattenberger, addressed the following communication to the Claimant:

"Deer Lodge
July 18, 1966
File: PR - R. S. Plum
075.01

Mr. R. S. Plum
Harlowton

This is to advise you that as a result of investigation held at Deer Lodge, Montana, July 9, 1966, as per my letter of July 5, 1966, concerning your failure to protect the Agent's position at Harlowton, Montana, commencing at 6:00 A.M., July 5, 1966, as per instructions from the Chief Train Dispatcher and Trainmaster H. J. McGuin, you are hereby dismissed from the service of the Carrier effective July 18, 1966.

You should arrange to deliver all company property and transportation to a Company officer.

Acknowledge receipt of this letter on duplicate copy attached.

/s/ W. F. Plattenberger
Superintendent

att.
WFP/o

cc: Messrs: L. V. Anderson
S. W. Amour
M. Garelick
C. E. Cornwall

.....
Date

Mr. W. F. Plattenberger:

This will acknowledge receipt and understanding of the above letter.

.....
Signature"

The Claimant raises three specific points in support of his position.

The first point raised is as follows:

- "1. Carrier acted arbitrarily and capriciously when it failed and refused to allow all of the evidence to be presented at investigation of R. S. Plum on July 9, 1966."

We have carefully searched the record with respect to this claim by the Claimant. The search fails to reveal any facts to substantiate this claim. He was well represented at the hearing, and there can be no question but

that he had a full, fair and impartial hearing. If, as he claims, he was refused and not allowed to present certain evidence that he thought might be beneficial to him, a request should have been made of the Hearing Officer that the matter be adjourned in order that such evidence might be produced by him. No such request was made. The Claimant's contention that the hearing was unfair or "biased" is also without merit. At the close of the hearing, the following took place:

"Q 94 Mr. Plattenberger: Are you satisfied that you have had a fair and impartial hearing?

A 94 Mr. Plum: I am."

Investigation closed at 10:57 A. M.

This Board has held on any number of occasions that objections to the manner in which a hearing is being conducted, i.e., as to its fairness and impartiality, must be raised during the hearing. The failure to raise such objections constitutes a waiver. See Awards 15027, 14573, 14444, 15025, 15020.

The second point raised is as follows:

"2. Carrier was discriminatory, unreasonable, and in abuse of the Carrier's discretion when it dismissed R. S. Plum on July 18, 1966."

Numerous prior awards of this Board set forth our function in discipline cases. We do not substitute our judgment for that of the Carrier, nor do we decide the matter in accord with what we might or might not do had it been ours to determine. Our function is but to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. Once that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable, or arbitrary as to constitute an abuse of discretion. See Award 5032.

Dismissal from service is an extreme and severe penalty. Whether or not such a penalty is justified depends upon the many factors and circumstances in each case.

The Claimant was charged with insubordination in that he refused to obey an order he received from his Chief Train Dispatcher and Trainmaster that he protect the Agent's position at Harlowton, Montana, commencing 6 A. M., July 5, 1966. The Claimant does not deny the receipt of the order and does not deny that he refused to obey that order. His defense at the hearing and on the property was that he was exercising his seniority rights under the provisions of Rule 3(g) of the Agreement. That portion of Rule 3(g) that concerns us reads, "The senior extra employe shall have preference to all extra work if available and competent * * *."

That the Claimant was competent is not in issue here.

The issue before us is whether or not the Claimant was justified in his refusal to comply with the order of the Chief Train Dispatcher under the rules of the Agreement between the parties and more particularly Rule 3(g).

The Claimant contends that as of July 5, 1966, there was or would be available extra work not only at Harlowton, but also at Square Butte and that he, as the senior extra employe, under the provisions of Rule 3(g), had the right to work the position he desired. Such contention might be correct and sustained, if, as he claims, extra work was available at both places at the same time.

The burden of proving this contention is on the Claimant by submitting competent evidence in support of his contention. There is no affirmative proof in the record submitted by the Claimant to sustain his contention. The record does contain proof to the contrary.

In the Ex Parte Submission of the Claimant we find the following statement:

"On July 2nd, while this exchange of wires between Plum and the Chief Dispatcher was in progress, the traveling engineer-trainmaster, Mr. McGuin, talked to Plum at Harlowton and advised him there would be no work available at Square Butte and that Plum was to protect the agency position at Harlowton as instructed by Chief Dispatcher Cornwall." (Emphasis ours.)

The orders of superiors must be obeyed. If the Claimant in this dispute was of the opinion that his instructions to relieve the agent at Harlowton, Montana was in violation of his contractual rights, his duty was to perform the services directed, and he then had the right to file a claim or grievance to obtain redress for the alleged violation. See Award 3999 (Second Division, Anrod).

The record discloses that under date of November 3, 1966, the General Manager of the Carrier forwarded a communication to the Claimant in which there is stated, among other things, the following:

"The discipline assessed you has been in effect long enough to have served its purpose. Therefore, I am agreeable to your reinstatement on a leniency basis, providing you will assure Superintendent Plattenberger you will comply with the instructions given you as an extra operator."

Under date of November 25, 1966, the Claimant forwarded a communication wherein he stated, " * * * I must decline your offer of reinstatement without back pay or an assurance that our union schedule will be honored in the future, and am appealing the decision to the Railroad Adjustment Board."

The penalty assessed is severe. The offer of the Carrier, as set forth in its communication to the Claimant under date of November 3, 1966, was declined and refused by the Claimant.

Discipline is a very serious matter for the safe operation of a railroad. The Carrier, of necessity, must have the right to require its employes to comply with the orders of those authorized to give them.

We find that the Claimant had a fair and impartial hearing and that the charge of insubordination was justified. This Board has consistently

found that insubordination will support the discipline of dismissal, especially where, as in the present dispute, the fact of insubordination is clearly established.

We will deny the claim.

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

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1968.