NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21419

THIRD DIVISION Docket Number CL-21238

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7846) that:

1. Carrier acted in an arbitrary, capricious and unjust manner when on September 30, 1974, it assessed Clerk J. R. Ratcliff and Messenger R. H. Enterline a deferred suspension of fifteen (15) days each.

2. As a consequence of such action Carrier shall now be required to:

(a) Compensate Clerk J. R. Ratcliff for eight (8) hours at the time and one-half rate of pay account attending the investigation on September 20, 1974, on one of his regularly assigned rest days.

(b) Compensate Messenger R. H. Enterline for eight (8) hours at the pro rata rate of pay account attending the investigation on September 20, 1974, in the capacity as witness for the Carrier.

(c) Compensate Clerk J. R. Ratcliff and Messenger R. H. Enterline interest at the rate of twelve (12) per cent compounded annually on the anniversary date of this claim for all monies due in (a) and (b) above.

(d) Carrier shall further be required to remove and expunge the fifteen (15) days deferred suspension, and any reference thereto, from the records of Clerk J. R. Ratcliff and Messenger R. H. Enterline, as a result of its arbitrary, capricious and unjust action.

OPINION OF BOARD: The claimants are employed in the Scioto Division of the Carrier at the Joyce Avenue Yard Office in Columbus, Ohio. On September 5, 1974 at approximately 10:30 a.m. the Assistant Superintendent, Columbus Terminals, N. H. Fortune, Jr., entered the office and saw claimants gathered around a machine; playing cards and money were on the machine. When he entered there was some scurrying to gather up the cards, money and retreat to other areas. Mr. Fortune frankly assumed gambling was going on although he did not see cards or money being dealt or exchanged. Based upon this occurrence claimants were served notice to the following effect:

> "You are hereby notified to report to the Office of the Assistant Superintendent, Joyce Avenue Yard Office Building, at Columbus, Ohio, at 9:00 a.m., Monday, September 9, 1974, for a formal investigation to determine your responsibility in connection with your engaging in activities interfering with your attention to your assigned duties at approximately 10:30 a.m., September 5, 1974, in the Watkins Yard Office IBM Room."

The notice was given pursuant to Rule 27 of the applicable agreement which provides in pertinent part:

> "An employe charged with an offense shall be apprised in writing of the specific charge or charges against him at the time charge is made, and will have reasonable opportunity to secure the presence of necessary witnesses and representatives. The investigation and hearing will be held within ten calendar days from date charged with the offense or held out of service, and a decision will be rendered within ten calendar days after completion of the investigation and hearing. A record of the investigation and hearing will be made and a copy of this record will be furnished the employe or his representative upon request."

The Carrier's chief witness, Mr. Fortune, candidly states the whole basis for this disciplinary action is the conclusion reached that claimants were playing cards and not performing duties at that time. The claimants assert the notice of hearing is invalid in that it lacks specificity and the Carrier failed to sustain its burden of proof by substantial evidence. Other objections are raised and for our purposes we need only consider these two.

The record contains ample evidence to sustain a charge that claimants were guilty of playing cards at the time involved. The Assistant Superintendent's testimony was clear and direct as to what he saw. This amounted to circumstantial evidence and we are not inclined to follow the views of certain awards tending to denigrate such proof. See Awards 14066,

15025 and 17761. We believe the better view is expressed in Award 12491 (Ives) where this Division said:

> "The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial."

The main difference between circumstantial evidence and direct evidence is that the former requires inferences to be drawn from the facts disclosed. The probative value of such proof depends upon the compelling nature of the inference required. In his journal of November 11, 1850, Henry Thoreau talked of watering milk and said: "Some circumstantial evidence is very strong, as when you find a trout in the milk."

Here the Assistant Superintendent entered the room unannounced. There was work to be done that was unattended. He saw playing cards and money on a machine. The claimants were adjacent thereto and there followed a scurrying to gather up cards and money and seek an exit. If this did not amount to apprehension in flagrante delicto, it is because of the scrupulous restraint on the part of the officer (albeit, commendable) that he did not see cards played or dealt. He assumed from the circumstances that such activity was going on. For their part the claimants made feeble attempts to provide another explanation. They placed greater reliance on their claim that his assumption was unwarranted and reflects a failure of proof. We do not agree. We have here a "trout in the milk" and, under the circumstances, it is unlikely the Assistant Superintendent upon entering the room could have seen more. The record provides ample support for the conclusion that card playing was going on. Award 16190 and Public Law Board 710, Award No. 5. This Board, of course, will not disturb a finding based upon substantial evidence in the record, whether direct or circumstantial.

As it happens the charge here was not "playing cards," rather, it was "engaging in activities interfering with ... assigned duties." The stated charge tends to obfuscate and it is challenged as lacking specificity under the above quoted rule 27(b).

The notice here is framed in terms of a formal investigation. This Division has had occasion to call such notices into question where the applicable disciplinary rule requires a specific charge in writing, as it does here. See 14778 (Dorsey) and Public Law Board 650, Award No. 28. More recently a contrary view was advanced in Award 21020 (Norris). In Award 21278 we had occasion to resist such formalism and determine whether the accused was afforded proper notice so he could understand the accusations, prepare his defense and meet the charges against him. Clearly, the requirement of specificity is not so rigid as a criminal complaint and it should not be employed as a technical loophole for avoiding discipline.

At the same time the requirements for specificity are real and we must examine the awards applicable. The Carrier's submissions to this Board cite approximately fifty awards in support of their view that the requirement is met here. We have examined these awards closely. A number of them failed to quote the charge or notice and as a consequence, the awards were not helpful. See 12255, 13633, 16115, 16602, 17163, 17761, 17765, 17998, 16344, 20857, 20675, 20670, 20603. Public Law Board 650, Awards 2, 12 and 13. A greater number of awards involved charges that encompassed specific dates and times and generally afforded details that met the who, what and where requirements: 6171, 10355, 11170, 11783, 13040, 13458, 13751, 15025, 16065, 16816, 17091, 17515, 18037, 13969, 21020, 20428, 20285, 20143, 19698, 18872. Insofar as these awards involved sufficient specificity, they do not help here and only verify that in most cases the requirement is fulfilled. The issue here is whether this notice was sufficiently specific.

The notice here deals with "engaging in activities interfering with your attention to your assigned duties" at a specified time and place. The difficulty lies in the fact this phrasing could serve as an umbrella for a multitude of offenses and place the claimant in the hazardous position of making a guess as to the offense and then prepare his defenses on risky foundations. For instance, this could include card playing and gambling. But it could also include, with equal clarity, loitering, idling, reading, watching T.V., listening to a radio. Further, depending upon ones' philosophy, it could even include sleeping or daydreaming. Granted all these offenses are impermissible, that does not help satisfy the requirements of specificity. In Award 14801 (Lynch) this Board held that a charge was not sufficiently precise that made reference to violation of Rule 702 on specified dates. The difficulty was that "Rule 702 contains five paragraphs with at least 20 separate transgressions covered."

Admittedly, the matter is not so one-sided that the Awards of this Division provide uniform support for the view that the notice here lacked specificity. In Award 12738 (Coburn) the charge related to "conduct unbecoming an employe by becoming involved in activities which resulted in your inability to perform the duties of your assignment." There this Board was concerned with lack of specificity but claimant's admission, combined with a conference predating the hearing, served to provide him with adequate notice of the charges. It appears therefore that surrounding circumstances may help cure an otherwise imprecise notice and charges. In Award 16121 (Friedman) the charge referred to an altercation but gave no specifics as to time or place. This Board concluded the charge was valid insofar as it had been delivered on the day of the occurrence, and, presumably, claimant was not prejudiced. Where the claimant admits his guilt such admission tends to control even where the charges may lack the required specificity. See Awards 14272 (Ives) and 17525 (Dugan). There can be no argument that the claimant can waive any objection to an imprecise or nonspecific charge. There was an element of waiver in Award 16121. In addition, the awards are not inclined to invalidate an entire proceeding where one element of

a charge is missing. In Award 17515 (Dugan) the names of the supervisors and fellow employes were not given although other facts were specified. The Award stated: "...if she felt that the names of said persons caught her by surprise, could have requested a continuance if she so desired." To the same effect see Award 20670 (Edgett).

These cases present the question whether a vague charge should be sustained unless the claimant can demonstrate genuine surprise or prejudice. Some cases are inclined to approve a doubtful or otherwise improper charge where the claimant is not prejudiced. See Awards 17837 (Dolnick), 18036 (Dolnick) and 17761 (Kabaker). The difficulty with this unstated approach is that it could eventually read the requirement of specificity and preciseness out of the agreements. The better view resists the temptation to speculate on what the accused "really knew" and tests the notice and charges by what is stated. An interesting discussion along these lines is contained in this Division's Award 12322 (Yagoda) where the investigation related to "your personal conduct which resulted in your arrest on January 24, 1962." The claimant challenged this notice as not sufficiently precise. The arrest involved the molesting of underage girls and the Board had no difficulty rejecting this procedural claim. The Award discussed at some length the subject we believe has pertinence here:

> Our position should not be misunderstood as that of holding that the "precise charge" requirement is met by a mere assumption that the accused employe may be relied on to reconstruct from his memories or experiences an hypothesis of the subject matter of the investigation, inasmuch as "he knows what he did." Thus, in Award 6213, the employer defended the meagerness of its charge on the grounds that inasmuch as the Claimant had been involved in a police action, he should have been counted on to know what was at issue without further specification. The Board rightly found against the Carrier, because the notification and charge in that case stated only that the employe was being charged with "conduct unbecoming a Bureau employe." There was not in that statement as there was in the present one, a reference to a specific arrest on a specific date for "personal conduct" which had been the subject of investigation by both law officials and Carrier investigators, who put before the accused the same detailed, specific allegations which he was to encounter at the investigation and part of which he there admitted.'
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> And in Award 4473, the Board rightly found the charge defective because no offense was charged. In the matter before us, although there is no

> reference in the charge to an Agreement or rule proviso, it is nevertheless clear that the employe is to be answerable for "your personal conduct," unmistakably identified by reference to the arrest. Award 2806 dealt with a situation in which the Claimant was palpably deprived of notice, specification, opportunity to prepare and opportunity to defend. It cannot be reasonably compared to the instant matter, but it is a useful example of the kinds of abuses, not present in kind or degree here, which such Rules as Rule 16 are meant to prevent.
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> We wish also to take cognizance of the obvious danger that cryptic characterizations of charges, whether by reference to other events or otherwise, may deprive an employe of the advance information which Rule 16 intends him to have. Our general course is to discourage such tendencies.

Applying these principles here we conclude the notice was too vague. Claimant's representatives gave notice of their objection on the ground of lack of specificity so there could be no question of waiver. The circumstances surrounding this matter did not shed light on the notice. Moreover, claimants did not admit their guilt during the hearing or at any other time. They did not request a continuance and the fact they were able to proffer a defense of sorts to the charges does not serve to cure this defect. Instead, it confirms that they guessed correctly what the charges meant. Rule 27 does not contemplate such guessing and a notice or charge that makes it necessary is unacceptable.

For these reasons we conclude Carrier violated the Agreement and acted arbitrarily, capriciously and unjustly when it assessed Clerk J. R. Ratcliff and Messenger R. H. Enterline a deferred suspension of fifteen (15) days each. Accordingly, Carrier is directed to remove and expunge said deferred suspension from their records.

With respect to the claims for attending the investigation and the claims for interest, we find no basis for them in the agreement and these claims are denied.

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.

A W A R D

The claims are sustained in part and denied in part in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.