Award No. 3288
Docket No. DC-3167

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

CHICAGO NORTH SHORE AND MILWAUKEE RAILROAD COMPANY

John B. Gallagher and Edward J. Quinn, Trustees

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local 351, on the property of the Chicago, North Shore and Milwaukee Railroad Company for and in behalf of Bernard B. Boatner, that he be reinstated with full seniority rights and compensation for all time lost because of Carrier's violation of Rule 11 of the current agreement.

OPINION OF BOARD: Here an employe of the Carrier was dismissed from the service for violation of rules. The sole question presented is, was the investigation conducted in violation of Rule 11 of the current Agreement between the Carrier and the Union representing the employe?

Rule 11, so far as material here, provides:

> "A. Employes may be suspended, but not dismissed from the service without a fair and impartial hearing. * * * Employes under investigation and their representatives will be given a letter setting forth the matter to be investigated, and his representatives shall be furnished such information on the matter as the company may have, prior to the hearing."
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> "B. Employes attending investigation or hearing will be notified that they may be accompanied by their authorized representative, who will be permitted to question witness in the interest of the employes concerned."

We need not here determine all the elements that enter into what constitutes "a fair and impartial hearing". The quoted rule states certain agred upon elements. Before the investigation is had the employe and his representative are to be given a letter setting forth the matter to be investigated. That was done in this case by letter dated May 12, 1945, in which the employe was notified of his suspension on six charges or counts. Five of the six charges refer to inspection reports. Obviously the Carrier had those reports in its possession at the time the latter was written which was five days prior to the hearing. The information contained in those reports was not furnished to the employe's representative prior to the hearing as the rule says "shall" be done. Neither was the information furnished to the representative at the hearing save as the Carrier read from them to the employe and his representative at that time. The contents do not appear verbatim in the transcript and we are left only to conjecture what they actually contained, as the employe was left to conjecture prior to the hearing.

These investigation rules are for the protection of the employe. Without such protection the employe is at the mercy of the Carrier. Without substantial compliance with the provisions of the rule he is likewise at the mercy of the Carrier.

The Carrier in conducting these hearings occupies a somewhat conflicting position. Its representative is both an interested party and also a "fair and impartial" judge. The difficulty of the position in which the Carrier is placed requires meticulous care in the conduct of these hearings, that both functions be properly performed.

The purpose of furnishing this information to the employe is obvious. It enables him to know the contents of the report, gives or should give time to investigate the circumstances related in the reports and time to prepare to answer, explain or deny. That is a substantive right. The Carrier here denied that right to the employe. It is our view that when a carrier has information in writing, which it expects to use as a basis of sustaining its charges, that it is incumbent upon it to furnish that information to the employes "prior to the hearing". If it does not do so the use of that information as evidence at the hearing should not be permitted. To use it, as the Carrier did here, violates and denies a contractual element of the "fair and impartial hearing" to which the employe is entitled.

The Carrier at the hearing, however, used the statements in the reports as substantive evidence of their contents, at the same time refusing to divulge the name or names of the inspector. It accordingly denied before the hearing any opportunity to the employee to check the statements and at the hearing denied an opportunity to inquire as to them of the party making them. It used the written and confidential report in lieu of the spoken word of the investigator. By this process it got parts of the statement of the inspector into the record and avoided any cross examination of the witness at the hearing. The Carrier says it is not required to produce the witness. It may well be that in hearings conducted as are these hearings, that unilateral statements may properly be received and considered. But somewhere along the line the employee has the right to "question the witness" if he so wishes. The rule so provides. That also is a substantive right of the employee which was here denied him. If the Carrier intends to rely upon the written statements as evidence, the rule requires that they be furnished to the employee prior to the hearing, and that means a sufficient time to enable an examination to be made of them and if necessary an independent check as to the alleged facts stated in them. On the other hand, if the Carrier intends to withhold the statements it should produce the witness to be questioned by the employee under the rule.

For two centuries in America it has been recognized that the right of testing the truth of any statement by cross examination is a vital feature of any investigation devoted to truth development. No safeguard for testing the value of human statements is comparable to that furnished by cross examination and no statement should be used as testimony until it has been subjected to that test or the test waived. It is a device for the discovery of all the truth. A witness on direct examination may disclose but a part of the necessary facts. The opposing party has the right to probe for the remainder. Qualifying, illuminating and often discrediting answers are secured by this process. Where statements are to be used and are furnished to the employee in advance of the hearing presumably he has the opportunity to secure explanatory, or amplifying statements, from the party making the statements. That process may in many instances satisfy the requirements of the rule. The rule is not satisfied where as here no opportunity to cross examine was furnished at any stage of the proceedings.

To approve the procedure here followed is to give to these reports the untouchable sanctity of being the truth, the whole truth and nothing but the truth. If such were approved then all that these investigations need be would be to present the inspector's report, and find the employee guilty as charged. The fundamentals of an investigation are to determine whether or

not the statements are true, to throw light upon the circumstances and to deny or disprove. These rights of the employee are all subject to denial unless these statements or the witness making them are subject to the critical scrutiny and examination of the employee. Those rights were denied here.

But the Carrier says that the employee admitted three violations of instructions in that he served food without written order and hence no harm was done to the proceduce here followed. To that there are two answers. The admissions were made at the hearing but at the time they were made the employee had already been denied the fair and impartial hearing that the rule requires. Fatal error had been had. The Carrier overlooks the fact that dismissal is not authorized when a naked admission of rule violation is made, but follows as a result of a finding based on a "fair and impartial hearing:"

We have not heretofore discussed the facts, for the issue is, was the investigation had in accord with the rule? But let's go on to the facts on this one question. The admissions were that the employee had accepted verbal orders for food and written the items on the check himself, instead of requiring the customer to do so. The instructions permit the employee to do that under one condition, "where the guest is handicapped physically to the extent that he cannot write his order the waiter may write the order in the presence of the guest". So far as the transcript reveals the Carrier assumed at the investigation that the guest was not "handicapped physically". The burden of showing the guest could have written all of the check rested on the Carrier. It may be that the secret reports, had they been put in evidence, would have revealed the facts, but they are not here. We do not know all those reports contained. The employer knew what they contained. Whether the employee knew all they contained even at the close of the investigation is not shown. The transcript shows only as to Charge No. 5 that the inspection report was read by the officer conducting the hearing. Its contents are not set out.

Under the circumstances which exist here we hold that the employee did not have the fair and impartial hearing which the investigation rule requires as a condition precedent to dismissal.

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 employee, Bernard B. Boatner, should be reinstated with full seniority rights and paid for all time lost.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of September, 1946.