

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24588  
Docket Number MW-24692

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Welder Foreman J. W. Spray for alleged violation of 'Rules 700, 700A and M702' was without just and sufficient cause and on the basis of unproven charges (System File C#43/D-2437).

(2) The hearing held on May 30, 1980 was not held as required under Rule 18(b).

(3) For the reasons set forth in either or both (1) and (2) above, the claimant shall be allowed the benefits prescribed in Agreement Rule 18(e)."

OPINION OF BOARD: Dealing first with Item 2, the time limit procedural questions we refer to Rule 18 (b) of the labor agreement which provides as follows:

"(a) An employe who has been in the service more than sixty (60) days, if disciplined or dismissed, shall be advised of the cause for such action in writing.

(b) An employe who has been disciplined or dismissed, or who considers himself unjustly treated, shall be given a fair and impartial hearing before the officer designated by the Railroad Company to handle such matters, provided that request for hearing is made in writing the Superintendent within ten (10) days from that date of advice of discipline or complaint. The hearing shall be held within ten (10) days from date of request for hearing and decision shall be rendered within ten (10) days from date the hearing is completed." (Emphasis Ours)

The rule requires that employe's request for hearing on a question of alleged unjust treatment is to be made in writing to the Superintendent within ten days and that such hearing shall be held within ten days. In this case the request was not made to the Superintendent but, instead, "To whom it may concern". By Carrier's own statement the request was received on May 19 and hearing date was set for May 30. Letter to Claimant setting the date for hearing was hand delivered to Claimant on May 28. While there was technical violation by the Carrier in failing to hold the hearing within the ten days as

2 required by the rule there was also violation by Claimant in failure to address request for hearing to the Superintendent. Without saying that one technical violation offsets the other we are compelled to **note** that the rule is directory rather than mandatory and, on the whole, loosely worded. In essence, it provides an aggrieved **employee** an avenue for a hearing, assures that such requests will be made promptly, addressed to the proper officer of the Carrier, and also acted on promptly.

3 § The Claimant made his request for hearing and it eventually found **its** way to proper Carrier authority. When received, the Carrier granted the hearing without undue delay and the hearing proceeded. There is no evidence that Claimant's rights of due process were adversely affected by the procedural delay. (This, together with the fact that neither side acted deviously, arbitrarily nor capriciously in the technical violations of the rule are the basis on which the Board waives ---such violations and proceeds to consider the merits of the claim.)

In support of this opinion we cite another Third Division Award No. 16172 involving a similar rule and the issue of a hearing not being held within the ten-day period set forth in the rule:

"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 rules which Claimant "as charged with violation are set forth as follows:

Rule 700 states:

"Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

Rule 700A states:

"Employees who withhold information, or fail to give factual report of any irregularity, accident or violation of rules, will not be retained in the service."

Rule M-702 states:

"Employees must be alert and devote themselves exclusively to the company's service, attend to their duties during the hours prescribed, reside where required by the management, and comply with the instructions from the proper authority in matters pertaining to their respective branches of the service. They must not absent themselves from duty, exchange duties with or substitute others in their place, nor engage in other business without proper authority.

An **employee** subject to call must not absent himself from his usual calling place without notice to those required to call him.

Employees while on duty, must not play games or read magazines, newspapers or other literature not concerned with their duties, or use radios **or** television other than those provided by the **company.** "

The Claimant, J. W. Spray was a welder foreman at Montivedo, Minnesota with duties on the line of road thus necessitating his work much of the time without direct supervision. During the hearing, instances were cited wherein Claimant failed to comply with established rules and that he had been cautioned numerous times that compliance was required. In addition to the general rules referred to in the claim, Claimant "as also charged during the hearing of violating specific local rules as follows:

"**Rule #1.** You "ill send a copy of your timesheets to the roadmaster and to J. M. Sherpe in Chicago at the end of each pay period--the 7th, 15th, 23rd and the end of the month."

"Rule #2. You will notify E. C. Jordan and the roadmaster every Friday of your location by wire."

"Rule 5. No ~~makup~~ time without permission of the roadmaster."

"Rule #7. you are not permitted to charge any material or supplies without proper authority."

Evidence showed clear violations of the above rules and also failure to notify proper authority during periods of absence from duty.

In general, the evidence was unrefuted that Claimant violated the rules as charged. His explanations were unconvincing and his conduct on the job was one of indifference to required procedures. His dismissal resulted from absenting himself without proper authority, submission of improper time slips resulting in receiving pay when not on duty and for misrepresentations to his supervisor as submitting revised time slips. In addition, Claimant was previously dismissed from service in 1979 for similar offenses and was restored on a leniency basis.

The record substantiates the violations as charged and the Board agrees that his dismissal was for just and reasonable cause.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago; Illinois, this 15th day of December 1983.