

Award No. 11783

Docket No. SG-13613

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad Company:

(a) The Carrier violated the current Signalmen's Agreement when it dismissed Signal Foreman E. L. Denton from the service of the Carrier, effective January 24, 1962, following an investigation held to determine the facts in connection with his being absent from duty on September 5, 6, 7, 8, and 18, 1961, alleged improper handling of time roll, and alleged use of intoxicants.

(b) The Carrier be required to restore Signal Foreman E. L. Denton to his position of Signal Foreman with all rights unimpaired and compensate him for all loss of time due to the Carrier violation outlined in paragraph (a).

[Carrier's File: 135-296-106 Spl.-Case No. 156 Sig.]

OPINION OF BOARD: There does not seem to be any substantial difference between the parties as to the facts of the case. Signal Foreman Denton absented himself from his duties without authority on September 5, 6, 7, 8 and 18, 1961. He could not discharge his responsibilities of properly handling the time roll since he was not on the job. There is a difference as to the reason for the admitted absences: The Carrier claims he was intoxicated on September 5, 1961; the Organization says he was sick.

The Carrier sent Claimant a notice to attend a " * * * formal investigation to be held in the Division Engineer's office, Carbondale, Illinois, at 10 A.M., DST, September 20, 1961, to determine the facts in connection with your absenting yourself from your duties on September 5, 6, 7 and 8, alleged improper handling of timeroll, and alleged use of intoxicants." The Brotherhood contends the notice was defective because it did not state the exact charges against the employee and Rule 701 (a) of the current Agreement requires that an employee be given advance notice in writing of the exact charges against him. The Organization further states that an investigation to develop facts is not the same as an exact charge and a hearing thereon; in the case at bar, after the hearing held pursuant to the defective notice, the Claimant was discharged. The Organization concludes that, based on the above statement of facts, it is

not necessary to decide the case on the merits because the hearing and the Carrier's decision to discharge Claimant were not in compliance with the Agreement and therefore the proceeding is a nullity.

The Awards are clear in holding that the reason for requiring a notice of hearing is to assure an employe of a clear statement of the subject matter of the hearing so that he can properly prepare his defense. Such requirements also comport with the larger purpose of guaranteeing him a full, fair and impartial hearing. This is an elementary requirement that must be met otherwise an employe might be exposed to a denial of due process of law.

An examination of the notice in the instant case shows the following:

- 1) The date, time and place of the hearing are clear and definite.
- 2) The precise derelictions of duty and the days on which they occurred are spelled out.

The overwhelming weight of the Awards support the proposition that a notice which reasonably apprises an employe of what set of facts and circumstances is under inquiry so that he will not be surprised and can prepare a defense will assure protection of his substantial rights. The notice which is the subject matter of the present dispute meets all necessary requirements. Award 3270 (Carter) is apposite to the facts in this case:

"* * * When he was advised by the notice to him that the improper handling of train order * * * was to be investigated, he knew full well that his part in the mishandling was the subject of the investigation. The notice advised him to report at the investigation with his representative if he desired one. He knew full well that this meant that he was charged with the mishandling of the train order and that the investigation was for the purpose of determining his guilt or innocence in connection therewith. * * * There is nothing in the record to indicate that Complainant was in any manner misled or prejudiced by the form of the notice and charge made. * * * The formation of a charge and the giving of notice thereof need not be in the technical language of a criminal complaint. It is sufficient if it appears that the one charged understood that he was being investigated and that he understood the dereliction of duty affording the basis of the complaint. * * *"

Also see Award 10355 (Harwood):

"It specified clearly the offense; it stated the hour and date thereof; and it stated the place where the offense occurred. As pointed out in Award 4781 (Referee Stone) the purpose of the rule 'was not to provide a technical loophole for escape from deserved discipline, but to enable the employe to prepare his defense.' Also, it should be added, that at the trial the Claimant said he had received proper notice. The objection not having been raised at the trial is deemed waived. (Award 4781, supra)."

Award 11443 (Dolnick):

"The charge does not need to contain the Rules which Claimant allegedly violated. Awards 7139 (Cluster) and 6171 (Wenke). Claimant knew the nature of the charge. He was not misled, nor was he deceived. Awards 5933 (Parker) and 5370 (Elson)."

Also see: the following Awards: 11170, 11327, First Division, 19699, 18803, 17609 and many others too numerous to require mention.

Even if the recited purpose of the hearing was to determine "facts", there is nothing in the Agreement prohibiting the investigation official from evaluating those facts and taking appropriate action thereon.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October, 1963.

Dissent to Award 11783, Docket SG-13613

In this Award the majority instead of applying the Discipline Rule, Rule 701(a), in light of the facts devoted its effort to bending the clear language of the Rule to fit what has been said in other cases in connection with other rules of other agreements and under other fact situations. For example, the comparable rule in Award 3270, which the majority leans heavily upon, provided that notice to the accused "shall be in writing and contain the specific charge or nature of complaint" (emphasis ours) whereas, the applicable rule in the instant case unequivocally provides that the accused will prior to the investigation be advised "of the exact charge or charges which have been made against him."

Notifying an employee to attend an investigation "* * * to determine the facts in connection with your absenting yourself from your duties without proper authority on September 5, 6, 7 and 8, alleged improper handling of timeroll, and alleged use of intoxicants." certainly does not advise the employee of the exact charge or charges which have been made against him.

Equally erroneous but understandable when considered in light of the reasoning employed by the majority in the remainder of the Award is the conclusion that it was alright for Carrier to set up a fact finding investigation and then dismiss the accused without a hearing on the exact charge or charges which have been made against him.

There is nothing in either the agreement, the record or the Award to justify the majority's upholding of the Carrier's disregard of the clear provision of Rule 701(a); therefore, I dissent.

/s/ **G. Orndorff**

G. Orndorff
Labor Member