Award No. 4781

Docket No. MW-4693

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

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 Laborer Jimmerson Johnson was unfairly and improperly dismissed from the service of the Carrier on September 7, 1948;

(2) That the Claimant be returned to his position as section laborer in Section Crew 256, Canadian, Oklahoma, with seniority rights and vacation rights unimpaired and be paid for all time lost on account of the Carrier's violation of the Agreement.

OPINION OF BOARD: Claimant, for several years a section laborer at Canadian, Oklahoma, was absent from his employment on Monday, August 30, 1948, without permission. By letter from his foreman, dated that day, and received the day following, he was notified of his suspension "account of violation of Rule I" and of the time and place of investigation to be held three days later, at Canadian. Just prior to the time set for hearing, Claimant's General Chairman, who had come to Canadian to represent him, was handed a letter addressed to Claimant, advising that the investigation had been postponed until 9:00 A.M. on September 7th at the office of the District Engineer at Muskogee, and therein the charge was again stated as violation of General Rule I. On September 6th, the General Chairman wrote the Superintendent, complaining at the ex parte postponement after employe and his representative had appeared for the hearing on the date set, expressing opinion that thereby "the spirit, meaning and intent of the contract was not complied with by the Carrier and accordingly because of your failure to have a representative there to proceed with the investigation * * * it is our opinion and position that you failed in proving the charge * * *. Therefore, we are respectfully requesting that Johnson be returned to service and paid for the time lost."

On September 7th, at the hour set, the Section Foreman and District Engineer designated to conduct the investigation made record of their appearance and notice to Claimant and of his failure to appear, and he was thereupon given written notice by the Superintendent, with recital of his failure to appear or to ask for continuance, "that he was therefore assumed to be guilty and was dismissed from the service of Carrier."

As ground for reinstatement, the Committee states in its submission that "The position taken by General Chairman Jones at that time and reiterated

in his letter to the Carrier under date of September 6, 1948 is the position taken by the System Committee in progressing this claim."

We think this contention cannot be sustained. There is no rule shown requiring that hearing be had on the day first set or that continuance can be had only by mutual agreement or that advance notice of continuance be given to the General Chairman. True, an employe is entitled to a fair hearing, and arbitrary continuance without advance notice resulting in substantial and unnecessary expense and loss of time to an employe or his representative would be potent evidence of unfairness. But here explanation is given of reason for the continuance and of attempt to notify Claimant, and no request was made for change of time or place in Claimant's behalf.

The hearing having been properly continued to September 7th, Claimant was obligated there and then to present his defense. It is urged in his behalf that he was present in Muskogee and seen by Carrier's representatives and spoken to by them, but was not invited to sit in at the hearing, and, being colored, could not presume to enter the Engineer's office without invitation. This evidence, standing alone, might well be convincing of unfairness, but we have also the facts that Claimant was represented by his General Chairman; that this Chairman was not present; that he had written, on the day before, the letter from which we have quoted, challenging the right to further hearing and standing on the failure to present evidence at Canadian as constituting failure to prove the charge. Further, this contention, with its supporting data, was not raised at any time in handling the case with the Carrier and cannot now be considered.

It is urged that Claimant's failure to report for work was involuntary for the reason that he was held in jail. Such defense should have been presented at the hearing and urged in handling the claim with the Carrier.

Finally, it is urged that Carrier at no time notified Claimant of the precise charge against him, required by the rules to be done "prior to the hearing". The Carrier insists that no such contention was made in handling the claim and it is not now properly before the Board. We think the data in support of Employes' contention, to-wit: the notice of hearing and the applicable rule, are affirmatively shown to have been presented to the Carrier and made a part of the ultimate question in dispute, so that the question is before us, unless that defense has been waived. The purpose of the rule patently was not to provide a technical loophole for escape from deserved discipline, but to enable the employe to prepare his defense. The rule being for the benefit of the employe, he may waive it. Such waiver may be explicit or by implication. Where in an apparent attempt to follow the rule, the Carrier gives the employe notice of the charge prior to the hearing, and the employe is able to understand his rights or is adequately represented, and is in fact aware of the basis of the charge, we think he is obligated promptly to request more precise statement of the charge if deemed uncertain; otherwise, the right to more precise notice is waived and cannot for the first time be raised before the Board.

Here Claimant was adequately represented by his General Chairman. He knew of his absence from duty and of the statement of the charge in the notice, and raised no question of its sufficiency before or at the hearing or in progressing the claim. We think it should not now be considered.

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

That the parties 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 claim for violation, if any, has been waived.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of March, 1950.