Award No. 15994
Docket No. SG-16669

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

NEW YORK CENTRAL RAILROAD COMPANY
(Western District)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the New York Central Railroad Company (Lines West of Buffalo) that:

> Carrier unjustly dismissed D. C. Meiers from service effective at close of work April 5, 1966, and should be required to restore him to service, clear his record, and pay him for all time lost as a result of his dismissal.

OPINION OF BOARD: Claimant, after some 17 years of service, was dismissed by Carrier for "chronic absenteeism."

The essential facts are not in dispute: Claimant was employed as a Lead Signal Mechanic at Carrier's System Signal Shop at Elkhart, Indiana. He had been warned several times about absenteeism. He was discharged in September, 1948 for chronic absenteeism, and twice suspended for short periods of time in 1964 and 1965 for the same reason.

On March 11, 1966, Carrier charged Claimant with:

> "repeated violation of Rule 725 of the Rules of the Operating Department since **October 8, 1965**, at which time you were disciplined for violation of the same Rule." (Emphasis ours.)

Hearing was held on March 23, 1966, and on April 1, 1966, Claimant was notified of his dismissal from service effective April 5, 1966.

Claimant, through the Organization, asserts that Carrier violated Rule 51(a) of the Agreement by failing to apprise him of the specific dates of the alleged violations from October 8, 1965 to March 11, 1966.

Carrier contends that the notice duly apprised him of the charge against him. It argues that the charge did not relate to any specific or single date, but was concerned with a pattern of conduct. Moreover, Claimant was aware of the times of absence to which Carrier had reference in its charge of "repeated violation of Rule 725."

Rule 51(a) reads, in part, as follows:

"(a) . . . no employe . . . shall be dismissed without a fair hearing by a designated official of the carrier. . . . At a reasonable time prior to the hearing **he shall be apprised in writing of the precise charge against him.** . . ." (Emphasis ours.)

Rule 725 reads as follows:

"725. No employe will be allowed to absent himself from duty without proper authority, nor will any employe be allowed to engage a substitute to perform his duties.

Employes subject to call for their tour of duty must not absent themselves from their usual calling place without notice to those required to call them.

Employes must give written notice to proper authority of change in residence or telephone number.

Employes who report for duty without being notified or called and whose usual reporting time is subject to change must inform the proper authority if they cannot be contacted at their usual place."

At the hearing, Claimant was read a list of 34 alleged violations of Rule 725 between November 4, 1965 to March 10, 1966.

No demand or request was made by Claimant or the Organization representative for a list of these specific dates prior to the hearing, nor was there a demand or request for a continuance at the hearing to prepare any defense or justification for any or all of the violations enumerated.

Two questions are, therefore, presented to this Board:

1. Did the charge set forth in the March 11, 1966 letter of notification satisfy the requirements of Rule 51(a)?

2. If not, did Claimant waive his right by failing to demand or request a continuance to adequately prepare a defense?

I.

With respect to the first question, the Board is satisfied that Claimant was not apprised of the "precise charge against him" as is required by Rule 51(a).

Even if we were to accept Carrier's argument that a recitation of specific infractions and the dates on which they occurred is not necessary in a notice of hearing when an employe is charged with "a pattern of conduct" contrary to the best interest of the Carrier, due process requires that the person charged be given a reasonable opportunity to defend against such a charge. The only way it can be done is to refute or justify any or all of the alleged infractions which constitute a "pattern of conduct." This is particularly so in the instant case where there were 34 such alleged infractions of the rule. The notice to Claimant, therefore, was defective.

II.

We come next to the question of whether such defective notice was waived by the Claimant.

It may be stated as a general proposition that procedural defects may be waived by the party charged if timely objections are not raised. Awards 10089, 4239 and First Division Awards 14753 and 18878.

Between the date of the notice and the date of the hearing, Claimant made no demand or request to be apprised of the specific dates or charges encompassed in the notice.

Claimant appeared at the hearing with four officials of the Organization, including the Acting General Chairman and the Local Chairman.

The specific dates of infractions were read to Claimant shortly after the hearing opened. There was no demand or request by Claimant or his representatives that the hearing be continued in order to afford Claimant a reasonable opportunity to prepare a defense against any or all of the alleged infractions of the rule.

Instead, Claimant elected to willingly proceed with the hearing. He cannot at this point protest an adverse decision.

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 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 8th day of December 1967.

DISSENT TO AWARD 15994, DOCKET SG-16669

This Award correctly finds that the notice to Claimant was defective, but in holding that the defect was waived by the Claimant and the Organization the Referee injected into the case an issue that was not raised on the property. Briefly, the Referee supplied a defense for Carrier which he as the Neutral had no authority to do under either the Railway Labor Act or the Board's Rules of Procedure. Therefore, I dissent.

G. Orndorff
Labor Member

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.