Award No. 9832
Docket No. CL-11801

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Agreement when it failed and refused to afford Employe John Dieringer an appeal hearing following his dismissal from Carrier service on March 7, 1959.

2. Carrier shall now be required to reinstate Employe John Dieringer to his caller position at Milwaukee, Wisconsin with all rights unimpaired and compensate him for all loss sustained from March 7, 1959 until he is returned to work.

OPINION OF BOARD: Claimant John Dieringer was the regularly assigned occupant of Road Caller Position No. 82 at Muskego Yards, Milwaukee, Wisconsin, with a seniority date of February 16, 1955. Charges were preferred against him on February 27, 1959, alleging failure to properly perform the duties of his position. Following an investigation held on March 4, 1959, he was dismissed from Carrier's service. A request for an appeal hearing, as provided in Rule 22 (c), was made on March 12, 1959. This request was granted and the hearing held on March 24, 1959. At this hearing the Organization contended that there were various discrepancies in the record of the investigation hearing and the charges made there. General Superintendent Shea promised to give consideration to the several matters called to his attention. But on March 27, 1959, he simply announced his decision to support the original dismissal action of Superintendent Dombrowski. In this no specific response was made to the Organization's objections to the way in which Superintendent Dombrowski had disposed of the case in the first step. On March 31st a request was made that Mr. S. W. Amour, Assistant Vice President in charge of Personnel, who is "the highest officer designated" by this Carrier to hear appeals, for a hearing on the decision of Superintendent Shea. On July 2, 1959, Mr. Amour wrote to the General Chairman. He declined the request, stating that he was not an appeal officer in "discipline cases".

The Organization contends that Claimant has been denied due process in that he was not given a full and fair hearing at the several steps of the grievance procedure as authorized in the parties' agreements. Specifically, our attention is called to Rule 22, paragraphs (c) and (d) of the 1949 Agreement.

> "(c) An employe dissatisfied with the decision **may have a fair and impartial hearing before the next higher officer,** at which such witnesses as are necessary and duly accredited representatives, as specified in Rule 52, may present the case provided written request is made to such officer and a copy furnished the officer whose decision is appealed within ten (10) days from date of advice of decision. The hearing shall be held within ten (10) days from date of appeal and decision rendered within ten (10) days after completion of hearing. Copy of evidence taken in writing at the investigation or hearing will be furnished to the employe and his representative on request.
>
> "(d) If an appeal is taken from **any hearing, it must be filed with the next higher official** and a copy furnished the official whose decision is appealed within thirty (30) days after the date of the decision. A hearing on the appeal will be held within thirty (30) days from the date filed." (Emphasis added.)

It is claimed that the aggrieved employe did not get "a fair and impartial hearing before the next higher officer", as required by paragraph (c), in that General Superintendent Shea dismissed the matter by simply backing up his subordinate without any stated reasons, and without any answer to the several matters brought to his attention by the Organization. Further Mr. S. W. Amour, who has been designated by the Carrier as the highest officer authorized to receive the last appeal, simply refused to go into the merits of the case.

It is the Carrier's position that for a number of years the Superintendent has been the highest designated officer to hear appeals in discipline cases. And furthermore, it is the Carrier's prerogative to name the "highest designated officer" to handle grievances. It is not a matter for the Organization to determine. And we are told that this action is a move on the part of the Organization to deprive the Carrier of this important prerogative.

In effect, what the Carrier is saying is that in Milwaukee all matters of discipline are in the hands of Superintendent Dombrowski. The entire discipline procedure practically begins with him and ends with him. Before him the charges are preferred. Before him the investigation is held. And from him comes the final decision, so far as an employe's seniority and service with the Carrier is concerned.

We cannot accept this as proper compliance with the procedural steps set forth in Rule 22. The language of the parties' Agreement provides for two appeal steps. It assures the employe who is being disciplined "a fair and impartial hearing before the next higher officer". The Carrier cannot unilaterally deny the employe independent consideration and decision at each successive appellate step without vitiating the whole purpose and intent of Rule 22. (Award 7021.)

The perfunctory treatment given to this case by General Superintendent Shea, and the flat refusal of Assistant to the Vice President S. W. Amour to

consider the matter on the merits, leaves us no alternative but to conclude that Claimant's rights under the Agreement have been violated. The claim must be sustained.

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;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 Claimant was not accorded a fair and impartial hearing within the requirements of Rule 22 of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 15th day of February, 1961.

DISSENT TO AWARD NUMBER 9832, DOCKET NUMBER CL-11801

Section 2, Second, of the Railway Labor Act provides for the handling of claims and grievances by those representatives of the parties who are designated and authorized to confer. Section 3, First (i) provides for handling in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes. Rule 22, construed in light of the Act, simply specifies the time within which appeals, if made, must be handled with designated and authorized officers of the Carrier.

Considering the broad scope of the Agreement involved, covering positions in many different Departments of the Carrier, variations necessarily exist in appeal procedures of Departments according to officers specifically designated and authorized therein to confer. Petitioner was on notice that the Assistant to Vice President was not such an officer insofar as discipline cases are concerned.

Considering the broad scope of the Agreement involved, covering positions in many different Departments of the Carrier, variations necessarily exist in appeal procedures of Departments according to officers specifically designated and authorized therein to confer. Petitioner was on notice that the Assistant to Vice President was not such an officer insofar as discipline cases are concerned.

An appeal hearing, as provided in Rule 22 (c), having been held on March 24, 1959, before the General Superintendent, the discipline procedure

in this case obviously did not begin and end with the Superintendent. Furthermore, the conclusion that perfunctory treatment was given to this case by General Superintendent Shea is unwarranted in light of the decision expressed in his letter of March 27, 1959, quoted in Carrier's Statement of Facts, and in light of the absence of probative evidence so showing.

Claimant was a repeat offender and admittedly guilty of the charge. When appeal on merit basis on the property failed, the instant case was thereafter pursued, not on the basis of merit, but on the technicality that an officer not designated and authorized to confer on discipline cases must nevertheless do so. In sustaining that contention in order to restore an errant employe to service with pay for time lost, Award 9832 is grossly erroneous.

For these and other reasons, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBER'S DISSENT TO AWARD NO. 9832, DOCKET NO. CL-11801

The Dissenters, in their usual manner, attempt to becloud the issue with incompetent, irrelevant and immaterial matters relating to provisions of the Railway Labor Act and false assumptions.

The Railway Labor Act leaves to the parties the authority to designate their own representatives and provide how and to whom grievances shall be presented and appealed "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes". Section 3, First (j). The parties to the subject agreement have agreed in Rule 22 (c) and (d) for an appeal hearing before the next two higher officers.

The appeal hearing under Rule 22 (c) shall be held within ten (10) days from date of appeal and "copy of evidence taken in writing at the investigation or hearing will be furnished to the employe and his representative on request." The appeal hearing under this provision was held before the General Superintendent, however, it was a perfunctory hearing without any evidence having been taken in writing. Consequently, General Superintendent Shea's treatment of the appeal under Rule 22(c) was not only perfunctory, but also arbitrary, capricious and in direct violation of Rule 22 (c).

In view of the requirements of Rule 22 (d), which provides for a further appeal from the hearing before General Superintendent Shea held under Rule 22 (c), such additional appeal be held within thirty (30) days from date appeal is made, it is clear that Shea could not be considered the "next higher official" to whom such an appeal could be made. Carrier, having designated Vice President Amour as the "chief operating officer" to handle such disputes, could not deny claimant's substantive rights to an appeal to such officer under the clear mandate of Rule 22(d). Mr. Amour's flat refusal to entertain claimant's appeal was arbitrary and capricious.

The penultimate paragraph of the Dissent is based entirely upon conjecture and assumption, in addition to being irrelevant to the issue confronting the Board. No attempt was made by the Carrier to prove its charges at the investigation. The transcript reveals that the hearing was conducted by Carrier's Superintendent and Trainmaster. The Trainmaster, apparently the complaining witness, offered no evidence in support of Carrier's charge, which did not include the charge of "repeat offender". Neither is there any evidence of record sustaining the allegation that Claimant was "admittedly guilty", as asserted by the Dissenters.

No decision of guilt could properly be made until Claimant's rights of appeal had been granted in accordance with Rule 22. Consequently, the Dissenters' have again prematurely jumped to false conclusions upon a showing of facts to the contrary. That an employe shall not be judged guilty until the entire procedures provided in Rule 22 have been fully complied with, is evidenced by Rule 22(f), where the contracting parties agreed that:

> "If the final decision decrees that charges against the employe were not sustained the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost less any amount earned in other employment."

Award 9832 properly disposed of the pertinent issue before the Board by holding that Claimant's substantive rights under Rule 22(c) and (d) were abrogated.

/s/ J. B. Haines

J. B. Haines

Labor Member