Award No. 14778
Docket No. SG-14374

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ATLANTA AND WEST POINT RAILROAD—WESTERN RAILWAY OF ALABAMA

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Atlanta and West Point Railroad Company—The Western Railway of Alabama that:

(a) The Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 60, when it suspended Signal Maintainer R. L. Bateman for ten days commencing June 25, 1962, and Assistant Signal Maintainer Charles Smith for five days commencing June 25, 1962, without first preferring the exact charge or charges and sustaining in a proper hearing.

(b) The Carrier violated Article V of the August 21, 1954 Nationaly Agreement when Supervisor TT&S R. C. Neville failed and/or refused to deny the claim as presented to him by Local Chairman G. F. Harper under date of August 21, 1962.

(c) The Carrier be required to compensate Messrs. Bateman and Smith for actual time lost because of these violations.

OPINION OF BOARD: On June 8, 1962, train No. 22 collided with a motor car in charge of Claimant Maintainer Bateman accompanied by Claimant Assistant Maintainer Smith. The motor car was unoccupied at time of collision. Claimants alighting when train came in view. The following day the Signal Supervisor wrote to and caused to be served upon Claimants the following:

"A joint hearing will be held in Trainmaster's office in General Office Building, Montgomery, Ala., on Wednesday, June 13, 1962, at 2:00 P.M. to develop facts, and place responsibility of collision between Signal Maintainer's motor car and Train No. 22 at 1:30 P. M., June 8, 1962, near Mile Post 32.

You will arrange to be present and have any witnesses or representation in your behalf, as you may desire."

Hearing was held on the appointed date. Thereafter, on June 19, 1962, the Signal Supervisor wrote to Claimants Bateman and Smith that they were being suspended for ten and five days, respectively, for "not complying with instructions in Chief Engineer's Circular No. 81." On August 21, 1962, the Local Chairman filed claim "Account the Carrier failed to comply with the

agreement particularly rule 60; and was in error in suspending (Claimants) without first preferring the exact charge or charges and sustaining such charges in a proper hearing." The Rule alleged to have been violated reads in material part:

"ARTICLE 7—DISCIPLINE AND GRIEVANCES
RULE 60

"(a) An employe who has been in the service more than sixty (60) days will not be disciplined or held out of service without a fair and impartial investigation and hearing, at which investigation and hearing he may be assisted by one o rmore duly accredited representatives of his own choosing. He will be advised at least forty-eight (48) hours prior to such investigation and hearing of **the exact charge or charges** which have been made against him. At such investigation and hearing he shall have the right to call witnesses to testify in his behalf." (Emphasis ours.)

The June 9, 1962, notice of hearing, **supra**, did not charge Claimants with violating instructions in Chief Engineer's Circular No. 81. The only reference to that Circular in the transcript of the June 13th hearing is the following question directed to and answered by Claimant Bateman:

"Q. Are you familiar with Transportation Department Circular 80-59, Chief Engineer's Circular No. 81 of instructions to be observed in the operation of motor cars?

A: I am not familiar with it."

Rule 60 (a) unequivocally mandates that an employe with more than sixty day services can be disciplined only after he has been given notice 48 hours prior to hearing of the "exact charge or charges which have been made against him." The words selected by the parties, it must be conclusively presumed, are, in the interpretation of the Agreement, to be given their usual meaning unless a peculiar meaning is attached to them in the industry. The words "exact charge or charges" have no peculiar meaning. The parties herein have agreed that the indispensable foundation to a disciplinary proceeding is the service of "exact" charge(s). We are constrained by the Agreement. We may not substitute a sense of equity which is foreign to the dictates of the Agreement. We find nothing in the June 9, 1962, notice that satisfies the mandate.

An investigation, sole, is a discovery procedure. It can be likened to a grand jury procedure to develop facts from which to determine whether an indictment should be returned. The indictment apprises the defendant of the precise (exact) illegal conduct with which he is charged so he can prepare and confine his defense thereto; fishing expeditions are barred in the trial; only probative material and relevant evidence is admissible. The defendant cannot be found guilty of anyother crime than that spelled out in the indictment.

We are aware that a hearing within the contemplation of Rule 60 (a) is not attended by the technicalities of a criminal proceeding or even a civil proceeding in a court of record. We make the comparison only to illustrate the common understanding of due process. No man can defend himself against a charge to him unknown. Certainly, it is not due process to shovel anything and everything into a record and leave to the uninhibited hearing officer finding what misconduct he feels the employe has committed. Issue must be joined before hearing.

The record in this case demonstrates the ills of lack of due process. Here the Claimants were found guilty of not complying with instructions in Chief Engineer's Circular No. 81. They were not charged with such malfeasance. Even during the hearing they were not advised that they were being so charged which would have afforded them opportunity to move for the protection of their rights. Consequently, they were denied the indispensable due process right to prepare and present their defense to such a charg. From our study of the transcript of the hearing and the notice giving rise to it we are persuaded that Claimants were not on notice, real or constructive, that they were being tried for violation of Circular No. 81. We, therefore, will sustain paragraphs (a) and (c) of the Claim.

A further revelation of the ill engendered by failure to serve an exact charge is found in the Director of Personnel denial of the Claim on appeal, datd November 9, 1962, wherein he embellished the reason for the suspension by finding Claimants had violated Rule M-2 of the Operating Rules. The only reference to that Rule in the transcript of the hearing is whether Claimant Bateman was familiar with it.

Inasmuch as Carrier is not a party to the August 21, 1954 National Agreement we will dismiss paragraph (b) of the Claim.

Carrier argues that a settlement proposal made by Petitioner is evidence that the Claim is without merit. Settlement proposals made by either party, but not agreed to are not evidence as to the merits. This is a well established principle in the law of evidence. Were it otherwise it would deter the parties in using their good offices to settle disputes on the property—a laudable objective which the statute encourages.

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 Carrier violated the Agreement.

AWARD

Paragraphs (a) and (c) of the Claim sustained.

Paragraph (b) of the Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September 1966.

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