Award No. 5359
Docket No. DC-5208

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee.

PARTIES TO DISPUTE:

JOINT COUNCIL OF DINING CAR EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim Joint Council Dining Car Employes, Local 351, on the property of Chicago and North Western Railway Company for and on behalf of Thomas Levy, Waiter, that he be returned to service with seniority accumulated and unbroken and compensation for wages lost from on or about April 4, 1949, Carrier's discipline of dismissal having been assessed in violation of Rule 26 of the current agreement.

OPINION OF BOARD: Before considering whether or not a certain occurrence constituted a hearing or an investigation and whether or not an act constituted an appeal we think it necessary to set out our opinion with reference to the meaning of Rule 26 (a) and (b). This is because what our opinion of the Rule and what it means with reference to the facts as we find them to be is controlling regardless of what either or both parties hereto consider the facts to be.

With the above in mind we now turn to a discussion of the rule. Before an employe may be disciplined or punished, Carrier must cause an investigation to be held. If the employe has been prevented from protecting the work pending the investigation, a report must be forthcoming within a reasonable time else Carrier would thereby avoid and circumvent said rule.

Where as a result of investigation an employe is advised of discipline, the burden of going forward shifts to the employe if he feels himself thereby aggrieved in which event he must in writing so advise a definite officer of Carrier within a specified time. Thereupon Carrier must grant to said employe a fair and impartial hearing. This means Carrier must in writing charge an accused with violation of an operating rule and give him a copy thereof; if the charge be vague and indefinite, the accused may move for a more particular statement. Upon hearing thereof, the accused must be present, he has the right of cross-examination, the right to offer witnesses in his behalf, the right to be his own witness and to offer and object to the offer of written and other types of evidence. The hearing officer must not engage in argument with the witnesses or the accused and must not comport himself in such a way so as to in effect prejudice the hearing. Finally, a time limit is set within which a decision must be made.

It will be noted no such requirement is made with reference to an investigation; however, if the parties desire, they may conduct an investigation as they would a hearing. But such procedure would not make a hearing out of what is in fact an investigation.

What then are the facts as applied to the above and foregoing and the result thereof? The cause or act giving rise to the subsequent events occurred on April 4. Petitioner was then and there withheld from service. Petitioner avers that on April 11th he requested a hearing. This request was made prior to holding an investigation and no showing has been made that Carrier had unreasonably delayed or was dilatory in making same. Furthermore, Petitioner must have presumed, for reasons which he no doubt considered good and sufficient, the result of an investigation would be adverse to him. But as stated above, the requirement of an investigation is mandatory. At any rate, on April 13th Carrier advised Petitioner in writing to "arrange" to appear on April 19th for investigation. This notice contained all the elements of a formal charge preparatory to a hearing. Subsequently after several postponements, which we are not here concerned with, what Carrier styles an investigation and what Petitioner styles a hearing was held. This occurred on April 27th. This meeting was conducted along the lines of a hearing. Fortunately or unfortunately as the case may be, it is not within the province of this Board to tell or even advise Carrier how to conduct itself except as such conduct is repugnant to the Schedule. We cannot say such meeting was not a proper investigation within the meaning of the Schedule. We do hold it met the mandatory requirement of the Schedule and that it was not a hearing.

We next consider the question of whether a report was duly and timely made thereon. The Schedule is silent. It therefore must mean a reasonable time. The report was made on May 4th. Under the circumstances here prevailing, we hold Carrier did not report in an unreasonable time.

The burden of going forward has now shifted to Petitioner provided he considered himself aggrieved, which he did. On May 5th Petitioner addressed to Carrier's officer styled "Director of Personnel" a communication styled "Appeal". This procedure was improper in that part (a) of the Rule makes no provision for an appeal from a decision resulting from an investigation and even though it be considered and treated as a request for a fair and impartial hearing, it was not presented to Petitioner's immediate superior in rank, namely, the Superintendent Dining Cars. We must therefore hold a request for hearing was not duly and timely made within the time specified in the rule and was not presented to the proper official and that Carrier has pleaded such bar and has not waived same.

By reason of the above and foregoing, the Board will not consider the merits of the act giving rise to the subsequent proceedings.

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 Schedule was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of May, 1951.