Award No. 18375
Docket No. SG-18724

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

PENN CENTRAL TRANSPORTATION COMPANY
(Northeastern Region, Springfield Division)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Boston and Albany Railroad (New York Central Railroad Co., Lessee):

> On behalf of Mr. E. P. Bennett (who was suspended pending investigation for an incident that allegedly occurred August 19, 1968, then dismissed effective January 28, 1969) for reinstatement with full rights and pay for lost time since August 19, 1968. (Carrier's File: 114-B.)

OPINION OF BOARD: This is a discipline case in which Charge and Notice of Hearing was served on Claimant on August 27, 1968. Hearing opened on September 4, 1968, at the time and place specified in the Notice. At 3:30 P. M. the hearing was recessed until a time mutually agreeable to the parties. It reconvened and was concluded on January 23, 1969. On January 28, 1969, Carrier issued its decision that Claimant was guilty as charged and he was dismissed from service. We find that this was accomplished in compliance with the contractual procedural due process mandated in Rule 36(a) of the Agreement.

Petitioner, on January 29, 1969, as provided for in Rule 36(b), made written request for an appeal hearing. Carrier, on February 4, 1969, set February 7, 1969, as the date for the appeal hearing. Carrier's officer who was to preside at the hearing was directed, on the afternoon of February 6, 1969, to be at a meeting in New York City at 9:00 A. M., February 7. He, forthwith, attempted to reach the General Chairman by telephone calls to advise him of the circumstances and seek agreement to postponement of the scheduled hearing to a mutually agreed upon future date. Being unable to reach the General Chairman through that media Carrier's officer filed a telegram, at 6:49 P. M., addressed to the General Chairman:

> "Unable to reach you by telephone today sorry will have to postpone scheduled meeting with you tomorrow Feb. 7th due circumstances beyond my control, suggest meeting Wednesday Feb. 12. Please advise."

The transmittal of the telegram was fouled-up and as a consequence it was not communicated to the General Chairman's home, to which it was addressed, until around noon of the following day, February 7. Further, on February 6, Carrier's officer mailed the following letter to the General Chairman:

> "Due to circumstances beyond my control, I was unable to attend the meeting with you scheduled for Friday, February 7, 1969.
>
> I attempted to reach you several times by telephone on February 6, 1969. Being unable to contact you, I sent you a confirmed wire on the evening of February 6, 1969 informing you of the postponement.
>
> I would suggest a meeting be scheduled for Wednesday, February 12, 1969. Would you please advise if this date is satisfactory."

At 9:30 A. M., February 7, Signal Supervisor Lombardi personally notified the General Chairman of the postponement.

The appeal hearing was held on February 12. There is no showing in the record that at this hearing Petitioner moved for dismissal of the charge and reinstatement of Claimant on the grounds that Carrier violated Rule 36(b) by failing to conduct the hearing within 10 days of Claimant's request. On February 18, Carrier affirmed the appealed decision. On February 20, Petitioner filed appeal with Carrier's Highest Appeals Officer. In the appeal letter the fact that the prior appeal hearing was not held within 10 days of Claimant's request was uttered, for the first time, as grounds for reversal of the initial decision. On May 8, Carrier's highest appeals officer affirmed the appealed from decision.

Petitioner in failing to move for dismissal of the charge and reinstatement of Claimant during the course of the February 14 hearing did not timely raise issue as to the procedural defect. By its participation in that hearing without raising the issue it must be held to have waived the procedural defect and was by its conduct estopped from raising the issue in a subsequent appeals proceeding. Not having timely raised the issue in the prior appeal proceedings there was no ruling relative thereto to be appealed to the Highest Officer. Compare with our Award No. 18352, involving the parties herein and the same Agreement Rule, in which the petitioner timely moved for dismissal of the Charge.

From our review of the record we find that: (1) Claimant was afforded due process; (2) there is substantial evidence to support Carrier's finding of Claimant's guilt as charged; and (3) the discipline imposed was reasonable.

We make no ruling as to whether Carrier can be released from its contractual obligation prescribed in Rule 36(b) by making a single officer unavailable to conduct an appeals hearing on a fixed date.

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 29th day of January 1971.

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