Award No. 16352
Docket No. TE-16966

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on The Pennsylvania Railroad Company, that:

1. The dismissal of W. R. Swingle following trial held on February 9, 1966, was arbitrary, capricious and unjust and was in violation of Regulation No. 6.

2. W. R. Swingle was denied due process when the Carrier failed to notify him in writing at least five (5) days in advance of the trial, as provided in Regulation 6-C-1(b).

3. W. R. Swingle was further denied due process when he was held out of service before it was determined or alleged that a major offense had been committed.

4. The Carrier failed to prove the charges and failed to prove that a major offense had been committed; and, furthermore, even had the charges been proven, the discipline was excessive for an employe with almost 11 years' service during which time no violations were alleged or committed, and who during this period was admittedly a dependable and efficient employe.

5. W. R. Swingle shall be restored to the service of the Carrier with seniority and all other rights unimpaired, and paid for all time lost from his position as Block Operator at Virginia Block Station, beginning February 3, 1966.

OPINION OF BOARD: The Claimant in this case was regularly assigned to the Virginia Block and Interlocking Station, Washington, D. C., with a tour of duty from 3:30 P. M. to 11:30 P. M. On February 3, 1966, he was orally notified that he was being held out of service for "failure to comply with instructions given to you by the Division Operator at 5:00 P. M., February 2, 1966, to report for work on that date at Virginia Block and Interlocking Station." On February 5, 1966, Claimant was notified by Certified Mail to attend a trial on the following charge:

"Violation of Rule 400N-21, failure to comply with instructions given to you by the Division Operator at approximately 5:00 P. M. on Wednesday, February 2, 1966.

Failure to cover assignment at Virginia Block and Interlocking Station 3:30 P. M. to 11:30 P. M. on Wednesday, February 2, 1966 without notification to the Division Operators Assignment Clerk."

The trial or hearing was held on February 9, 1966, at which Claimant was present and represented. On February 21, 1966, he was notified officially that he was dismissed from the service.

The Organization, on behalf of Claimant, contends that the Carrier, by conducting the trial on February 9, only four days after he was officially notified in writing of the trial, stands in violation of Rule 6-C-1(a) of the Agreement. This rule reads as follows:

"RULE 6-C-1.
ADVANCE NOTICE OF TRIAL

(a) An employe who is accused of an offense and who is directed to report for a trial therefor, will be given at least (5) days' advance notice in writing of the exact offense for which he is to be tried and the time and place of trial."

Although the written notice was dated February 3, it was not received by the Claimant via Certified Mail until February 5th. This is an indisputable fact. Since only 4 days intervened between the notice and the trial, timely objection was made by the Claimant at the very beginning of the trial, when he was asked by the hearing officer if he was "ready and willing to proceed with the trial", and replied that he was not "ready and willing." He objected to the continuance of the trial on the grounds that the Company had failed to give him proper written notification under the aforecited Rule. The hearing officer noted the objection, and proceeded to take evidence relevant to the charges.

As we view the language of 6-C-1(a), we must conclude that the verbiage is directory in nature, and not mandatory. To be sure, if the Claimant had elaborated on his reasons for not being "ready and willing" to proceed with the trial, by stating that certain witnesses essential to his case were unavailable, or time would not permit him to accumulate additional evidence, or other matters of a substantive, evidentiary nature were presented, we would be inclined to agree with his argument that he was denied due process. However, the record shows that he merely objected on the grounds that 4 and not 5 days had passed since the date of the notice. We are further bolstered in our opinion that the language of the Rule is directory, and not mandatory, by the language used by the parties in Rule 6-C-1(b) and 6-C-1(c) which read in pertinent part as follows:

"6-C-1(b) Trials on matters which involve employes held out of service shall be scheduled to begin within ten (10) days following date the accused is first held out of service. **If not so scheduled, the charge will become null and void.**

6-C-1(c) Trials on matters which do not involve employes being held out of service shall be scheduled to begin within twenty (20)

days from the date of Management's first knowledge of such matter. **If not so scheduled, the charge shall become null and void."** (Emphasis ours.)

It is quite apparent that these two paragraphs are mandatory as indicated by the emphasized words. Lacking such language in 6-C-1(a), we can only conclude that it was the intent of the contracting parties to make this paragraph merely directory, and with this as our interpretation, we must accordingly deny Claim No. 2.

From a review of the record, it appears that on February 1, 1966, a day on which a severe snow storm occurred in the Washington, D. C. area, Claimant was able to drive his car through the snow a distance of 25 miles from his home to his place of employment. Upon arrival at the latter location, he was unable to park his car in his customary place provided by the Carrier; he states that he went into the tower, marked off duty, and went home. With snow on the ground the next day, he was called by his supervisor and ordered to report to duty. Claimant inquired about his parking space, and when told the conditions were relatively the same as the preceding day, refused to report to duty. The evidence attesting to this fact is incontrovertible. He did disobey an order to report and hence is guilty as charged. This is unquestionably a major offense notwithstanding the arguments propounded by the Organization and certainly cannot be condoned. To do so would inevitably lead to nothing but chaos. Nevertheless, taking into consideration the factual situation involved, as well as the fact that the Claimant has, from all available evidence, been an exemplary employe with an unblemished record of eleven years' service, we feel that dismissal was too severe a punishment. Loss of pay for these past 2 years is sufficient punishment. We therefore order that Claimant be restored to duty with seniority and all other rights unimpaired, but with no compensation for time lost.

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 violated by the Carrier.

AWARD

Claim sustained to the extent provided in this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1968.

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