Award No. 2806
Docket No. TD-2772

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: (1) Claim of the American Train Dispatchers Association that the Chicago and North Western Railway Company violated Rule 24 of the Train Dispatchers' Agreement when it dismissed Dispatcher I. A. Wyland, Huron, S. D. office, from its service effective May 30, 1944, without proper notice and without hearing.

(2) Dispatcher Wyland shall now be restored to his position with seniority unaffected; his record shall be cleared of the charges; and he shall be compensated for all wage loss suffered by him retroactive to May 30, 1944, the date he was illegally dismissed from the service.

OPINION OF BOARD: This is a discipline case. Under date of May 22, 1944, the Claimant received the following communication from the Carrier:

> "Please report to the superintendent's office at 8:30 A. M. tomorrow to give a statement in connection with the derailment Train 503 at Lake Benton, Minnesota, about 5:20 A. M. May 18th.
>
> "Per Schedule Rules, you may have a representative of your choice present with you at the investigation."

He appeared at the time and place required and made a statement. The next day he was suspended.

Thereafter on May 30, 1944, without further notice or hearing he received a notice of dismissal which read:

> "YOU ARE HEREBY NOTIFIED THAT AFTER INVESTIGATION OF derailment of passenger train No. 503 1.69 miles east of Lake Benton, Minn., 5:20 A. M., May 18, 1944 and your failure to have track inspected in accordance with Rule 706, rules for the government of the Operating Department dated December 1, 1929, THE FOLLOWING DISCIPLINE HAS BEEN APPLIED: Dismissed from the service."

Subsequently on June 14, 1944, after request for a hearing had been made to the Superintendent that official wrote the Local Chairman of the Brotherhood in part as follows:

> "With respect to a request for a hearing, we have to say that the hearing as provided in Section B, Rule 24 was held at Huron on Tuesday, May 23, 1944, at which you were present, representing Train Dispatcher Wyland, and we do not understand that further hearing is necessary."

On recourse to the Carrier's Director of Personnel such official confirmed the Superintendent's position and in addition stated he was not agreeable to directing Division officers to conduct a subsequent hearing.

What has been related will suffice for the facts as this controversy is not here on its merits but on the proposition the Claimant was dismissed from service of the Carrier without proper notice and hearing in violation of Rule 24 of the current Agreement.

Preliminary to consideration of other matters we dispose of the Carrier's contention the Claim was not handled in the usual manner up to and including the Chief Operating Official of the Carrier, as required by Section 3 (i) of the Railway Labor Act. The contention is without merit as will be evidenced by referring to the Superintendent's letter and confirmation of his action by the Director of Personnel. The substance of the claim has been stated. It was based on failure to give proper notice and hearing. The officials mentioned refused to recognize or even give it consideration. Under such circumstances the Employes' only recourse was to this Board and the Carrier cannot now be heard to say such claim was improperly handled. It is estopped from doing so by its own conduct.

We now direct our attention to the all important question. Was there a proper notice and hearing? Reference to Subsection (a) of Rule 24 reveals that it provides a Train Dispatcher will not be disciplined without a proper hearing, while Subsection (b) guarantees a fair and impartial hearing before the Superintendent after notice specifying the precise nature of the charge or complaint made against the accused. It also provides such accused shall have the right to be represented by counsel and given a reasonable opportunity to secure the presence of necessary witnesses. In passing and for reference presently we note it further provides investigation will be held within 30 days from date of the alleged offense.

A fair summary of the notice is that the Claimant was to report the next day to give a statement in connection with the derailment of a train. It wholly failed to specify the precise charge or nature of the complaint. In fact it did not advise that either complaint or charge had been made. Therefore it was insufficient. Carrier argues that because the accident had occurred and the notice permitted a representative at the investigation the Claimant should have known a complaint or charge had been made against him. The argument begs the issue and if not frivolous, is akin to it. Speculation and conjecture are never required of a party to an agreement when the terms thereof provide for precise notice of the character to which we have referred. Even so, Claimant had a perfect right to assume that all he was being called in for on the date in question was to make a statement regarding the accident. The notice expressly so stated.

With respect to the alleged hearing it clearly appears it was not a fair and impartial one as contemplated and required by the Contract. Many decisions could be cited to justify this conclusion but we do not deem them necessary. It can be sufficiently substantiated without them. In the first place, the Claimant was directed to appear at an investigation, not a hearing. From the contents of his notice he had a right to rely on the Carrier's statement that was what it would be. In the next, he was required to appear the following day. That hardly gave him an opportunity to secure his witnesses for a hearing even if one had been noticed. It does not suffice to say, as is done by the Carrier, that if he had requested delay he would have been given time for the purpose of procuring witnesses. The Contract gave him that right and he was not required to ask for it unless, of course, during the trial the evidence there adduced reasonably required an adjournment for the purpose of procuring the testimony of additional witnesses. Moreover at this alleged hearing neither the Claimant nor his representative was permitted to examine witnesses or even hear their testimony. A fair and impartial hearing contemplates

all the rights and privileges to which we have referred and failure to accord the Claimant any one of them was sufficiently fatal to require a conclusion he did not have a proper hearing as guaranteed by the Contract.

Aside from the question of whether Claimant was given a fair and impartial hearing, and when stripped of its excess verbiage, the Carrier's contention is that it can conduct an investigation and thereafter dismiss an employe from its service without even notifying him in writing that a complaint or charge has been made against him. In other words, if at the investigation after notice similar in character to the one involved here, the Carrier concludes grounds for dismissal exist it can at that time, mentally or orally, prefer charges and thereafter treat the investigation as a hearing which will sustain an order of dismissal. Action of that character might have been proper prior to execution of any agreement or one which did not provide to the contrary, but not now. The current Contract defines the type of hearing to be given an employe and its terms must be complied with. As heretofore indicated, that was not done in this case. The most that can be said for the proceeding had on the date specified in the notice is that it constituted an investigation within the provisions of the Agreement. Up to this date no hearing whatsoever has been given the Claimant.

The Carrier seeks to justify its action by evidence of long continued practice similar to that indulged in here and refers to numerous other instances where like procedure was followed and accepted without complaint. We are not impressed. Long continued violation of a rule does not preclude its application when wrongful action is properly challenged.

It further endeavors to sustain such action by pointing out that because Wyland answered in the affirmative when asked if he had been given a fair and impartial investigation he waived all further rights to a hearing. We do not agree. Waiver is a matter of intention and we certainly cannot say that at an investigation held pursuant to a notice such as here involved, the Claimant intended to waive the right to a hearing accorded him by the Contract.

What has been here said is not intended to imply that under the existing Agreement the Carrier cannot hold a combined investigation and hearing if it sees fit. All we hold in that regard is that if it desires to do so it must prefer the charge and notice the defendant in the manner required by the rule in order to conduct a proper hearing as provided by its terms.

A final contention is that Claimant failed to comply with the provisions of Rule 24 (c) in failing to take an appeal within the time limit prescribed therein, and that for such reason the claim should be denied. From what has been said the answer to such contention must now be obvious. Since no charge was preferred against Claimant and a hearing on any charge was denied him there was nothing from which he was required to or could appeal. The Carrier dismissed him from service without compliance with the procedure required in discipline cases. Therefore the dispute is properly here for consideration. Many awards are cited as sustaining the Carrier's position on the immediate subject in question. They either are not in point or can be distinguished. The opinion of one in particular, Award No. 2765 written by the present referee, has our attention. The distinction between that case and the instant one is easily discernible. There the Claimant had been served with proper notice of hearing. He had been given a hearing, but after receipt of the Carrier's notice of its decision had failed to appeal within the time specified in the Agreement. Here the Claimant had neither notice nor hearing.

Our conclusions require the claim be sustained in its entirety. It is urged that to sustain Item 2 substitutes our judgment for that of the carrier and conflicts with many of our awards. Heretofore we have pointed out the rule requires an investigation must be held within 30 days of the alleged offense. We find no such time limitations with respect to a hearing. Neither do we regard the terms "investigation" and "hearing" synonymous as used therein.

Having never given Claimant a hearing there is nothing to prevent the carrier from attempting to do so later on if it believes the exigencies of the situation demand and it is inclined to do so. We do not assume to pass on his guilt or innocence. But first, it must restore him to his position with seniority unaffected, clear his record and compensate him for all wages from May 30, 1944, the date he was wrongfully and illegally dismissed from service. The penalty may seem severe but it is a small price to pay for the learning of the lesson that the terms and conditions of a contract when entered into are binding upon all parties and are meant to be complied with instead of broken.

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 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 claim should be and is sustained as indicated in the Opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of February, 1945.