Award No. 4027
Docket No. 3992
2-CMStP&P-MA-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Machinist Joseph J. Maietta was unjustly suspended from service on May 7, 1960 and dismissed from service on May 13, 1960.

2. That accordingly the Carrier be ordered to compensate Machinist Joseph J. Maietta for all time lost beginning with May 8, 1960 and continuing through May 19, 1960.

EMPLOYES' STATEMENT OF FACTS: Joseph J. Maietta, hereinafter referred to as the claimant, is employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the carrier, at its diesel house shop in Milwaukee, Wisconsin, with a seniority date of June 24, 1945.

Under date of May 7, 1960, District Master Mechanic A. W. Hallenberg directed a letter to the claimant advising him to appear in the locomotive department general office at 10:00 A. M. (DST) May 11, 1960 for formal investigation on a charge set forth in the letter, a copy of which is submitted herewith and identified as Exhibit A. The formal investigation was held as scheduled and submitted herewith and identified as Exhibit B, is a copy of the hearing transcript.

Under date of May 13, 1960, a letter was directed to the claimant by District Master Mechanic A. W. Hallenberg, advising him he was dismissed from the service of the carrier effective May 13, 1960, a copy of which is submitted herewith and identified as Exhibit C.

As stated, it is the position of the carrier that the responsibility of Mr. Maietta in connection with the charges preferred against him was fully developed and his dismissal was warranted and we respectfully request that the carrier's action not be disturbed and the claim denied.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Rule 34 (g) provides that after thirty days' service an employe cannot be disciplined or dismissed without a fair and impartial hearing, and Rule 34 (h) provides for his full reinstatement if found to have been unjustly suspended or dismissed. However, the rules make no provision for direct appeals of suspensions or dismissals, which like other discipline decisions, and other claims and grievances, are governed by Sections (a), (d) and (e) of Rule 34.

Those sections provide that if an employe believes he has been unjustly dealt with, his claim shall be presented to his immediate supervisor, and that an unsatisfactory decision by him may be successively appealed through next higher appeal officers to the highest official designated to consider appeals.

Claimant being a machinist in the Milwaukee Diesel House, his immediate supervisor is the Roundhouse Foreman. The successive officers designated to hear his appeals are: (1) the Master Mechanic at Milwaukee; (2) the District Master Mechanic there; (3) the Superintendent of Motive Power there; (4) the Chief Mechanical Officer there; and (5) the Assistant to Vice President at Chicago.

The hearing under Rule 34(g) was held by the District Master Mechanic and he ordered claimant's dismissal on May 11, 1960, and his reinstatement on a leniency basis on May 16, effective May 17, 1960.

The claim is for compensation for the days lost, on the ground that claimant was unjustly suspended and dismissed; it was initiated by a letter to the Superintendent of Motoive Power on May 23, 1960 saying: "Kindly consider this a claim in behalf of Machinist J. J. Maietta, * * * for all time lost * * *."

Within the sixty days limited by Article V of the August 21, 1954 Agreement, the Superintendent of Motive Power denied the claim, both on the merits and because it had not been made to the Roundhouse Foreman within the time limit provision of Article V. Thus the time limit issue was raised by the first Carrier representative to whom the claim was presented. In that respect this claim differs materially from Award 3280, which is relied upon by claimant but in which the time limit issue was raised for the first time by the final appeals officer.

In Award 3280 it was said:

> "As noted, the charge, hearing and discipline of Eggert were handled by the Master Mechanic, who is an officer superior to the Round House Foreman and thereby in effect waived its contractual requirement that this claim be initially presented to him. Under the circumstances, submission to the Round House foreman of a claim for reinstatement and payment for time lost, would have been an idle and useless act and was unnecessary. Since the Master Mechanic discharged Eggert, the proper step for seeking relief from the carrier's action was to appeal to the District Master Mechanic which was done by the claimant within the required time".

If, when Rule 34(a) was adopted, it had been the established practice to hold discipline hearings at or below the immediate supervisor's level, their change to a higher level might be construed as by-passing him and waiving the requirement that claims be presented to him. But in this record there is no claim, or even intimation, of such change, and we cannot presume that it occurred. Certainly this Board cannot conclude that adherence to a practice in the light of which a rule was made, makes its provisions idle, useless or unnecessary. That would be to rewrite the Agreement for them.

Presumably, therefore, in designating him the parties had other things in mind than the probable granting of claims at the first step;—perhaps procedural uniformity, so that there would be no room for doubt where to file claims; or perhaps the convenience of claimants and others in the local presentation and initial handling of all claims, wherever they may arise. The latter motive is strongly indicated by the provision of Rule 34(a) that the grievance is to be taken to the immediate supervisor by the local committee or by its representative. But whatever their motive, the record discloses no valid ground upon which this Board can overrule the parties' express agreement in Rule 34(a) as idle, useless or unnecessary. It cannot be too often stressed that the parties are competent and entitled to make their own agreement (Illinois Central R. Co. v. Whitehouse, C.C.A. 7, 212 Fed. 2nd 22), and that an award of this Board which alters, changes or amends a collective bargaining agreement is an usurpation of power. (Hunter v. A.T.& S.F.Ry., C.C.A. 7, 171 Fed. 2d 594). Consequently we do not feel justified in following the precedent of Award 3280 in this situation.

The claim was not presented in accordance with Rule 34(a) within the time limited by Article V of the August 21, 1954 Agreement, and the objection was not waived by the Carrier but on the contrary was raised by it at the first opportunity. Not being a valid claim it is not properly before us and must be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1962.

DISSENT OF LABOR MEMBERS TO AWARD NOS. 4027, 4028, 4029, 4030, 4031

Neither Rule 34 (a) nor Article V of the August 21, 1954 Agreement requires an employe to appeal from a superior to subordinate official of the carrier.

The majority holding "The claim was not presented in accordance with Rule 34 (a) within the time limited by Article V of the August 21, 1954 Agreement * * *" and "Not being a valid claim it is not properly before us and must be dismissed," here is in error.

It is not logical or reasonable to insist that an employe perform a vain, idle and absurd act of appealing downward from the decision of the District Master Mechanic to the Roundhouse Foreman and assume the subordinate foreman can determine an appeal of his superior.

Therefore we dissent from the majority decision in Awards No. 4027, 4028, 4029, 4030, 4031.

C. E. Bagwell

T. E. Losey

E. J. McDermott

Robert E. Stenzinger

James B. Zink

REFEREE'S REPLY TO LABOR MEMBERS DISSENT ON AWARDS 4027 - 4031

This referee heartily concurs in the statement that it is not logical or reasonable to require an employe to file a grievance with his immediate supervisor instead of appealing a discipline decision directly to the next successive higher officers. Many agreements prescribe such procedure in discipline cases, and the referee believes that the parties could properly adopt it here. But he cannot find any authority for this Board's adopting that procedure for them, under the guise of "interpreting" the present Agreement as so providing.