Award No. 2470
Docket No. MW-2509

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

St. Clair Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood—

(a) That J. Howard Jones, Section Foreman, Section 6, Richland Iowa, was unjustly held out of service from June 16, 1942 to July 29, 1942, both dates inclusive;

(b) That Foreman Jones be paid, at his regular rate of pay as foreman, for the time held out of service from June 22 to July 29, 1942, both dates inclusive.

OPINION OF BOARD: The uncontroverted facts establish a violation of Rule 18 supra by the Carrier. It dismissed claimant from its service and in strict compliance with paragraph (a) of that rule, advised him of such action in writing. However, altho claimant made timely demand for the hearing to which he was entitled under the explicit provisions of paragraph (b) of that rule, the Carrier steadfastly refused to accord claimant such a hearing. In justification of its conduct the Carrier points to the investigation conducted on June 6th, prior to the described dismissal, and states, "In this particular case, as has been the practice in many similar cases, rather than take arbitrary action prior to the holding of a hearing, as allowed in the above quoted rule, arrangements were promptly made for the hearing which was held on June 6, 1942, and Mr. Jones was accorded the privilege of having a representative present."

The described policy of the Carrier to acquire full information by careful investigation before meting out discipline, so as to safeguard against arbitrary and ill advised action, is wholly commendable. In the instant case a distinct impression is gained from the record that the Carrier's officers regarded the disciplining of claimant as a distasteful but necessary duty, and that they intended to be fair and just in the performance of that duty. Further, we do not doubt but what these officers held the honest opinion that the best interests of all concerned would be better served by the substituted procedure. That others are of that view is indicated by the number of contracts between carriers and the crafts which require notice and hearing in advance of disciplinary measures. However, to establish that procedure as between this craft and carrier will require a recasting of their solemn agreement. This contract expressly provides for hearing after the decision of the Carrier has been made and communicated. It reads, (a) * * * "An employe * * * if dismissed, shall be advised of the cause in writing," and (b) "An employe who has been dismissed shall be given a fair and impartial hearing * * *." Plainly, the rule contemplates an inquiry into the propriety of a disciplinary decision after the event.

The rule was violated. A mere procedural technicality is not involved. We cannot say petitioner has not been prejudiced. He has sincerely sought the right to make a showing to the Carrier in the light of the particulars set forth in his letter of dismissal. We know neither the nature of his proposed showing nor its ultimate effect upon his unprejudiced superiors. It must be presumed that in attending the investigation of June 6th, Claimant charted his course by the terms of this agreement. Under those terms he was justified in then assuming that if, from the facts developed during its investigation, the Carrier should form the opinion that he was in any degree responsible for the lamentable events of June 4th and should be moved to take disciplinary steps, that he would forthwith receive notice in writing containing the particulars which had induced the Carrier's action, and that thereafter he would be accorded a full and fair opportunity to make such a showing as his judgment might dictate for the purpose of pointing out wherein he deemed the action taken to be erroneous or immoderate. Neither are we permitted to allow the fact that the Carrier promptly reinstated the petitioner to sway our judgment. It was for petitioner to determine whether he should insist upon his rights in the circumstances. The contract assures him a right to a hearing, and he should not have been denied that right unless it had been waived. Thus we are brought to the ultimate contention of the Carrier.

The claim of waiver is premised upon answers made by petitioner in the course of the June 6th investigation. Every member of the crew, including petitioner, was called for questioning and in turn admitted that they had received notice of the purpose of the investigation and indicated that they did not desire the aid of counsel. At the close of the interrogation of each person examined, they again in turn avowed that they had had a fair hearing. The precise inquiry is, do these answers establish the asserted waiver of the hearing for which Rule 18 (b) makes provision? Waiver is a creature of intention. To infer from these general answers, made during the course of an investigation having for its apparent purpose the gathering of facts from which the Carrier would arrive at its decision, a specific intention on the part of Claimant to waive a right to challenge that decision before it was made and the grounds and purport thereof had been communicated, in our opinion, is not permissible.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 carrier violated Rule 18 and the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of February, 1944.