Award No. 4175
Docket No. 4087
2-CMStP&P-EW-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, the Carrier improperly suspended Electrician Ellery Waters effective May 8, 1960 and unjustly discharged him from the service effective May 16, 1960.

2. That accordingly, the Carrier be ordered to reinstate the aforenamed employe with all rights unimpaired and compensate him for all time lost account the aforesaid improper suspension and unjust discharge.

EMPLOYES' STATEMENT OF FACTS: Electrician Ellery Waters, hereinafter referred to as the claimant was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the carrier, at its Diesel House Shop in Milwaukee, Wisconsin, since Jan. 15, 1952.

Under date of May 8, 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., May 11, 1960, for a standard investigation to develop all facts in his alleged violation of Scheduled Rule 34, Paragraph F, and suspended the claimant from service pending this investigation. The claimant complied with this letter and appeared at the investigation on May 11, 1960. The carrier then found that they were charging the claimant with a violation of a rule that did not cover him. They held the investigation and read the notice, asked the claimant if he received such a notice, and he advised that he did. The carrier then stated that there was an error made and concluded the investigation.

The claimant on May 12, 1960, at 10:30 A. M. was handed another notice signed by District Master Mechanic A. W. Hallenberg, advising him to appear in the locomotive department general office at 10:00 A. M., May 11, 1960 for

As stated, it is the position of the carrier that the responsibility of Mr. Ellery Waters 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.

In order to present a complete picture of the procedural situation which we must here consider, it seems well to detail step by step the proceedings had following the incident which led to carrier's charges against Electrician Ellery Waters and which eventually resulted in a complete investigation held at 9:00 A. M. on May 16, 1960 before Mr. A. W. Hallenberg, District Master Mechanic.

Initially, as alleged by claimant and nowhere in the record mentioned or denied by carrier, a letter dated May 8, 1960 was directed by the District Master Mechanic to the claimant, which read in part as follows:

> "You are hereby requested to attend a Standard Investigation to be held on Wednesday, May 11, 1960 at 10:00 DST in the Locomotive Department General Office, Milwaukee, Wis., to develop all facts in regard to your alleged violation of Schedule Rule 34, Paragraph 'F' and you are suspended herewith pending this investigation. You may have an employe(s) of your choice to represent you if you so desire."

That investigation was commenced as scheduled, on the morning of May 11, 1960, with Mr. Hallenberg as presiding officer, but was abruptly concluded by him after a few moments with the statement:

> "There has been a typographical error in the notice as sent to Ellery Waters consequently the investigation as stated in the notice referred, is concluded as of now." (Emphasis ours.)

Not until the following day, May 12, 1960 at 10:30 A. M., as alleged by claimant and not denied by carrier, was another notice handed to Electrician Ellery Waters. This notice requested him to attend an investigation on May 11, 1960, the day preceding the receipt of the notice. This notice likewise was dated May 8, 1960. (Emphasis ours.)

The latter investigation was not commenced until May 12th and was "concluded" at 2:00 P. M. of that day. (A note of the transcript reporter explains that said hearing was postponed to May 16, 1960 at request of claimant's representatives.)

On May 16, 1960 the investigation was resumed and concluded and as a result thereof claimant was "dismissed from service" that same day. However, the next day, Mr. Hallenberg, the District Master Mechanic, wrote a letter to claimant saying:

"Feeling dismissal has served its purpose, I am arranging for your reinstatement on a leniency basis effective May 17, 1960, with service rights unimpaired."

Returning to a consideration of the second notice of investigation received by claimant, it is obvious that, although dated May 8, 1960, it was not prepared until at least some time after the first hearing was concluded on May 11th and the only evidence we have of when it was served upon claimant is his statement, as above, that he received it at 10:30 A. M. May 12th.

It is also clear from the record that the first letter, or notice, to claimant was ineffective for any purpose, calling as it did for an investigation to be held May 11, 1960 for an "alleged violation of Schedule Rule 34, Paragraph 'F'" (which appears to be a rule contained in the agreement of September 1, 1949 between this carrier and its Machinists and others, and not the agreement with its electrical workers et al, also dated September 1, 1949.) Thus claimant's suspension under the first notice was clearly erroneous and he should have timely filed and properly progressed his claim for compensation for the period May 8th through May 11th, or in other words until May 12th when he was suspended under the notice he received that morning. This the claimant did not do.

Rule 30 of the applicable agreement effective September 1, 1949, reads as follows:

"Employes subject to this agreement, who believe they have been unjustly dealt with, or when any of the provisions of this agreement have been violated, such cases shall be taken to the Foreman, General Foreman, Master Mechanic, Shop Superintendent, each in their respective order, by the duly authorized Committee or the General Chairman."

Instead of filing the claim with his foreman, as the rule requires, we find the first mention of it in a letter dated June 3, 1960, from Local Chairman W. E. Henning to Mr. A. Hallenberg, District Master Mechanic, which reads as follows:

"Please be advised that we cannot agree with your disposition of Mr. E. Waters' case.

"Unless you can agree to compensate Mr. E. Waters for all time lost and all rights unimpaired, you may consider this a notice of our disapproval and to inform you of our intention to process this case to the next highest officer."

Thereafter such claim is next mentioned in letter from Mr. Henning appealing the matter to Mr. F. A. Upton, Superintendent of Motive Power, dated July 15, 1960, where it is said:

"We are now appealing to you for lost time and rights unimpaired for E. Waters."

In this situation the carrier contends:

"The instant claim was never presented to the respective roundhouse foreman in the first instance and was never appealed to the

Master Mechanic in view of which the instant claim has not been properly handled in accordance with the provisions of Article V of the Agreement of August 21, 1954 and it is, therefore, barred."

Facts essentially similar to those here set forth have been considered heretofore in awards of this division, among them Numbers 3280 and 4027. For ready reference and to facilitate comparison, we will here repeat relevant portions of each.

In Award 3280, in sustaining the claim, 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. In that procedure the carrier by-passed 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. We think the claimant satisfied the purpose and intent of Article V. The claim for reinstatement and payment for time lost was seasonably and properly presented to the carrier and the carrier was required to disallow it in writing within 60 days from May 7, 1956 if it desired to do so."

In Award 4027 however, after discussing the fact situation in which the question arose in Award 3280 and quoting therefrom as above, we find the following exhaustive analysis of the procedural difficulty involved:

"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 (Rule 30 in the instant case) is an usurpation of power. (Hunter v. A.T.&S.F. Ry., C.C.A. 7, 171 Fed.

2nd 594). Consequently we do not feel justified in following the precedent of Award 3280 in this situation."

We agree with the soundness of the observation made in the Dissent of Labor Members to Awards 4027 - 4031, and in the Referee's reply thereto, 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. Never-the-less, we feel constrained to adhere to the ruling of the Board in Awards 4027 - 4031 and we therefore hold that this, not being a valid claim, is not properly before us and must be dismissed. (In this connection, see also Award 2240).

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1963.