Award No. 7173
Docket No. PM-7347

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of W. Griffin, who was formerly employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company as a porter, operating out of Chicago, Illinois.

Because the Chicago, Milwaukee, St. Paul & Pacific Railroad Company did, under date of September 3, 1954, dismiss W. Griffin from the service for the following alleged reasons:

1. For refusing assignment to Car L-17 on Train 17 from Chicago July 16, 1954, which was due you as extra board porter after having accepted the assignment.

2. For failure to be available to accept assignment that was due you as extra board porter on July 17, 1954.

3. For failure to appear for hearing that was scheduled to be held with you at 8:30 A. M. CST Wednesday, September 1, 1954, to answer charges preferred against you in our letter of August 5, 1954.

And further, because W. Griffin was dismissed in violation of the rules of the Agreement governing the class of employes of which he was a part by reason of the fact that he was not given a hearing as provided for under the rules of the Agreement before disciplinary action was taken.

And further, because the record does not prove that any of the charges are correct, and the action iself was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for W. Griffin to be reinstated to his former position as a porter for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company with seniority rights and vacation rights unimpaired, and for him to be reimbursed for all time lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: Claimant was discharged and requests reinstatement and pay for time lost. The claim does not go into the merits of the charges upon which he was discharged, but is predicated upon the theory

that he was discharged without having been given a fair and impartial hearing as required by Rule 40 of the Agreement.

Rule 40 provides:

"Rule 40—Hearings

An employe shall not be disciplined, suspended or discharged without a hearing. He may, however, be held out of service pending investigation. An employe shall be notified in writing of the time and place of hearing and the specific charge against him.

An employe who considers he has been unjustly treated and who desires a hearing shall make written request containing his specific charge within fifteen (15) days from the date of the cause of complaint.

Hearings shall be held within ten (10) days from receipt of request for hearing or after notice shall have been mailed to an employe at his last recorded address, as the case may be, and decision shall be rendered in writing within ten (10) days after the hearing is completed."

The facts are not disputed. On August 5, 1954, the Carrier notified claimant by letter of the charges against him and that hearing on the charges would be held on August 13. It is undisputed that claimant received this notice. Under date of August 11, Mr. Webster requested a postponement of the hearing on the ground that he would be out of town and unable to represent claimant on the date scheduled. Carrier advised Mr. Webster by letter of August 28 that the hearing would be held on September 1. It is undisputed that no notice of the new hearing date was sent by Carrier to claimant.

On September 1, Mr. Crowder, Field Representative for the Brotherhood appeared at the appointed time and place to represent claimant, but claimant did not appear. Mr. Crowder stated that Mr. Webster had contacted claimant and he (Crowder) could not understand why claimant was not there. Carrier ascertained through its assignment clerk that claimant was not assigned to duty out of the city at that time. Mr. Crowder asked that the hearing be rescheduled at another time. Carrier refused. No hearing of any kind was held; no evidence of any kind was introduced. Crowder was merely informed that the hearing was due to be held at that time and that no further rescheduling would be made.

By letter of September 3, Carrier notified claimant that he was discharged for the reasons set forth in the original charges against him and for the additional reason that he failed to appear at the scheduled hearing. By letter of September 13, Mr. Webster appealed from this decision, stating among other things that: "The Organization was at the hearing as per the letter, and Porter Griffin claims that he did not get the letter." On October 1, the appeal was denied by letter containing the following statement: "Porter Griffin was accorded an opportunity for hearing and the fact that a hearing was not held was due to the fact that he refused or at least elected not to appear for the hearing on the postponed date."

Since the record was unclear as to just how claimant had been "contacted" by Mr. Webster, the question was put to Mr. Webster at the hearing before the referee in this case. Mr. Webster replied that he had telephoned claimant's lodgings, where claimant lived alone, and left a message as to the time of the postponed hearing with an unidentified person who answered the telephone. He then wrote a letter to claimant containing the same information.

Many awards of this Division have commented on the importance of a fair and impartial hearing as a condition precedent to the imposition of dis-

cipline under agreement rules similar to Rule 40. It has been stressed that the hearing is designed as a protection to the employes. See Awards 6087, 3288. Thus, when discipline is administered to an employe without a hearing despite the existence of a rule guaranteeing that a hearing will be held, the burden is on the Carrier to show that this deviation from the rule is justified. In this case, Carrier asserts justification in the fact that claimant, by his failure to appear at the scheduled hearing, "waived" his right to any hearing at all. Certainly it is true that an employe may waive his right to a hearing; but whether he has done so or not is a question to be answered from the facts and circumstances of each case. As was said in Award 2806, waiver is a matter of intention; in each case the question to be answered is whether it can reasonably be inferred from claimant's conduct that he intended to give up his right to the hearing guaranteed him under the agreement rule.

In this case, we think it obvious that no such inference can be supported. Plaintiff was represented at the hearing by Mr. Crowder. Far from conceding that claimant did not wish a hearing, Mr. Crowder stated that he expected him there and did not know how to explain his absence. **He then asked that the hearing be rescheduled.** In the face of this clear insistence upon the right to a hearing by his authorized representative, how can it be said that claimant intended to waive that right? Carrier relies entirely upon the assumption that since claimant was not assigned out of the city at the time of the hearing, he must have willfully refrained from attending. No such assumption was justified at the time of the hearing; Carrier had no direct knowledge that claimant personally knew of the hearing since it had not personally notified him, nor could Carrier be sure that any one of a number of other legitimate reasons was not accountable for his absence. Nevertheless, Carrier refused to postpone the hearing, and discharged claimant two days later without further inquiry into his unexplained absence.

Even assuming that Carrier had some justification for its precipitate action in discharging claimant without a hearing originally, claimant's appeal made the point that claimant pleaded lack of knowledge as the reason for his absence. Despite this, the record shows no attempt on Carrier's part to determine the truth or falsity of this claim. Instead, Carrier chose to rely on its original position that claimant knew of the hearing and willfully refused to attend, thereby conclusively waiving his right to a hearing. Carrier's actions in this case demonstrate a serious misconception of its obligation to hold a hearing under Rule 40. As has been stated above, a hearing is a basic prerequisite to the imposition of discipline under this and similar rules. Every effort must be made to carry out the requirements of the rule in doubtful cases, not to avoid them. In this case, where there was serious doubt that claimant intended to waive his right to a hearing, Carrier should have resolved this doubt in his favor, rather than close the door on claimant's rights despite the uncertainty as to the reason for his absence, and the presence of his representative demanding a postponement of the hearing. There was no waiver here and the failure to hold a hearing was a violation of the rule.

This is not to say that an employe whose course of conduct clearly indicates an intention not to go through with a hearing may, by oral protestations that he wants a hearing, avoid a determination that he has waived his rights thereto. Such a case is not before us. Nor do we here decide, since the question is not presented, what the status of the claim would have been had Carrier proceeded to conduct a hearing in the absence of claimant but in the presence of his representative.

Several cases in which claimants have been held to have waived hearings were cited by Carrier. In each of these cases, the facts were different from those in the instant case, and in all but one of them, showed admissions of guilt, stated or repeated refusals to appear or other such manifestations of intention to waive. The one exception, and the award most strongly urged as controlling here, is Award 6777. This award involved the same parties and same rule as here, and the claim was denied by the Division without a referee. However, the facts were substantially different. There, notice

of hearing was sent directly to the claimant by registered mail and there was evidence that although he was informed by the Post Office that the letter was there, he did not pick it up. Neither he nor any representative appeared at the appointed time and place of hearing. In addition, the record in that case shows that the employe had been reinstated and the claim came to the Board solely on the question of back pay.

The Board's opinion in that case consists of one line: "The record herein discloses no reason to disturb the action of the Carrier." It is thus impossible to tell by what considerations the Board was moved to deny the claim; any one of the differences pointed out above may have been the deciding factor. We therefore do not think that the instant case is controlled by Award 6777, but is clearly distinguishable from it. The Carrier's failure to hold a hearing and hasty imposition of discipline under the facts and circumstances of this case amounted to a clear violation of Rule 40.

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 Agreement was violated.

AWARD

Claim sustained. The monetary claim is sustained for the amount of compensation claimant would have earned, less compensation received in other employment.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of November, 1955.