Award No. 1821
Docket No. MC-1440-74
2-WT-I-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYLVESTER SHAW, CARMAN (Individual)

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES: (a) That under the controlling agreement, Carman Oiler Sylvester Shaw, was unjustly dismissed from service by the Washington Terminal Company, December 3, 1952.

(b) That accordingly the Company be ordered to reinstate him to all service rights and compensation for all time lost since the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: The Washington Terminal Company, hereinafter referred to as the company, employed Sylvester Shaw, hereinafter referred to as the claimant, on March 12, 1946, as a carman oiler in the carmen craft at Washington, D. C. in the maintenance of equipment department.

The claimant was regularly assigned to work the tour of duty 8:00 A. M. to 4:00 P. M., assigned rest days Wednesdays and Thursdays.

On November 28, 1952, about 7:50 A. M., claimant was told by his immediate supervisor, Woodrow Smith, to report at the assistant master mechanic's office at 8:00 A. M. An alleged investigation was held immediately by Woodrow Smith and a stenographic record was made of the investigation, copy of which was refused the claimant.

Upon completion of the so-called investigation what was alleged to be a trial was held immediately.

On December 3, 1952, a letter was addressed to the claimant by J. A. Long, Jr., master mechanic of the company, advising him he was dismissed from the services of the company, a copy of which is submitted herewith and identified as Exhibit A.

This dispute has been handled with the company's officers, up to and including the highest designated officer, to whom such matters are subject to appeal, with the result that all appeals were denied.

The agreement effective June 14, 1946, as subsequently amended, is controlling and is by reference hereby made a part of this statement of facts.

vestigation of Shaw's November 26 conduct was made; he was apprised of the precise charges against him; he was given an original hearing by a designated officer of the carrier, at which representatives of the Brotherhood Railway Carmen of America were in attendance; and finally Shaw's appeal was heard by the manager of the carrier, the highest designated official of the carrier, at which hearing the general chairman of the Brotherhood Railway Carmen of America was present. As has been noted above, Shaw was asked if he were ready to have the charges heard at the original hearing, he stated he was not. But his sole reason for not being ready was that he was not being permitted to be represented by a person who was neither an employe of the carrier nor an accredited representative of the Brotherhood Railway Carmen of America, the authorized representative of the craft to which Shaw belonged. But such a complaint was no reason for continuing the hearing. As is noted in Rule 31, in a hearing by the carrier of charges against an employe either the Brotherhood Railway Carmen of America shall present the employe's case, or he may be permitted to do so. An outside party, such as Shaw demanded, is not permitted under the terms of the current agreement to represent the employe or participate in the hearing. Therefore, the disciplinary action with respect to the charges against Shaw complied with the agreement rules cited by Shaw.

It is respectfully submitted that, the charges against Shaw being established by the evidence, his dismissal from the service of the carrier was justified.

A copy of the stenographic report of the investigation and hearing of the charges against Shaw, and the effective Agreement, with amendments, between The Washington Terminal Company and the company's employes represented by System Federation No. 106 Railway Employe's Department, A. F. of L., in support of carrier's position were mailed to Shaw by registered mail.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Carman Helper Oiler Sylvester Shaw contends the Washington Terminal Company unjustly dismissed him from its service on December 3, 1952. Because thereof, and by virtue of the provisions of Rule 29 of the carmen's agreement with the company which covers him, he asks that he be reinstated with all service rights restored and compensated for all time lost.

In this respect Rule 29 provides:

> "If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss, if any, resulting from said suspension or dismissal."

Shaw was employed by the company on March 12, 1946 in its Maintenance of Equipment Department, Washington, D. C., as a carman helper oiler. At all times herein material he was regularly assigned as such with a work week of Friday through Tuesday, with Wednesday and Thursday as rest days, and hours of service from 8:00 A. M. to 4:00 P. M.

On November 28, 1952 at about 7:50 A. M., Shaw was instructed by his immediate supervisor, Woodrow Smith, to report to the office of the Assistant

Master Mechanic at 8:00 A. M. Shaw reported as directed and an investigation followed immediately. Upon completion of the investigation, and as a result thereof, Shaw was charged "with loitering in the locker room on your day off, on the morning of November 26, 1952, defying your supervisor and insubordination". As a result of the investigation and hearing the company, by letter dated December 3, 1952, advised Shaw he had been found guilty as charged and that his services with the company were being terminated.

The dispute was handled on the property up to and including the highest officer designated by the company to handle such matters and appeal taken therefrom to this Division. This properly lodged the dispute here. See Section 3, First (i) of The Railway Labor Act.

However, suggestion is made that the claim was not handled in the manner as required by certain "rules of Procedure" provided in Circular No. 1 of the National Railroad Adjustment Board issued October 10, 1934. These rules provide, as to "Form of Submission", that a statement of the controlling facts involved be briefly, but fully, set forth in a "Joint Statement of Facts", if possible. It is contended Shaw made no effort to do so. To do so, if possible, is a duty resting on both parties. It is a provision primarily for the benefit of the Board. The rule also provides:

> "In event of inability to agree upon a 'Joint Statement of Facts', then each party shall show separately the facts as they respectively believed them to be."

This requirement relates solely to the "Form of Submission" and not to any jurisdictional requirement. It is apparent from the record that no such statement of facts could have been arrived at by the parties. Since the Division has seen fit to permit the dispute to be heard after each of the parties, in ex parte submissions, had separately set forth what they considered the facts to be, we think the dispute is properly here for our consideration.

Shaw contends the company did not comply with the following requirements of Rule 29:

> "At a reasonable time prior to the hearing, such employee and the duly authorized committee will be apprized of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

That Shaw was apprized of the precise charge made against him is fully evidenced by the quoted language thereof as hereinbefore set forth.

That Shaw was not notified of the charge a reasonable time prior to the hearing, and thus given a reasonable opportunity to secure the presence of necessary witnesses, is fully evidenced by the record. In fact, it is apparent the hearing on the charge followed immediately the investigation and little, if any, time intervened. It is the company's thought that Shaw waived this requirement. That a party may do so is beyond question. However, such waiver can only be said to have been made when, from the record, it appears the party did so with full knowledge of the fact.

At what is referred to as the investigation Shaw sufficiently raised this requirement so it cannot be said that he intended to waive it. After the charge was made he did not again do so. It is the latter fact of which the company here seeks to take advantage. But it is apparent the company considered the investigation and hearing as one proceeding because no evidence of what took place on November 26, 1952, on which the charge was based, was offered after the charge, as such, was read into the record. If the investigation is not considered a part of the hearing then there is no evidence to support the charge. We find the company did not meet this requirement of Rule 29, as quoted, and that Shaw did not waive it.

Rule 29 also requires that:

> "Stenographic report will be taken of all hearings or investigations under Rule 29, and the employee involved and the duly authorized committee shall each be furnished with one copy."

Although he immediately requested such a copy Shaw was not furnished one until April 2, 1953. The company seeks to excuse its failure to reasonably comply with this provision on the ground that Shaw refused to sign the report certifying it as a true and correct transcript of his testimony, saying it had long been a practice and custom to require an employe to do so. We have examined the rules relating to the furnishing of a stenographic report to the employe involved and find no such requirement therein. We do not think carrier was privileged to add such additional requirement before furnishing the report.

Shaw also complains of the fact that on the property the company refused him the right to be represented at the investigation and hearing by someone of his own choice. In this respect the "Note" to Rules 29, 30 and 31 provide:

> "Neither Rules 29, 30 nor 31 obligate the carrier to refuse permission to an individual employee to present his own grievance or, in hearing involving charges against him, to present his own case personally. The effect of these rules, when an individual employee presents his own grievance or case personally, is to require that the duly authorized committee, or its accredited representative be permitted to be a party to all conferences, hearings or negotiations between the aggrieved or accused employee and the representatives of the carrier."

This note provides an employe may present his own case or it may be presented by the Local Committee of the Brotherhood of Railway Carmen of America, or its accredited representatives. Shaw declined the services of Ralph Hoover and Bert Hall, committeemen, who were present and representing the Brotherhood of Railway Carmen. This he had a right to do and handle his own case. But we can find no provision of the Railway Labor Act which gives to employes the right to a representative of his own choice at an investigation on the property by carrier officials of a charge that the employe has violated some company rule or order. The Statute recognizes a distinction between proceedings on the carrier level and those before the Adjustment Board, when there is in effect a collective bargaining agreement. In investigations, conferences, or hearing by or before officers of the carrier the terms of an existing contract controls, whereas the procedure before the Board is controlled by the Act and arises only after the chief or highest operating officer of the carrier designated to handle such disputes has completed his inquiry and entered a finding unsatisfactory to the employe. Then, and only then, is he entitled, under the Act, to be represented by whomever he chooses. See Section 3, First (i) and (j) of The Railway Labor Act. The company was correct in denying the request of Shaw that Roy Grenata, an outsider, represent him at the investigation and hearing.

In view of what we have said we find Shaw did not have "a fair hearing" as contemplated by Rule 29 of the parties' agreement. Consequently it is not necessary to discuss the question of the sufficiency of the evidence to support the charge. However, so there may be no misunderstanding in this regard, it should be stated that the company was within its rights in ordering Shaw not to loiter in the locker room of its Coach Yard Building while off duty on rest days and that Shaw was entirely outside of his rights in refusing to leave when he was directed to do so by those in charge.

The claim is made for "compensation for all time lost since the aforesaid date", which is December 3, 1952. This right is qualified by the language of Rule 29, which provides he shall be "compensated for his net wage loss, if any, resulting from said . . . dismissal." In other words claimant must show, before he can recover any compensation, that his dismissal has

resulted in a net wage loss and, if he does, he can recover the amount of net wage loss he establishes he actually suffered as a consequence of his dismissal.

AWARD

Claim sustained except the right to compensation which is limited as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July, 1954.