

Report
TO
THE PRESIDENT
BY THE
EMERGENCY BOARD

APPOINTED SEPTEMBER 15, 1949, BY EXECUTIVE
ORDER 10078, PURSUANT TO SECTION 10 OF
THE RAILWAY LABOR ACT, AS AMENDED

To investigate an unadjusted dispute between
The Monongahela Connecting Railroad Com-
pany and certain of its employees represented
by the Brotherhood of Railroad Trainmen, a
labor organization

(N. M. B. No. A-3220)

PITTSBURGH, PA.

OCTOBER 7, 1949

PITTSBURGH, PA., *October 7, 1949.*

THE PRESIDENT,
The White House.

DEAR MR. PRESIDENT: The Emergency Board appointed by you on September 15, 1949, under section 10 of the Railway Labor Act, as amended, to investigate an unadjusted dispute between the Monongahela Connecting Railroad Co. and certain of its employees represented by the Brotherhood of Railroad Trainmen, a labor organization, has the honor to submit herewith its report.

Respectfully submitted.

HARRY H. SCHWARTZ, *Chairman.*
FRANCIS J. ROBERTSON, *Member.*
ANDREW JACKSON, *Member.*

(II)

REPORT

September 9, 1949, the President of the United States issued the following Executive Order No. 10078, creating an Emergency Board:

EMERGENCY BOARD

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE MONONGAHELA CONNECTING RAILROAD COMPANY AND CERTAIN OF ITS EMPLOYEES

Whereas a dispute exists between the Monongahela Connecting Railroad Company, a carrier, and certain of its employees represented by the Brotherhood of Railroad Trainmen, a labor organization; and

Whereas this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act as amended; and

Whereas this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce within the State of Pennsylvania to a degree such as to deprive that portion of the country of essential transportation service:

Now therefore, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U. S. C. 160), I hereby create a board of three members, to be appointed by me, to investigate the said dispute. No member of the said board shall be pecuniarily or otherwise interested in any organization of railway employees or any carrier.

The board shall report its findings to the President with respect to the said dispute within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the Monongahela Connecting Railroad Company or its employees in the conditions out of which the said dispute arose.

THE WHITE HOUSE,
September 9, 1949.

(Signed) HARRY S. TRUMAN.

September 15, 1949, the President designated and appointed Harry H. Schwartz of Casper, Wyo., Francis J. Robertson of the District of Columbia, and Andrew Jackson of New York City to make said investigation and to report to him.

By order of the National Mediation Board the Emergency Board investigation began at 10 o'clock, a. m., in a designated room in the Victory Building in Pittsburgh, Pa. The board met at that time and place, organized the board by electing Harry H. Schwartz chair-

man, approved the designation of Alderson Reporting Co. as official reporters; and by agreement of the representatives of the carrier and the employees, the board fixed the hours for daily hearing from 9:30 a. m. until 1:30 p. m.

Appearances were entered on September 21, 1949, as follows:

For the employees:

J. P. Cahill, vice president, Brotherhood of Railroad Trainmen, Colonial Hotel, Cleveland, Ohio.

George W. Legge, general chairman of the Brotherhood of Railroad Trainmen, 286 North Bellefield Avenue, Pittsburgh 13, Pa.

For the carrier:

T. W. Pomeroy, Jr., 1130 Oliver Building, Pittsburgh, Pa.

There were also present: Mr. R. L. Barnes, president; Mr. J. L. Sorensen, vice president; and Mr. P. G. Edwards, chief of personnel of the carrier.

On August 18, 1949, officers of the Brotherhood of Railroad Trainmen circulated a ballot among the employees it represented on the Monongahela Connecting Railroad for a vote whether or not a legal strike should be called if the matters in dispute were not settled. The matters in dispute, as listed in the requested vote, were as follows:

OFFICIAL BALLOT

PITTSBURGH, PA., August 18, 1949.

To All Members of the Brotherhood of Railroad Trainmen and Others Holding Seniority as Yardmen on the Monongahela Connecting Railroad Co. of Pittsburgh, Pa.

SIRS AND BROTHERS: Your committee, assisted by a Grand Lodge officer, has been unsuccessful in inducing the management of the Monongahela Connecting Railroad Co. to adjust certain grievances presented by the employees in accordance with the Railway Labor Act, as amended. The particular matters in dispute are set forth as follows:

1. Violation of article 27 of Yardman's Agreement.

(a) In the case of Conductor W. J. Legge, Jr., the carrier violated every rule, practice, and precedent in handling the case in the manner they did. They have placed in jeopardy every yardman's right to a "fair and impartial investigation." He was tried twice for the same offense, denied the right to cross-examine witnesses making prejudicial statements against him; he was charged of the alleged violation, tried on it and judged for it by one and the same operating official. This same official was the only witness the company had against him. All of this was done in violation of the principle set forth in scores of adjustment board awards.

(b) In the case of Conductor T. Callahan another principle is involved. He was tried and subsequently dismissed without being properly charged of any

offense; it is also our position that the discipline imposed is far too severe for the alleged offense if he was properly notified.

2. A docket of claims involving article 3 of the Yardmen's Agreement and article 2 of both the Tower and Gatemen and Yardmasters Agreements. (Overtime Rules.)

These claims cover situations where yardmen work on yard assignments from 8 a. m. to 4 p. m. the same day and are denied the overtime rate for starting a second tour of duty within the same 24-hour period in violation of the above-named rules.

The hearing in this case began on September 21, 1949, and was formally closed on October 3, 1949. Prior to closing argument, this board unsuccessfully attempted to adjust the dispute through mediation.

During the course of the proceedings, a transcript of record consisting of 742 pages was made and 30 exhibits were received.

FIRST ITEM ON THE STRIKE BALLOT

Shortly before 3:30 a. m., on April 7, 1949, Conductor Legge, with a crew of two brakemen, Otto C. Herforth and J. A. Herleman, were assigned to a train of 16 cars to be delivered from one point to another in the city of Pittsburgh, Pa., over the tracks of the carrier. Conductor Legge observed two angle irons, a piece of pipe and some fuses (weighing approximately 25 pounds) in the possession of Brakeman Herleman and was aware of the fact that Brakeman Herleman intended to make a "firecracker" or "boomer." Conductor Legge made no effort to hold up the movement of the train until the material was turned over to him, or at least removed from the train. Subsequently, while the train was moving, there was an explosion, and Brakeman Herleman was found in the car with his left hand and half his head blown off. He was pronounced dead shortly thereafter.

After the explosion and early the same day, officials of the carrier made preliminary inquiries to determine what had happened. Neither Conductor Legge nor Brakeman Herforth were on the property and efforts to contact them at that time were of no avail.

Before noon on April 7, 1949, Mr. J. L. Sorensen, vice president of the carrier, caused notices to be mailed to a number of employees to attend an investigation on April 9 to determine the cause of the fatal injuries to Brakeman Herleman. The investigation was conducted by Mr. Sorensen, as scheduled. After this investigation, Mr. Sorensen acquired knowledge of certain facts which led him to believe that Conductor Legge might have testified falsely at the afore-said investigation on April 9, 1949, and might have violated article

85 of the Operating Rules. That portion of article 85 involved reads as follows:

They are responsible for the safety, prompt movement, and proper care of their trains, for the conduct and work of the men employed thereon, and for the signals, lamps, and tools intrusted to their care.

Mr. Sorensen thereupon on May 2 served written notice upon Conductor Legge, charging him with violating the foregoing rule and with giving false testimony at the hearing of April 9, 1949, and requested that he attend investigations to be held in connection with said charges on May 4, 1949. The investigations were adjourned by agreement between the carrier and brotherhood representatives and later held on July 1, 1949. Conductor Legge was found guilty on both charges and discharged July 7. His appeals were denied.

The brotherhood contends that the investigation of April 9 was a fair and impartial investigation of charges against Conductor Legge and that he was not found guilty of any offense; that if it were not such investigation it should be considered as such, inasmuch as the carrier had ample opportunity prior to April 9 to ascertain the facts and present the charges which were later pressed against Conductor Legge; that the July 1 investigations should never have been held, and therefore, constituted double jeopardy as far as the violation of Operating Rule 85 was concerned, and further, that so far as the giving of false testimony is concerned there is no rule on the subject; that the carrier at the July 1 investigations violated all the requirements of article 27 in that (1) the employee representatives were not given the opportunity to cross examine the witnesses who testified against Conductor Legge; (2) Vice President Sorensen acted as judge, jury, and prosecutor, as well as witness for the carrier; and (3) the appeals provisions of the agreement were nullified. The carrier denies each of these contentions.

We find that the April 9 investigation was not an investigation of "charges". Furthermore, at this investigation Conductor Legge admitted being properly notified of the investigation, and was represented by the general chairman and secretary of the Employees Grievance Committee, who were given ample opportunity to question Conductor Legge and other witnesses.

At the July 1 hearings, Conductor Legge was represented not only by General Chairman Legge, but also by J. P. Cahill, vice president of the Brotherhood of Railroad Trainmen. It appeared at these hearings that Conductor Legge had made a statement under oath to a deputy coroner which conflicted materially with testimony given by

him at the April 9 investigation. At the time of the signing of such statement he was represented by officials of the brotherhood.

We find after a careful consideration of all the evidence that the carrier was justified in its disciplinary action and that none of the brotherhood's contentions as above set forth can be supported except to the extent which we indicate later on in this report. Actually, in our opinion, the brotherhood is not so much concerned with the discipline imposed as it is with the alleged violation of the Investigation Rule.

The carrier produced at the hearing before this board the Deputy coroner before whom Conductor Legge made the aforesaid sworn statement as to his version of the accident, and two detectives from the homicide squad who had investigated the accident. The testimony of these witnesses, in our opinion, is very persuasive. These witnesses were not present at any of the carrier's investigations. While their presence at such investigations was not necessary, it would have been desirable as further evidence of the substance of the carrier's charges against Conductor Legge. In any event, the testimony which they gave before this board substantiated the finding of guilt.

With respect to the procedure of using Vice President Sorensen to act as the hearing officer, we find that, notwithstanding the carrier's contention in that respect, such action is a violation to some extent of the spirit, if not the letter, of the Investigation Rule.

SECOND ITEM ON THE STRIKE BALLOT

On January 22, 1949, Conductor Callahan became ill while on duty, approximately 1 hour before his regular relief period. He left his crew and went to the locker room and then home. He notified neither the members of his crew nor any of his superiors, nor did he go to the Emergency Hospital, which was but a short distance from the exit from the property.

Under date of January 24, 1949, Trainmaster Brooks by written notice charged Callahan with leaving his assignment "without permission and failing to return to duty until the following day * * * (Alleged violation of rule 15 of Rules, Instructions and Regulations of the Monongahela Connecting Railroad Co.)." Rule 15 provides:

"Employees must not absent themselves from duty without proper authority.

After an investigation on January 26 before the assistant to the chief of personnel, Callahan was discharged, effective at once. Upon his appeals to the committee for the carrier and then to the vice president, they refused to modify the discipline originally imposed.

At the hearings before this board, the brotherhood withdrew the contention set forth in the strike ballot that there had been no proper charge against Callahan. It did not deny any of the foregoing facts. It relied solely on the argument that the discipline was far too severe.

In support of its action, the carrier pointed out that the crew of which Callahan was the conductor, was working in the Furnace Alloy, one of the most important points on the railroad, as well as one of those most vital to the operations of the steel mill, and urges that the two men left working on the job had had little experience. The brotherhood argued that there was no delay in the work performed by the crew. However, it is significant that one of the crew members complained to his superior regarding Callahan's absence.

Vice President Sorensen testified, that in refusing to modify the original disciplinary action and in support of the carrier's position that the discipline was not arbitrary or severe, he took into consideration all of the foregoing facts, as well as the fact that Callahan had been disciplined seven times between January 1941 and the date of his discharge (four times for failing to report for duty, once for eating during working hours, once for violating safety rules, and once—in 1947—for an infraction similar to the one here involved, i. e., leaving the property during working hours without permission).

THIRD ITEM ON THE STRIKE BALLOT

This item involves 14 claims¹ by 5 employees who started to work at various times as yardmasters and then were called to work as conductors 23 hours after beginning their previous assignments as yardmasters. The claims are that time and one-half instead of straight time should have been paid for their assignments as conductors. In other words, each claim involves an additional 4 hours' pay.

At the time this dispute arose, the brotherhood represented three groups of employees working for this carrier, i. e., Conductors and Brakeman, Towerman and Gateman, and Yardmasters, and there were three separate agreements in effect. The overtime rules are substantially identical:

Except when changing off where it is the practice to work alternately days and nights for certain periods, working through two shifts to change off, or where exercising seniority rights from one assignment to another, all time worked in excess of eight (8) hours continuous service in a twenty-four (24) hour period

¹An additional claim involving an employee who worked on an assignment as conductor and subsequently (15 hours after the start of his conductor assignment) as towerman was withdrawn by consent, in view of the carrier's agreement to pay it.

shall be paid for as overtime, on the minute basis, at one and one-half times the hourly rate. (Article 3 of Trainmen's Agreement.)

Under date of April 1, 1947, an interpretation of article 3 of the Trainmen's and Towerman's Agreements was agreed to as follows:

When an employee begins a second assignment within twenty-four (24) hours after he began a previous assignment, he will be paid at the overtime rate for the second assignment.

No such interpretation was agreed to as regards the Yardmen's Agreement.

The carrier contends that the words, "an employee," must necessarily refer only to an employee covered by the respective agreements; and that the interpretation is not applicable to the Yardmasters' Agreement, since among other things yardmen and yardmasters constitute two different crafts. The brotherhood argues that "an employee" means any employee and in support of its argument points out that the carrier started a precedent by the so-called Pearson case. In that instance, Pearson worked first as a conductor, then 15 hours after the start of his conductor assignment, he was called as yardmaster and was paid time and one-half for the latter assignment. The carrier argues that this settlement was "without prejudice," and was made because Pearson could not have worked his regular assignment the same day as conductor.

RECOMMENDATIONS

In its opening statement, the carrier contended that all matters in dispute were properly within the jurisdiction of the First Division of the National Railroad Adjustment Board. The brotherhood contended in effect that where a principle has been established by the Adjustment Board it (the brotherhood) should not be required to take the case thereto and that it cannot tolerate the delay which the brotherhood alleges was deliberately caused by the carrier in having every case taken to the Adjustment Board regardless of whether the principles have been established by previous board cases or not.

We are by no means convinced that principles have been established by the Adjustment Board which would clearly warrant awards in favor of the employees when applied to the facts involved in these cases. There does not appear to be any lack of good faith in the position which the carrier has taken with respect to these cases.

It developed during the course of these proceedings that the strike ballot, while carefully drawn with respect to the Legge case, was carelessly drawn in connection with the other two items appearing thereon.

The brotherhood retracted a part of its complaint in the Callahan case and was required to correct errors of fact with respect to the complaint over the time claims. By far the major portion of the record herein is devoted to the Legge case. The case involves a death brought about by an instrument of tremendously destructive potentialities. It received considerable publicity in the newspapers. The brotherhood has indicated that it considers that the whole structure of the Investigations Rule is threatened because of the manner in which the Legge case has been handled on the property. The brotherhood has asserted unequivocally that it would not take any of these cases to the Adjustment Board. Such assertion, in the board's opinion, has been prompted by its feelings with respect to the Legge case. It is clear that it has assumed a place in the relationship between the carrier and its employees far out of proportion to that generally attributed to a grievance involving disciplinary action taken against one employee.

For this reason, among others, the board is of the opinion that while one forum for the determination of all the matters in dispute may be the Railroad Adjustment Board, nevertheless, this board is taking upon itself the responsibility of making a specific recommendation with respect to the merits of the Legge case.

As previously noted, the major contention of the brotherhood with respect to the claim is that Legge was not afforded a "fair and impartial investigation," in that he was not accorded all of the rights reserved to him under the Investigation Rules, particularly because Vice President Sorensen held the investigation and also acted upon the appeal. While there is nothing in the language of the rule which prohibits the vice president from acting as hearing officer in disciplinary investigations, the spirit and contemplation of the rule indicate to some extent that an official of the carrier of lower rank than the vice president would conduct the hearing and that appeal from the decision of such lower ranking official to the vice president would lie. In any event the accused was afforded the right to representation in all of the hearings and in all other respects accorded the rights traditionally recognized in American jurisprudence as accruing to an accused party. Proof of guilt was substantial. Therefore, while we found that the carrier violated to some extent the spirit of the Investigations Rule, such violation does not in our opinion justify a determination that the conclusion reached by the carrier be set aside. It is, therefore, our recommendation that the discipline administered by the carrier to Conductor W. J. Legge, Jr., be permitted to stand. In the future, in furtherance of amicable labor relations on the property, we recommend that disciplinary investigations or hearings be conducted before an

examining official, with the right of appeal to the committee for the carrier and the vice president.

In connection with the Callahan case and the time claims mentioned in the third item on the strike ballot, we recommend that they be progressed to the National Railroad Adjustment Board, if agreement cannot be reached thereon.

Respectfully submitted.

HARRY H. SCHWARTZ, *Chairman.*

FRANCIS J. ROBERTSON, *Member.*

ANDREW JACKSON, *Member.*

OCTOBER 7, 1949.

