Award No. 3274
Docket No. CL-3192

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA

SOUTHERN PACIFIC COMPANY—PACIFIC LINES

STATEMENT OF CLAIM: On behalf of Eugene Hurt, red cap, employed by the Southern Pacific Company, Pacific Lines, since July 7, 1923, who is discharged in violation of Rule 18 of an Agreement between the Southern Pacific Company, Pacific Lines and the United Transport Service Employes of America. This claim is for reinstatement of Eugene Hurt, seniority unimpaired and pay at the prescribed rate from date of discharge, December 31, 1944 until date of his reinstatement.

OPINION OF BOARD: Claimant had served as a Business Car Porter for a good many years prior to the origin of this dispute. Business Car Porters are not covered by the current Agreement. From December 2 to 9, 1944, he was assigned to perform certain duties on a private car for officials of the Carrier. The car was stocked with certain supplies from the commissary department, including a quantity of liquor, which was placed in charge of Claimant. On the return from the trip, it developed that a quantity of the liquor was unaccounted for. Claimant was requested to disclose the names of the persons who used the liquor or otherwise account for the shortage. This, he refused to do and left the inference that to do so would tend to incriminate some of the officials occupying the car on the trip. There is no direct charge made that the Claimant took the liquor. The record seems to indicate that the Carrier held him guilty of insubordination in failing to make an accounting. For this he was discharged, and Claimant has appealed to this Board.

The rules of the current Agreement applicable to the present dispute are:

> "Rule 18 (a). An employe disciplined or dismissed, or who considers himself otherwise unjustly treated, shall have a fair and impartial hearing, at which he may be represented by an officer of the Organization or an employe of his choice, who is of the same seniority district and grade of service, provided written request is presented to his immediate superior within ten (10) days of the date of advice of discipline or dismissal, or the date of alleged unjust treatment, * * *"
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> "Appendix (d). * * * Business Car Porters shall establish Red Cap Station Porter seniority as of the first date service is performed as Porter on business car having headquarters at Oakland Pier and shall continue to accumulate such seniority while so employed."
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> "Rule 13 (b-1). In event he loses his Chair Car Porter or Business Car Porter position through no fault of his own, he may

displace any junior employe who has acquired a position under bid during his absence, * * *."

In accordance with Section (d) of the Appendix, Claimant was shown on the Red Cap Porters seniority roster with a seniority date of July 7, 1923, It is clear that insofar as his position of Business Car Porter was concerned, it not being within the Agreement, that his dismissal was effective in severing his employe relation to that position. The question for determination is whether it was effective in terminating his seniority rights as a Red Cap Porter under the Agreement.

The Carrier alleges that Claimant was orally dismissed from the service of the Carrier on January 1, 1945. It is the contention of the Carrier that Claimant was not entitled to a hearing under Rule 18 for the reason that he, not having lost his Business Car Porter position "through no fault of his own" as provided in Rule 13 (b-1), no displacement rights accrue to him under that rule. This is on the theory that he has no rights remaining under the Agreement and consequently none of the Agreement rules, including the investigation rule, apply. In this the Carrier is in error. Whether an employe lost his position "through no fault of his own" under Rule 13 (b-1) can well afford a basis for a justifiable dispute. In a similar case in principle, we said:

> "We do not question that an employe may resign his position by action or conduct indicating clearly an intent to do so. But where the Carrier concludes from conflicting evidence that any employe did in fact resign, and the employe feels himself unjustly treated by such decision, he is entitled to an investigation when the request therefor is timely made. Otherwise the Carrier by the simple expedient of finding that the employe resigned rather than was discharged, even though the evidence thereon was in hopeless conflict or preponderated in favor of the employe, could by its unilateral action remove an employe from the protection of the collective Agreement. The Carrier cannot compel an employe to accept its conclusion on conflicting evidence that employe terminated the employer-employe relationship by resignation and escape the effect of the investigation rule if the employe feels he has been thereby unjustly treated." See Award 2941.

Likewise in the present case, the employe is not compelled to accept the Carrier's conclusion that Claimant did not lose his position as Business Car Porter "through no fault of his own", and thus have his rights under the Red Cap Porters' Agreement terminated without reference to the investigation rule thereof. This holding requires that the Carrier's motion to dismiss be overruled.

It will be observed that Rule 18 provides that an employe who has been dismissed shall have a fair and impartial hearing providing written request therefore is made within ten days from his dismissal. While the elements of a fair trial usually require the making of a statement of facts showing the precise violation with which the employe is charged before the investigation (See Principle 8, Decision No. 119, Decisions of United States Labor Board, a contract provision providing for a fair and impartial hearing after the assessment of discipline, is a substantial compliance with that principle. At least, we are not wiling to say that the general principle thus announced can have the effect of overruling or changing the plain language of the collective agreement.

The record shows that Claimant was dismissed from the service on December 31, 1944. It is evident that Claimant did not understand and the Carrier did not make it clear that this dismissal had the effect of terminating his employe relationship under the Red Cap Porters' Agreement as well as that of Business Car Porter. On January 26, 1945, the Carrier by letter made it clear that Claimant was dismissed from the service of the Carrier and all his rights to serve the Carrier terminated. After receiving this information, Claimant slept on his rights and failed to give notice of appeal until

February 14, 1945. Assuming that Claimant was first properly advised of his dismissal from service on January 26, 1945, Claimant failed to give notice of appeal within ten days thereafter as plainly required by Rule 18. We must hold that Claimant's appeal was out of time and that he is deemed to have waived his right of appeal by failing to give notice thereof within ten days as required by that rule.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, find and holds:

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1946.