



Award No. 15647
Docket No. TE-16562

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Coast Lines)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Atchison, Topeka and Santa Fe Railway, that:

1. Carrier violated the Agreement between the parties by imposing the severe, harsh and arbitrary discipline of dismissal from its service upon Towerman J. D. Donley, effective January 26, 1966, alleged violation of Rule B and 752(A), Carrier's Operating Department Book of Rules.

2. Carrier indulged in procedural error when it failed to notify the Employees of the assessment of discipline within the prescribed time limit set forth in the General Agreement.

3. Carrier shall now reinstate Claimant Donley to his position at Stockton Tower with seniority, vacation and all other rights unimpaired, expunge his personal record of the charges against him, and compensate the Claimant for a day's pay each and every day held out of service, January 26, 1966, forward.

OPINION OF BOARD: After having carefully reviewed the record in this case, and having given full consideration to the argumentation presented by and in behalf of the respective parties, it is our conclusion that the complained-of action on the part of the Carrier was not arbitrary, capricious, or unjust.

In the initial phase of the handling of the alleged grievance, the Carrier official at that level notified the individual grievant of the results of the investigation hearing within the twenty-day period of time required by the Agreement, but failed to notify the representative of the employee (in this case, the General Chairman) within the required twenty-day time period established by the provisions of Section 3 of Article V of the current Agreement. This failure is not condoned; however, two important circumstances must be considered in this regard: (1) expeditious action was taken to correct this error, and (2) when the General Chairman became aware of this matter, he wrote the Superintendent that he had not been notified of the results of the hearing and asked for information: "Will you kindly advise." Carrier contends that this inquiry constituted a waiver of the technical violation.

Whether a waiver thus cured the technical error referred to above is a difficult issue to resolve; however, we conclude that the point of the Carrier is well taken, and must be sustained. If either of the parties plans to base its case on a procedural defect, such a position should be established promptly and unequivocally.

A thorough search of the record reveals that the claimant was not deprived of the benefit of due process of law. On the contrary, he was well and vigorously represented by the Union.

Accordingly, for the reasons stated above, this Claim must be denied in its entirety.

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 Employees involved in this dispute are respectively Carrier and Employees 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 in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of June 1967.

DISSENT TO AWARD 15647, DOCKET TE-16562

I cannot agree with the finding of the majority that the letter of the General Chairman referred to can properly be construed as a waiver of the clear violation of the notification provisions by the Carrier. I take a dim view, also, of the majority's denoting this clear violation as a "technical violation." The rule plainly provides that the accused employee's representative will be given a copy of the notice. Carrier did not comply with that provision. The rule, therefore, was violated — no modifying adjectives can change that fact.

Waiver is a matter of intent. It refers to the intentional relinquishment of a known right. The General Chairman knew his right to be given a copy of the notice. His letter has no element of intent to relinquish that right, and was not so treated by the Carrier. The contrary finding of the majority has no support, and I dissent.

J. W. Whitehouse
Labor Member

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.