

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

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

VALDOSTA SOUTHERN RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Valdosta Southern Railroad, that:

1. Carrier violated Rule 12 of the Agreement when it dismissed Leo D. Pridgen from the service without an impartial investigation.
2. Carrier shall be required to restore Leo D. Pridgen to his position of agent, Clyattville, Georgia, seniority unimpaired, and pay for all time lost as a result of its action.

OPINION OF BOARD: Claimant, whose seniority date runs from February 25, 1954, was employed as agent at Clyattville, Georgia. It was alleged by the Carrier that the employe was on an unauthorized absence from May 11 to May 22, 1964. Therefore, on May 22, he was contacted by telephone and during the course of the conversation gave vent to abusive and profane utterance. Later, that same afternoon, he arrived at the Carrier's office building and again engaged in an abusive and profane altercation with T. S. Dvorak, the Vice-President.

At the conclusion of the diatribe, the employe was orally notified that he was dismissed from the Carrier's service. A written confirmation to this effect was sent on May 25, 1964, with a copy to the Organization's General Chairman.

No further action was taken in this matter until June 3, 1964, when the Vice-President attempted to contact General Chairman Matthews concerning the problem of hiring a new agent. The latter was finally reached on June 4 and the parties discussed some of the ramifications surrounding the dismissal of the Claimant.

Thereafter, an investigation was scheduled for July 1, 1964, but was aborted into a conference. Subsequently, a formal investigation was held on the property on August 14, 1964. The Organization appeared specially and made timely objection to the investigation on the ground that the Carrier had violated Rule 12(a) and (b) of the effective Agreement, hereinafter quoted.

Inasmuch as the hearing was presided over by the Vice-President, the Organization alleged that he performed the functions of prosecutor, chief witness and judge. Thence, despite the hearing being concluded on August 14, 1964, the transcript was not furnished the Claimant nor the Organization

until September 14, and finally on September 18, the Carrier rendered its decision affirming the dismissal of the Claimant. As a result, another claim was filed by the Organization which subsequently was progressed to this Board and docketed as TE-15340.

In order to place this claim in proper perspective, the entire Rule 12 of the effective Agreement is quoted herein:

"RULE 12.
DISCIPLINE.

(a) Employes shall not be disciplined or dismissed from service without an impartial investigation by the proper officers. Such investigations shall be held within ten (10) days after the alleged offense has been committed.

(b) The employe shall be furnished a copy of the specific charges preferred, upon which the charges are based reduced in writing at least forty eight (48) hours before going into an investigation.

(c) At the hearing or on the appeal the employee may be assisted by one or more duly accredited representatives, who shall be permitted to examine and cross-examine all witnesses. The term duly accredited representative is understood to mean the General Chairman of The Order of Railroad Telegraphers.

(d) A decision shall be rendered within ten (10) days after completion of hearing. If an appeal is taken, it must be filed with the next higher official and a copy furnished the official whose decision is appealed within thirty (30) days after date of decision. The hearing and decision on the appeal shall be governed by the time limits of this paragraph.

(e) The right of appeal by employe or representative in the regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the Carrier to whom appeals may be made, is hereby established.

(f) If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended, or dismissed, the employe shall be returned to former position and paid for all time lost.

(g) An employe on request shall be given a letter stating the cause of the discipline. A transcript of the evidence taken at the investigation or on the appeal shall be furnished on request to the employe and his duly accredited representative."

As Dockets TE-15023 and TE-15340 involve the same Claimant and the alleged violations contained therein emanate from Rule 12, both will be discussed together.

Basically, the thrust of the Organization's claim is predicated upon the denial of due process to the Claimant. Specifically, that the Carrier failed to conduct an impartial investigation within ten days after the alleged offense had been committed. The record denotes that the Claimant was orally dismissed on May 22, 1964, and, thereafter, it was confirmed in writing on May 25. The Carrier first attempted to contact the Organization's representative

on June 3 and did converse with him on June 4—in either event, more than ten days after the dismissal. We will leave aside for the moment whether the Claimant was furnished a copy of the specific charges in writing at least forty-eight hours prior to the investigation, as *arguendo*, the letter of May 25 sets out reasons for the dismissal.

The Organization further contends that the hearing on August 14, was not an impartial investigation by the proper officers, as required by the Rule. Although the Agreement does not spell out who the proper officers are, nevertheless, it is questionable whether the same individual can impartially perform the functions necessary to safeguard the rights of the Claimant.

Finally, the Organization directs its attack to Section (d) of Rule 12, *supra*, which requires a decision to be rendered within ten days after completion of hearing. In the instant claim, the hearing was concluded on August 14 and the decision rendered on September 18, 1964. Hence, in view of the compounding of the various violations by the Carrier herein set forth, can we conclude that the errors committed were trivial or substantial enough to deprive the Claimant of basic protective rights accorded him by the Agreement?

After a thorough review of the various awards cited by the parties, we have concluded that the Organization's arguments are sound and require us to sustain the claim. In support of our conclusions, it is recognized that Rule 12(a) employs the word "shall"—a mandatory requirement and not permissive. Sections (b) and (d), again use the same phraseology, "shall". This is a word of art which has been interpreted too frequently to require citation by us. Nevertheless, many awards of this Board have upheld claims based upon a failure to conduct an impartial investigation. See Awards 11340, 12437 and others.

Further, this Board has also rendered awards relative to holding an investigation within the prescribed time limits. See Awards 5197, 7831 and 11757, as well as First Division Award 15902. The manner of conducting a hearing has also been presented to the various Divisions and in this regard we cite our Awards 8513, 13978 and others. Finally, as to the failure to render a decision within the required time limits, see Awards 11019, 12362, 12559 and others.

Noteworthy herein is a decision rendered by the U.S. Court of appeals, Fourth Circuit, 210 F2nd 812, *Atlantic Coast Line Railroad Company v Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, wherein the appellate court reversed the District Court's affirmance of our Award 3857. The latter Award was also concerned with a delayed investigation. However, we do not believe the circumstances there compare to the situation contained in the instant claim. Here, we have a multiplicity of violations which we feel cannot be cast aside as mere technicalities. Perhaps an isolated derogation committed in good faith, might not be considered a substantial deprivation of due process. However, where we find a total disregard of rights accorded to employees—rights negotiated and bargained for by responsible parties, we may not presume to ignore them. Our function is not to write agreements for the parties, but rather to interpret them when the issue is presented to us. Were we to ignore violations of this dimension, we would be encouraging others to commit transgressions ad infinitum and reduce collective bargaining agreements, solemnly executed, to nugatory documents and categorized as *nudum pactum*.

Hence, in view of our conclusions that the agreement was violated, we find it unnecessary to discuss the question whether the dismissal was for cause.

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 the Agreements was violated.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1966.

**CARRIER MEMBERS' DISSENT TO AWARDS NOS. 14496, 14497,
DOCKETS NOS. TE-15023 AND TE-15340**

The disputes as submitted to the Division by the Petitioner were loaded with charges of alleged technical violations on the part of the Carrier, but the Petitioner was curiously quiet, as is the Referee, as to the merits of the disputes.

The record bore out that the Claimant was guilty of conduct that simply cannot be condoned by any Carrier.

The Referee should have taken into account that the delay in conducting the investigation was due primarily to refusal of the Claimant and his representative to participate in such investigation prior to August 14, 1964.

The record contained no proof by the Petitioner that the manner in which the investigation was conducted prejudiced the substantive rights of the Claimant in any manner, and, most important, the applicable Agreement contains no provision as to how such investigations are to be conducted. There is likewise no showing as to how the delay in rendering the decision following the investigation prejudiced the substantive rights of the Claimant.

The disputes should have been decided on their merits, which would have required a denial of the claims in their entirety.

/s/ P. C. Carter

/s/ R. E. Black

/s/ D. S. Dugan

/s/ T. F. Strunck

/s/ G. C. White

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