Award Number 4607

Docket Number MW-4648

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Dudley E. Whiting, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

## MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That Section Foreman John W. Broadhead, Atoka, Oklahoma, was unfairly and improperly dismissed from the Carrier's service on July 20, 1948;

(2) That the claimant be returned to his position as Section Foreman at Atoka, Oklahoma, with seniority rights and vacation rights unimpaired and that he be paid for all time lost as a result of the Carrier's unfair and improper action.

EMPLOYES' STATEMENT OF FACTS: About mid-afternoon of July 9, 1948, a Missouri-Kansas-Texas Railroad freight train known as Second 72 derailed on Section No. 281 near mile post 609, Atoka, Oklahoma. This derailment caused considerable damage to freight cars as well as to the Carrier's right-of-way, tieing up traffic in both directions for many hours.

Section Foreman John W. Broadhead was in charge of Section No. 281 at the time of this accident. Immediately following the derailment Section Foreman Broadhead worked with his crew, assisting in clearing the wreckage and repairing the tracks and roadbed in order to restore the track to operating condition.

Subsequently, however, Section Foreman Broadhead was notified by wire from his Roadmaster as follows:

"MA WX McALESTER 15

J W BROADHEAD
ATOKA

YOU ARE RELIEVED FROM SERVICE AS OF 5pm DATE F M LOWE WILL RELIEVE YOU

K B WENDT"

or minimize in any way the charge against an erring employe and the investigation to any particular rule or portion of any particular rule or rules, or it would be necessary to prefer separate charges and hold separate investigations for each and every individual and particular rule or portion of a rule the employe is considered as having violated. No such handling was ever intended or contemplated by the rule and no such handling has ever been given, or heretofore been contended should have been given, under this and similar rule in effect prior thereto. Such handling would retard and prolong investigations unnecessarily, and would not in all cases accomplish the purpose of investigations. No legitimate objection can be raised to charging an employe with violation of rules consisting of more than one part, or with violation of more than one rule, even though none of the rules or only part of the rules may have been violated. This is not unusual but occurs quite often and where employes are cleared by the investigation of the charges preferred against them they are protected against loss of employment and earnings. There is nothing unfair or improper in preferring charges against employes and holding investigations in this manner, which, in the opinion of the Carrier, is in accordance with the provisions of the agreement and not in violation thereof as contended by representative of the claimant in this case.

Attention of the Division is also invited to the fact as shown by the investigation record, Carrier's Exhibit "A", attached, that no exceptions to the charges against Mr. Broadhead were taken by his representative when the investigation began at 9:00 AM, July 19, 1948, but he did request and the tigation was resumed July 20, 1948, exceptions were then taken to the charges employe witnesses desired by the accused not being present. When the investigation was resumed July 20, 1948, exceptions were then taken to the charges preferred against Mr. Broadhead. There certainly was no need for postponing the investigation, as desired and requested by representative of the employe, and attendance of employe witnesses, if they did not consider the charges proper and did not intend to proceed with the investigation. The actions of the employe and his representative, both with respect to attendance of employe witnesses and the charges against Mr. Broadhead, speak for themselves.

The facts and circumstances, therefore, do not justify or support the contention of the Petitioner that Mr. Broadhead was unfairly and improperly dismissed from the Carrier's service on July 20, 1948, but, on the contrary, the action of the Carrier is fully justified considering the seriousness of this accident and the failure and refusal of Mr. Broadhead and his representative to proceed with the investigation as contemplated by the agreement.

The claim should, therefore, be denied and the Carrier requests the award of the Division be rendered accordingly.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of Petitioner's claim, original submission and any and all subsequent pleadings.

Exhibits not reproduced.

**OPINION OF BOARD:** This case involves Rule 1 of Article 21 of the Agreement between the parties pertaining to discipline or dismissal of employes with 12 months or more of service. It provides in part that "prior to the hearing, the individual will be notified in writing of the precise charge against him." In this case the claimant was notified of a hearing in which he would "be charged with violation of Rules Q, 37, 38, 66, 111 and 112" in the book of rules for the Maintenance of Way and Structures. When the hearing opened claimant through his representative requested a more specific statement of the charges and when such request was refused, the claimant and his representative refused to take any part in the hearing.

We think that the requirement of notification of the precise charge against an employe requires an exact specification of the action or non-action which

is alleged to constitute a dereliction of duty. A charge of violation of the general rules specifying employes' duties in the performance of their work is not a precise charge.

Since an employe is, under the rule, entitled to notice of the precise charge against him prior to the hearing, such notice is a condition precedent and he is not obligated to attend or proceed with the hearing until such condition has been met. Particularly so, as in this case, where proper objection to the charge is made at or prior to the opening of the hearing.

**FINDINGS:** The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier violated the Agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of October, 1949.

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

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## INTERPRETATION NO. 1 TO AWARD NO. 4607

## DOCKET MW-4648

**NAME OF ORGANIZATION:** Brotherhood of Maintenance of Way Employes

**NAME OF CARRIER:** Missouri-Kansas-Texas Railroad Company
Missouri-Kansas-Texas Railroad Company of Texas

Upon application of the representatives of the employes involved in the the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

This request for interpretation presents two issues, to-wit:

(1) Whether the Carrier may deduct earnings of the Claimant in other work in making payment for time lost pursuant to our award herein, and

(2) Whether Claimant is entitled to pay in lieu of a vacation for the period of time lost.

The Carrier relies on Rule 6 of Article 21 of the effective agreement between the parties to sustain its deduction of Claimant's earnings in other employment. That rule provides:

> "If the result of the investigation is not such as to sustain the discipline or dismissal, the records shall be corrected accordingly; and, if the employe has been removed from the service, he shall be restored to his former position or status; if, in the meantime, former position is abolished, he may exercise his seniority; and he will be paid what he would have earned had he not been removed from service; less what he may have been paid for his services in other work, or through unemployment compensation."

The Organization contends that such rule applies only when an investigation has been held, the results of which do not sustain the charges, and that herein no investigation was ever held so that rule is not applicable.

We think the investigation referred to in Rule 6 of Article 21 is synonymous with the hearing provided for in discipline and dismissal cases under Rule 1 of that Article of the Agreement between the parties. Our Award herein held that under the provisions of such Rule 1 it is a condition precedent to the conduct of a hearing that the employe be notified in writing of the precise charge against him and that the notice to the Claimant did not specify a precise charge against him. Failure to meet the condition precedent made the noticed hearing a nullity.

Thus it follows that the basis for the reinstatement of the claimant by our Award was the failure to accord him the fair and impartial hearing required by such Rule 1 before he could be dismissed from service. The plain and unambiguous language of Rule 6, referred to above, makes it

inapplicable to this situation. There can be no result of an investigation if none was held.

In the submission of the case to this Board there was no claim by the Carrier that earnings in other work should be deducted from the claim if granted. So, since the automatic deduction provided for by Rule 6 is not applicable, our Award sustaining the claim for all time lost does not permit of such deduction and we may not under the guise of interpretation rehear the case and alter the Award under consideration of matters not before the Board when the award was rendered.

The claim of the Organization that the Claimant should also receive pay in lieu of vacation for the time he was withheld from service raises an issue not presented in the original submission of this case and not before us when the award was rendered herein. The fact that the award sustaining the claim restored the claimant to his position "with seniority rights and vacation rights unimpaired," does not mean that we thereby passed upon or determined what those rights were. Both seniority rights and vacation rights are fixed by agreements of the parties. If they disagree as to what those rights are after Claimant's restoration to his rights, that is a new dispute over contractual provisions and not something adjudicated by the award of restoration. Section 14 of the Vacation Agreement establishes a procedure for the resolution of disputes as to the interpretation or applictaion of that agreement.

We may not under the guise of interpretation of an award pass upon a new dispute which has not been handled in accordance with the procedures established by agreement.

Referee Dudley E. Whiting, who sat with the Division as a member when Award No. 4607 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of June, 1950.

## DISSENT TO INTERPRETATION NO. 1 TO AWARD NO. 4607, DOCKET MW-4658, SERIAL NO. 91

This interpretation is based on words used in Article 21, Rule 6. This was a discipline case brought under Article 21, the discipline rule, and whether under Award 4607 the dismissal was improper because of a technical violation of Article 21 or because the charges were not sustained, the result was the claimant was dismissed and the Award held his dismissal was improper. To hold that because there was a flaw in the proceedings, under the discipline rule, the claimant is entitled to greater compensation than he would have received had he been declared not guilty, clearly was never contemplated by the parties. Article 21, Rule 6, recognizing the propriety of deduction of pay for services in other work and being in accord with well known rules of law not contravened by any other agreement between the parties, required an interpretation sustaining the contention of the Carrier.

(s) A. H. Jones
(s) C. C. Cook
(s) R. H. Allison
(s) C. P. Dugan
(s) J. E. Kemp