Award No. 11019
Docket No. SG-10524

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Missouri Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 26, when it assessed discipline against Signalman Robert Steinmetz, Scott City, Kansas, following an investigation held on September 12, 1957, to determine the cause and place responsibility for Section motor car and Signal motor car running together at or about 3:05 P. M., September 4, 1957, at Mile Pole 664-12, near Healy, Kansas.

(b) The Carrier now be required to compensate Signalman Robert Steinmetz for all time lost as a result of the discipline rendered (September 24, 1957, to October 6, 1957, inclusive) and also clear his personal service record of this unjust change. [Carrier's File No. JA-S 225-300]

OPINION OF BOARD: The facts are not in dispute. On September 4, 1957, the motor car operated by Claimant was involved in a collision with another motor car. On September 5th Claimant received a notice to appear in the Office of the Division Engineer on September 12th "for formal investigation to determine the cause and place the responsibility" for the accident. He was advised to "bring representative and witnesses, if you desire". The investigation was held on September 12th. By letter of September 23rd the Superintendent notified Claimant that he was dismissed from service for responsibility in connection with the collision of the motor cars. On September 30th the General Chairman appealed the decision of the Superintendent to the Assistant General Manager asserting a violation of Rule 26(d) of the Agreement by failure to render the decision within the prescribed time. The Assistant General Manager advised the General Chairman by letter of October 8th that the decision must be appealed to the Superintendent before he could hear the case. In the meantime, on October 7th Claimant was allowed to return to work. By letter of November 3rd the General Chairman rejected the Assistant General Manager's position as unreasonable since the Superintendent had rendered the decision, and in this letter he made the additional contentions that the Claimant was not apprised in writing of the charge and that

the decision was not rendered by the officer who conducted the investigation. In a letter of November 12, 1957, the Assistant General Manager denied the appeal. A subsequent appeal to the Chief Personnel Officer was also denied.

The Organization contends that the Carrier violated the Agreement in three respects: It failed to apprise Claimant in writing, prior to the investigation, of the charge against him contrary to Rule 26(b); It failed to render a decision within 10 days after the investigation as required by Rule 26(d); That the Superintendent by rendering the initial decision (investigation having been conducted by the Division Engineer) denied Claimant the right of appeal guaranteed him by Rule 26(e).

The Carrier asserts that the claim was not timely and properly presented in the first instance. It argues that the appeals procedure in Rule 26 was superseded by Article V of the August 1954 National Agreement, under Section 1(a) of which the Superintendent was the officer of Carrier authorized to receive claims or grievances in connection with disciplinary action; and that such claims must be filed within 60 days after the action (in this case September 23, 1957) and that Claimant failed to do that in this case. This point was not raised by Carrier in the handling of the claim on the property. It is asserted for the first time in Carrier's ex parte submission. It is the well established practice of this Board to refuse consideration of matters not raised on the property, and for this reason we do not pass on the question.

Carrier takes the position that there was no violation of Rule 26. As to the notice, Carrier says it was sufficient to apprise Claimant that he was being investigated in connection with the collision of the motor cars. It argues that Claimant was not surprised, had time to prepare his defense, and at the investigation made no objection concerning the lack of a specific charge and admitted receiving proper notice. In short, it says the notice met the requirements of the Rule. We do not agree. The rule requiring written notice to an employe of the charge against him is a fundamental rule negotiated by the parties for the protection of employes and should be strictly construed. The notice given in this case did not specify any charge. It merely said that an investigation was to be held to determine cause and place responsibility. We hold that it was not the equivalent of the charge required by Rule 26(b). The Carrier argues that since Claimant knew he was involved in the accident and was advised that he could have a representative and witnesses present he should have known the nature of the charge. This begs the question, does not excuse the Carrier from compliance with the Rule, and cannot be considered as equivalent to the written notice required. See Awards 2806 and 4473. We are aware that some awards have taken a contrary position but we believe the better reason requires a strict construction of such a fundamental rule. We, therefore, hold that Carrier failed to properly apprise Claimant of the charge against him and thus violated Rule 26(b). Furthermore, we do not agree that failure of Claimant to state at the hearing that he was unaware of the charge against him can be considered as a waiver of his rights under 26(b).

We are also of the opinion that Carrier violated Rule 26(d) when it failed to render the decision within ten (10) days after the investigation. The Rule says, "Decision to the employe, with copy thereof to representative who assisted him at the investigation will be rendered in writing within ten days after completion of the investigation." This is mandatory. The Carrier has only ten days in which to render the decision. There is

no authority in the agreement for a decision after that time and such a decision is of no effect. Awards 2590, 3502, 3697, 5472, 8160, 10035. The Carrier makes the ingenious argument that 26(d) was not violated because the Superintendent did not render any decision but merely assessed the discipline; that no decision was necessary since Claimant admitted his guilt. This reasoning is without merit. The Superintendent did make a decision that Claimant was at fault although he may have based it upon Claimant's admission. He also made a decision as to the penalty. He failed to render these decisions within ten days and thereby lost the authority to do so.

Since we find that Carrier violated Rules 26(b) and 26(d) we do not pass upon the alleged violation of Rule 26(e). We hold that the discipline was improperly assessed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1963.