Award No. 15184
Docket No. TD-16036

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Ft. Worth and Denver Railway Company (hereinafter referred to as "the Carrier") violated the effective schedule agreement between the parties, Rule 28 thereof in particular, by its action in dismissing Train Dispatcher Zeb Ellis, Jr., from the Carrier's service.

(b) The Carrier shall now be required to reinstate the individual claimant to service with all rights unimpaired, clear his employment record of the charge which provided basis for Carrier's action and compensate Claimant Ellis for loss of compensation from date of dismissal until restored to service.

OPINION OF BOARD: This is a dismissal case wherein Zeb Ellis, Jr., Claimant, entered Carrier's service as a clerk in 1941, became a telegrapher in 1942, was promoted to train dispatcher in 1948 and has served in that capacity until by letter, under date of June 21, 1965, he was notified to attend an investigation. The date of the investigation was subsequently changed at request of the General Chairman and was held in Superintendent H. E. Moyer's office on July 8, 1965. Transcript of proceedings is attached to the record. On July 21, 1965, Claimant was notified that effective that date, he was dismissed from service for violation of Rule G while on duty as train dispatcher on June 19, 1965. Superintendent Moyer conducted the investigation for Carrier and Claimant was represented by the Vice President and General Chairman of the American Train Dispatchers Association.

Carrier moves for the dismissal of the claim on two grounds: (1) that Claimant failed to perfect his appeal in the usual manner on the property as set forth in Rules 28 and 30 of the Agreement; and (2) that the basis for appeal did not contain a request for compensation and must be considered as being handled on the property on a leniency basis.

Pertinent parts of Rules 28 and 30 are as follows:

"RULE 28. DISCIPLINE

(a) Train dispatchers will not be demoted or disciplined or dismissed without a hearing as provided for by the following paragraphs of this rule:

(b) When charged with, or involved in, an offense likely to result in his demotion or disciplinary action, he will be advised in writing of the specific charge or complaint within thirty days of the date of such offense, and hearing shall be held by the Superintendent or his representative within ten days from the date of such notice. He shall have the right to be represented by a train dispatcher of his choice and/or an official of the American Train Dispatchers Association. He shall be given a reasonable time to secure the presence of necessary witnesses. Decision will be rendered within thirty days from the date of close of hearing.

(c) If decision is against the train dispatcher, written appeal may be made to the highest officer designated by the Carrier to consider appeals; copy of such appeal to be furnished the officer whose decision is so appealed. Time limits in which appeals may be made under this paragraph are the same as contained in the second paragraph of Rule 30."

"RULE 30. TIME LIMITATION

(a) Claims and grievances made under the terms of this agreement must be filed in writing within sixty days of the grievance or alleged violation of the agreement or otherwise such grievance or claims will not be recognized by either the Carrier or Train Dispatchers.

(b) Any claim or grievance filed under the provisions of the foregoing paragraph and not satisfactorily adjusted between the General Chairman and Superintendent may be appealed to the highest officer of the Carrier designated to represent it in labor relations, providing such appeal is made within ninety days of the decision of the Superintendent; and if still not satisfactorily adjusted may be appealed to the National Railroad Adjustment Board under the provisions of the Railway Labor Act, provided arrangements are made to so appeal same within six months from the decision of the highest officer of the Carrier as hereinabove provided. Failure to appeal cases in accordance with this paragraph will constitute a withdrawal of claim or grievance."

We are constrained to find Awards cited by Carrier as being directly in point with the request for dismissal upon the question of procedure of appeal. The language or words used in those cited awards on appeal procedure are not ambiguous as in the case of Rule 28. It is elementary we must give the words, so used, their usual and customary meaning without resort to strained construction or interpretation resulting in effect of rewriting the parties' agreements. Though the rules of appeal and the arguments advanced are similar to our case, we find in the cited awards that key words are explicit and clear as to the steps of procedure. Award 2765 — ". . . he will have the right of appeal, **in succession**, up to . . ."; Award 8297 — ". . . **it must be filed** with the **next** higher official . . ."; Award 8676 — ". . . **will be** submitted in writing **direct to the supervisor** . . ." (Emphasis ours.)

Rule 28 (c) is ambiguous in that it does not spell out explicit and clear procedural steps of appeal with such words as "in succession" or "must be filed with the next" or submitted "direct to" the Superintendent of Carrier.

Therefore, from the language of Rule 28 (c) we find that the Claimant did appeal within the provisions of the agreement as ". . . written appeal may be made to the highest officer designated by the Carrier to consider appeals; copy of such appeal to be furnished the officer whose decision is so appealed." (Emphasis ours.) Although the initial appeal under Rule 28 (c) of the Agreement should possibly have been made to the Superintendent, this alleged procedural deficiency was waived by the Carrier when the appeal was accepted and considered by highest officer, Assistant to General Manager (Labor Relations) designated by the Carrier to consider appeals of disciplinary matters. Moreover, the Superintendent was furnished a copy of employe's intention to appeal his decision as he presided at the investigation of Claimant. We cannot either make, amend, or nullify a contract as this will be left to the parties at the conference table to rewrite any explicit, mandatory steps for appeal procedure within Rule 28 (c).

We further find that the Claim, as framed on the Employes' Submission, is in substance the same as that presented and handled on the property. "Substance, not form or wording, governs." Quoted from Award 14246 (Dorsey). The subject matter and the basis for claim was appealed within the time limit of Rule 30 and is properly before this Board. Carrier has not been prejudiced thereby.

In considering the merits of the claim, we find that the evidence of the record and the transcript of the hearing, clearly establishes that Claimant was guilty of violating Rule G which prohibits the use of intoxicants or their possession while on duty. The Board is quite aware that the charge here involved is very serious in nature resulting in severe disciplinary action.

The Organization contends that the substantiality of the evidence represents only the testimony of Carrier's one witness, whose statements are uncorroborated. We disagree. The witness testimony was corroborated by the Claimant's own testimony and admission as to being in possession of whiskey. This in itself is sufficient proof under Rule G to support Carrier's decision for dismissal.

Further, the Organization asserts that Claimant's employment record was not reviewed by the Carrier at the hearing, nor was advice given him or his representative that it would be. It is well settled by this Board that in affixing the degree of discipline, Carrier is privileged to take into consideration the employe's prior service record. This evaluation does not have to take place or be introduced into the hearing proceedings but is used as a yardstick, after Claimant is found guilty of the charge, to assess discipline. Then and only then does the past service record influence the punishment appropriate to the violation of Carrier's operating rules.

As set forth above in the opinion, the Board finds no valid reason for disturbing the discipline imposed, there being no showing that Carrier acted in an arbitrary or unjust manner; nor can we substitute our judgment for Carrier.

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 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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1967.

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