Award No. 16172
Docket No. CL-16986

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

THE WASHINGTON TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the *Brotherhood* (GL-6273) that:

1. The Carrier violated the Clerks' Agreement when on July 8, 1966, it summarily dismissed Louis D. Stewart, Jr., Mail and Baggage Handler, Washington, D. C., from its service.

2. Louis D. Stewart, Jr., shall now be reinstated to the service of the Carrier with seniority and all other rights unimpaired.

3. Louis D. Stewart, Jr., shall now be compensated for all wage and other losses sustained account this summary dismissal.

4. Louis D. Stewart, Jr.'s record shall be cleared of all alleged charges or allegations which may have been recorded thereon as the result of the alleged violation named herein.

OPINION OF BOARD: This is a discipline case.

The Claimant was employed by the Carrier from October 8, 1962 up to July 8, 1966, in its Mail and Baggage Department. On June 14, 1966, he was removed from the service of the Carrier.

Under date of June 21, 1966, a letter, in the form of a notice, was forwarded to the Claimant, advising him that he was being charged with "Tampering with and misdirecting U. S. Mail while employed by the Washington Terminal Company."

The letter and/or notice also advised the Claimant that a hearing, on the charge, would be held at the office of the Superintendent of Mail and Baggage, Room 203, Union Station, at 10:00 A. M., E. S. T. on Tuesday, July 5th, 1966; he was advised to be present and that he could be accompanied by any witnesses selected by him and also by a member of his Union Committee, as provided by the terms of the Agreement between the parties.

The hearing was held as scheduled, before Mr. F. W. Kane, the Superintendent of Mail and Baggage. The Claimant was present at the hearing and was represented at the hearing by two representatives of the Organization.

Under date of July 8, 1966, Mr. Frank W. Kane, the Superintendent of Mail and Baggage and the Hearing Officer addressed a letter to Claimant advising him that effective July 8, 1966, he was discharged from the service of the Carrier.

An appeal, on behalf of the Claimant, was duly made to the highest officer of the Carrier to whom an apepal could be made, Mr. C. W. Shaw, Jr., Manager. A conference was requested and held on July 27, 1966. Under date of July 29, 1966, Mr. Shaw, by letter dated that day, sustained the decision of the Hearing Officer.

The Ex Parte submission of the Claimant to this Board is based primarily, upon what he considers to be, a technical violation of the Agreement between the parties.

The pertinent portion of the Agreement with which we are concerned is as follows:

"RULE 24.

DISCIPLINE - HEARING AND DECISION

(a) An employe who has been in the service more than 60 days shall not be disciplined or dismissed, except as provided for in Rule 51, without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At a reasonable time prior to the hearing, such employe shall be notified in writing of the precise charge against him, and he shall have reasonable opportunity to secure the presence of necessary witnesses and one or more duly accredited representatives. The hearing shall be held within 10 days from the date when charged with the offense or held from service, and decision in writing will be rendered within 15 calendar days after completion thereof."

The Claimant contends that under the provisions of Rule 24, an employe is provided with certain rights in instances where the Carrier places charges against him in connection with an alleged offense. That among these rights is that the hearing shall be held within 10 days from the date when charged with the offense or held from service. The Claimant claims, and it is not denied by the Carrier, that he was removed from service on June 14, 1966 and was not afforded a hearing until July 5, 1966, a period of 21 days; that the provisions of Rule 24 are mandatory and that the failure of the Carrier to comply with the provisions of the rule, makes ineffective any action by the Carrier with reference to the charges brought against him.

The Carrier, on the other hand, contends that the provisions of Rule 24, with which we are concerned, are not mandatory, but directory.

It is a well settled rule of law that in determining as to whether a provision of an agreement is mandatory or directory, the end sought to be attained by the provisions of the agreement is always important to be considered. One

of the tests for determining whether the provisions of an agreement are mandatory is whether it contains negative words which renders the performance of the act improper if compliance is not made with the provisions of the agreement. The absence of negative words tends to show that the language used is directory and not mandatory. The negative need not be expressed but may be inferred. If the agreement imposes a penalty for its violation, we may reasonably assume that the parties intended that its provisions be followed, and hence the provisions are construed as being mandatory. The fact that the agreement is framed in mandatory words, such as "shall" or "must" is not the determining factor as to whether it is mandatory or directory.

Rule 24 does not contain any negative words. It does not contain any language to the effect that the failure to comply with its provisions or terms will void and/or nullify the result of any proceedings had pursuant to and in accordance with its provisions. It imposes no penalty if its provisions are not followed.

We hold, therefore, that the provisions of Rule 24 are directory and not mandatory.

Rule 24 sets forth the steps to be taken by the parties in the type of dispute before us. The steps taken by the parties prior to the dispute being submitted for hearing and decision are matters of procedure. Defects in matters of procedure may be waived by consent of the parties or by their actions.

The Carrier contends that the Claimant, by his actions in this dispute, waived any defects in the notice served on him.

As a general proposition procedural defects may be waived by the party charged if timely objections are not raised.

The record in this matter discloses that between the dates of the notice and the date of the hearing, a period of 21 days, Claimant raised no objection to the notice. On the date set for the hearing, the Claimant appeared with two officials of his organization, to wit, the General Chairman and his Local Chairman. That before the hearing took place there was no claim made by the Claimant or his representatives that the notice and the hearing violated the provisions of Rule 24. Instead Claimant and his representatives elected to willingly proceed with and take part in the proceedings. It was only after the hearing was in the process of being concluded and when the Hearing Officer made inquiry of the Claimant and his representatives as to whether or not they had any comments or any criticism in the manner in which the hearing had been conducted that the representative of the Claimant, for the FIRST time raised the question of the alleged violation of the provisions of Rule 24. The last two sentences of the transcript of the hearings are very significant. They are as follows:

"Q. (By Mr. Kane) Mr. Taylor?

A. The Committee reserves the right to question the nature of these proceedings, pending the outcome thereof."

Having received an adverse decision, the Claimant at this point cannot protest because of the adverse decision. Such protest should have been made either at the time of the receipt of the notice or before the hearing took place.

The Claimant further contends that the decision and the assessed penalty of dismissal, by the Carrier, was neither just nor reasonably consonant with the facts.

It is too well settled to require comment or citation of authority as to what the function of the Board is in a discipline matter. It is not to weigh the evidence, appraise the credibility of the witnesses, nor to substitute its judgment for that of the Carrier in the absence of a clear showing that the Carrier's disciplinary action was motivated by bad faith, arbitrary, capricious or discriminatory. If there is sufficient evidence of a probative value, though, as in the matter before us, some of the evidence is based on expert opinion testimony, such expert opinion testimony may be considered by the Board. What the Board does look for is prejudicial error adversely affecting a Claimant's procedural and substantive rights under the controlling agreement.

A thorough search of the record discloses that the Claimant was not deprived of the benefit of "due process of law." He was well and most vigorously represented by his organization. We find that he had a full, fair and impartial hearing, and although some of the evidence was expert opinion testimony, the entire evidence adduced at the hearing was of sufficient probative value to sustain the Carrier's dismissal of the Claimant from service with just cause and that its action was not motivated by bad faith, or was arbitrary, capricious or discriminatory, measured by the gravity of the offense committed.

The claim will be denied.

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 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1968.

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