

Award No. 18332

Docket No. CL-18701

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYEES**

BOSTON AND MAINE CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6794) that:

1. Carrier action in dismissing Yard Clerk T. C. Healey on unproved charges and unjust, unreasonable, arbitrary, capricious and in abuse of its discretion.
2. Carrier shall be required to promptly restore Mr. Healey to service with all rights unimpaired and his record cleared of these charges.
3. Carrier shall be required to pay Mr. Healey for all time held out of service, including payments of amounts, which would have accrued to him had he been retained in service.
4. For any month in which claim is herein made for compensation on behalf of Mr. Healey, the Carrier shall also make premium payments in his behalf in the appropriate amounts required under Travellers Group Policy Contract GA 23000 as amended, for all the benefits prescribed in that contract.

OPINION OF BOARD: At issue is interpretation and application of the following provisions of the Agreement:

"Rule 39 DISCIPLINE AND GRIEVANCES

(a) An employe shall not be disciplined or dismissed without the precise charge or charges being furnished him in writing if requested.

(b) If the employe is dissatisfied he will be given a hearing if request is made to the next proper officer in writing within seven (7) days after being disciplined or dismissed, a copy of such request being furnished officer whose decision is being appealed. A fair and impartial hearing on the precise charge or charges shall be held within ten (10) days of the date hearing is requested and decision shall be

rendered within seven (7) days after completion of hearing. Employees shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses and copy of evidence taken in writing at the hearing will be furnished to the employee or his representative." (Emphasis ours.)

Claimant was suspended from service and precisely charged as stated by Mr. Furey, Hearing Officer, in hearing convened at the appointed time and place — all in compliance with procedures and time limitations prescribed in Rule 39 (a) and (b):

Mr. Furey: This hearing is being held pursuant to a letter dated August 13, 1969 addressed to Mr. W. V. Furey, Supt.: "I have been notified that effective August 8, 1969, I am out of service of the Boston and Maine Corp. I hereby request a hearing under the provisions of rule 39-B of the BRAC agreement. Respectfully, Thomas C. Healey" A letter dated August 18, 1969, addressed to Mr. Thomas C. Healey, 15 Willey St., Malden, Mass.: "Dear Sir: Please arrange to be in my office at 11:00 A. M., Friday, August 22, 1969, for a hearing. You are charged with larceny of sugar from car PRR 22794 on August 7, 1969. You may be represented according to your schedule requirements. Yours truly W. V. Furey, Supt." (Emphasis ours.)

Immediately upon opening of the hearing the following appears in the transcript:

Mr. Emmet Dinsmore, Attorney at Law for Mr. Healey, stated this was a military court or Kangaroo court and he wasn't going to subject Mr. Healey to this type of hearing. He stated that he was leaving and told Mr. Healey to leave with him, which he has done, stating that we could do anything we saw fit. * * * (Emphasis ours.)

The hearing was then closed without Carrier adducing evidence to prove the charge. Rule 39(f) reads:

(f) If the final decision decrees the charges against the employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be reinstated and paid for all time lost.

The Claim as to this particular charge must be sustained because: (1) Carrier failed to adduce any evidence to sustain it; and (2) Carrier did not render a decision within 7 days of the date of hearing.

Under date of August 28, 1969, Carrier served the following notice on Claimant:

"You are hereby discharged from the service of the Boston and Maine Corporation in accordance with the provisions of Rule 39 of the Agreement with the Brotherhood of Railway and Steamship Clerks, for insubordination in failing and/or refusing to testify and for leaving hearing held in my office on August 22, 1969, such hearing having been called pursuant to request contained in your letter of August 13, 1969.

Please arrange to return all company material in your possession."

Claimant failed to make a request for hearing — an indispensable condition precedent, prescribed in Rule 39 (b), to a contractual right to deny the charge and contest it on the merits. Therefore, the charge stands undenied and not subject to subsequent attack.

For the foregoing reasons we will by application of Rule 39 (f) award that: (1) Claimant be compensated for all time lost from August 8, 1969 to August 28, 1969; and, the August 8, 1969 charge "larceny of sugar from car PRR 22794 on August 7, 1969" be stricken *in toto* from Carrier's records; and (2) the Claim is denied as to the charge of August 28, 1969 — "insubordination failing and/or refusing to testify and for leaving the hearing * * * on August 22, 1969" and discharge from service; this because Claimant failed to exhaust his contractual remedies (due process) in the usual manner on the property.

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 Carrier violated the Agreement only to the extent set forth in the Opinion, *supra*.

AWARD

Claim sustained in part and denied in part as prescribed in the Opinion, *supra*.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1970