Award No. 13447
Docket No. TD-14630

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The St. Louis-SanFrancisco Railway Company (hereinafter referred to as "the Carrier") violated the effective schedule agreement between the parties, Article V thereof in particular, by imposing disciplinary action upon Train Dispatchers J. E. Price and P. J. Nerren following improper charges and as a result of hearing held on January 23, 1963.

(b) The Carrier be required to clear the records of the individual claimants of said disciplinary action and compensate each of them for one day lost account required to attend the said hearing.

OPINION OF BOARD: The claim is submitted by the Organization in behalf of Train Dispatchers J. E. Price and P. J. Nerren that their records be cleared of 30 demerit marks assessed and that they be compensated for one day's pay lost on account of attending a hearing on January 29, 1963. The penalty was assessed for their responsibility in a collision which occurred at Carbon Hill, Alabama on January 23, 1963.

The Organization raised objections to the procedure followed in that Carrier had not given Claimants proper notice specifying "the precise charge or nature of the complaint" as required by Article V of the effective agreement.

The notice about which the Organization complained was served upon the Claimants on January 26, 1963 and read as follows:

"Please report to the Assembly Room in the Mechanical area at Thomas Yard, Alabama at 8:30 A. M., Tuesday, January 29, 1963, for hearing to develop the facts and determine your responsibility, if any, in connection with collision of Extra 570 with cars on siding at Carbon Hill, Alabama, about 9:40 P. M., January 23, 1963.

You may have representative as specified by Agreement rule, if one is desired."

The question raised is whether or not this notice satisfies the rule requirement of specifying the precise charge or nature of the complaint. The Organization contends that the failure to specify that Claimants were being charged with any violation of a rule rendered the notice insufficient and it cited Award 4607 which holds:

> "We think that the requirement of notification of the precise charge against an employe requires an exact specification of the action or non-action which is alleged to constitute a dereliction of duty. A charge of violation of the general rules specifying employes' duties in the preformance of their work is not a precise charge."

We think the notice herein does not meet the standards set in Award 4607. The notice served herein was defective in that it did not contain a charge nor was it sufficiently precise.

Article V sets forth the procedure protection which must be afforded an employe before discipline can be imposed. He must be clearly charged, that is, he must be told he is on trial for an offense. Carrier's notice falls far short of being a clear charge. It instructed Claimants to report for hearing "to develop the facts and determine your responsibility, if any. . . ." It does not say to Claimants that Carrier thought him guilty of an offense. On the contrary the notice says, in effect, that Carrier does not know who is responsible but intends to find out. It should be noted that Carrier deemed the development of the facts as the primary purpose of the hearing by placing it first in the notice. Only secondarily were the Claimants put on notice of the possibility that they may be found responsible. The effect of the notice was to tell the Claimants that they would participate in a general inquiry rather than a trial. The distinction is a vital one.

Article V has as its purpose to alert the accused employe so that he may properly prepare his defense, for to try a man without affording him an adequate opportunity to gather evidence and witnesses and obtain counsel and advise offends our sense of fair play. This the notice did not do. The Claimants had no idea of what evidence they might need since they had no idea of wherein they had been remiss. Nor did the Carrier, since it announced that the hearing was to be held not to try the Claimants but to find out who was responsible.

Article V also requires that the charge be precise. A notice which does not clearly charge cannot be said to be precise. We do not mean that the accused must be told in detail which action or non-action is the subject of the charge, but he must be informed in a general way so that he or any reasonable person would know the nature of the charge.

But here, the accused were not told, even in a general way, the nature of the charge. They were charged with "responsibility", a broad term embracing a wide range of possibilities, which can hardly be described as "precise". The consequence of this was that the accused were found guilty for their "responsibility in connection with collision of Extra 570 with cars on siding at Carbon Hill, Alabama, January 23, 1963 as developed in hearing conducted with you. . . ." The verdict was precise as to when and where they were guilty but not as to what.

An examination of recent awards cited by the Carrier are distinguishable in that the employe was charged with an offense which was specified.

In Award 9322 (Johnson) the Claimant was charged specifically with being discourteous to a Steward and Staff Officer, using vulgar and profane language and failing to obey instructions.

In Award 11170 (Coburn) the notice required attendance at a formal investigation "for purpose of developing information and your responsibility regarding injury inflicted on waiter Fred Smith and threatening gestures made toward him. . . ." Any doubt that this notice was sufficient was resolved, the Board noted, by the fact that "no charge of misconduct was brought against him until after preliminary inquiry into the facts had been conducted." In our case, the Claimants were found guilty in the preliminary inquiry.

In Award 11443, the notice required the accused "to report for a hearing on the following charge: Insubordination to Waiter-in-Charge Stevenson, train 41, January 29, 1958." It should be noted that the accused was charged with an offense even though the specific rule was not stated. The Board found that "Claimant knew the nature of the charge. He was not misled, nor was he deceived." In our case, the failure to be specifically charged might have misled Claimants into a false sense of security and hampered adequate preparation of their defenses.

In Award 11783, the hearing was "to determine the facts in connection with your absenting yourself from your duties on September 5, 6, 7 and 8, alleged improper handling of time roll, and alleged use of intoxicants." The accused knew that he was charged and precisely why.

In Award 12138, the Claimant was charged with:

"1. Insubordination by refusing to comply with instructions issued by duly appointed Supervision.

2. Displaying hostile attitude toward Supervision in its efforts to improve the manner in which you handle claims."

The Board held,

> "We are of the opinion that although the charges were not technically explicit in all details when issued to the Complainant. However, prior to the trial, he was fully acquainted with the time, place and circumstances of the charge. . . . This information adequately enabled them to prepare a defense, which is all the Rule requires."

In Award 12255, the major objection was that although the rules were mentioned, the offenses thereunder were not spelled out. The Board, in a short opinion, held it to be adequate, noting that Claimant came to the hearing armed with statements to support his defense. Therefore, the Board concluded that Claimant knew the nature of the hearing. In Award 12255, the Claimant entered the hearing knowing he was charged and prepared to meet it. In our case, the Claimants did not know they were charged. They knew only that they might be.

Finally, in Award 12322, the notice referred to "your personal conduct which resulted in your arrest on January 24, 1962. . . ." The Board said,

"The requirements of Rule 16 (b) for advance notice 'in writing of the precise charge' need not be met by a 'bill of particulars' giving in explicit detail the case which has been marshalled against the defendant. Nor must it, as the employe argues, include the names of witnesses, what they will say, . . .

Our understanding of the purpose of this stipulation in Rule 16 is that it is meant to give the employe unmistakable advance notice of that with which he is charged and which is deemed by the Carrier to merit discipline, if borne out by the hearing."

The Board found that the reference to the arrest apprised the defendant of the nature of the charge.

We hold that a notice to attend a broad, general inquiry to ascertain who, if anyone, was responsible for a collision does not satisfy the requirement of Article V.

Compliance with the procedure is a basic safeguard of due process and failure to do so is fatal, regardless of the merit of the charge.

Carrier argued that Claimants should have raised an objection at the hearing if they did not think the charge was precise enough or that it did not even constitute a charge. There is, indeed, authority for the proposition that procedural objections must be raised at the hearing or be deemed to have been waived. We find, however, that this principle is not applicable unless the Claimants knew they were on trial.

At no point in the hearing were the Claimants apprised that they were on trial. Whatever knowledge they had of their status came from the original notice and that notice, we have already pointed out, did not clearly tell them they were to be tried for some dereliction of duty. We cannot, therefore, be sure that their failure to raise an objection was not due to their having been lulled into a false sense of security.

Carrier objects to the argument that Claimants were not even charged, saying that this was not raised on the property and was mentioned for the first time in argument before the Board. It pointed out that the Organization objected to the lack of precision in the charge in that the violation of specific rules was not alleged and it never mentioned that the notice was not a charge. This attack raises an important question: Should Claimants be restricted to the precise arguments raised on the property or may they expand those arguments before the Board?

There is undoubtedly merit in the argument that parties should be restricted to those arguments raised on the property. The general purpose of the Railway Labor Act and the Rules of the Board is to encourage the disclosure of arguments as well as facts on the property so as to enhance the possibility that claims will be disposed of before they reach the Board. An opposite point of view would only serve to encourage the parties to withhold their plans of attack until the last moment and thereby reduce the time and opportunity for the opposition to meet it.

At the same time, restricting argument to the points raised on the property would reduce the function of this Board to the acceptance or rejection of arguments made on the property and would deprive the parties of the

maturity and experience and breadth of view which the members of the Board who argue these cases give to them. What is needed is some leeway to expand the argument provided its general outlines have been raised on the property.

In the case at issue, the preciseness of the charge was raised on the property and we are, therefore, not faced with a new attack not raised on the property. The question is reduced to whether the attack on the notice as not constituting a charge is an expansion of the attack made on the property, and therefore acceptable, or constitutes a new kind of attack and therefore unacceptable. We think it is the former. It is embraced under the umbrella of an "imprecise charge." To say it does not clearly constitute a charge is tantamount to saying it is not a precise charge. Both statements concern the kind of notice given to alert the accused so that he prepares his defense adequately.

In our opinion, Carrier did not comply with the requirement that the charge be precise.

In addition to the claim as to the discipline, the Organization also claimed compensation for one day lost because the Claimants were required to attend the disciplinary hearing. This money claim was denied because an appeal was not perfected within the required six months. This money claim was not a separate claim but the remedy which was contingent upon the outcome of the discipline case as provided in Article V (c) which states:

> "If the decision be against him, he shall have the right of appeal to each succeeding higher operating officer. If an appeal is taken it must be filed in writing within fifteen (15) days after date of decision, and a copy of the appeal furnished to both the officer appealed to and the one whose decision is appealed. The hearing and decision on appeal shall be governed by the time limits of Section "b". **If the decision be in his favor he shall be compensated for time lost less any amounts earned in other employment."** (Emphasis ours.)

Claimants' right to compensation is clearly part of the remedy afforded and not a separate claim. The fact that under Carrier's rules, money claims must be processed separately and differently from discipline cases, does not make them separate or distinct claims. Carrier may not by procedural devices fragment claims and thereby deny the remedy to a Claimant whose claim is sustained. Award 11777, cited by Carrier, is clearly distinguishable. It concerned a money claim not part of a discipline case.

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 3rd day of March 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13447, DOCKET TD-14630

(Referee Wolf)

We respectfully submit that an impartial reading of the record in this case, and particularly the transcript of investigation, will convince anyone who is familiar with the industry that Claimants knew they were being charged, and they knew precisely the nature of the offense with which they were being charged. The Referee's conclusion to the contrary is erroneous and is unquestionably the product of his lack of experience and background in this phase of railroad work. Compare Award 6590 (Rader).

We dissent.

G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts