

Award No. 2218

Docket No. 2196

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

Referee William H. Coburn

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

ERIE LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmasters A. T. Fagan and P. A. Acquino be paid for all time lost and that their personal records be cleared of discipline administered as a result of an investigation held on September 14, 1965 in connection with accident in New York Central Frontier Yard, Buffalo, New York and damage to cars MDAX-244, 236 and 2144, automobiles.

OPINION OF BOARD: This is a discipline case. On September 10, 1965, Claimants were on duty at Carrier's West End Tower and SK Yard respectively when at approximately 3:15 P. M. three high-level triple-decker cars loaded with new automobiles failed to clear a bridge while being delivered to the New York Central's Frontier Yard. Damage was estimated at \$50,000. On September 11, Claimants were notified they would be held out of service pending an investigation. The investigation was held September 14 and, as a result, discipline of 15 days' suspension was assessed against each Claimant.

Two agreements between the parties are in evidence: one dated March 11, 1953 (former Erie) and October 1, 1957 (former DL&W).

Rule 11 of the DL&W Agreement applies to Claimant Fagan and reads as follows:

**"RULE 11.
INVESTIGATION AND DISCIPLINE
(Former DL&W)**

Rule 11 (a) A yardmaster will not be disciplined without a fair and impartial hearing which shall be held within ten days of the date on which the Superintendent first had knowledge of the alleged offense. He may, however, in cases of serious charge be held out of service pending hearing. At a reasonable time prior to the hearing the employe will be apprised in writing the precise charge against him. The employe shall have reasonable opportunity to secure the presence of representatives and witnesses. If a transcript of the evidence is taken at the hearing, copy thereof will be furnished to each the em-

ploye and his representative. An employe involved in a hearing may demand that a transcript be taken.

(b) An employe who considers himself otherwise unjustly treated, or has an unfavorable entry made on his record of which he shall be informed, shall have a fair and impartial hearing as provided for in paragraph (a) of this Article provided written request is presented to his Superintendent within sixty (60) days of the occurrence giving rise to the request and hearing shall be held within ten (10) days' thereafter.

(c) With respect to paragraphs (a) and (b) of this Article, decisions will be rendered within twenty (20) days after completion of hearings. If an appeal is taken it must be filed with the next higher officer and a copy furnished the officer whose decision is appealed within thirty (30) days after date of decision. Decisions on appeals will be rendered within thirty (30) days from the date of appeal.

(d) The right of appeal by employes or their representatives in regular order of succession and in the manner prescribed up to and including the highest official designated by the company to whom appeals may be made is recognized.

(e) If the final decision decrees that the charges against the employe are not sustained, the record shall be cleared of the charges; if suspended or discharged, the employe will be reinstated with seniority and other rights unimpaired and paid for all wages lost.

(f) The time limit of this rule may be extended by mutual agreement."

Rule 12 of the Erie Agreement applies to Claimant Acquino and reads as follows:

"RULE 12. DISCIPLINE
(Former Erie)

Rule 12 (a) A yardmaster will not be disciplined by record, suspended (except pending investigation) or discharged without a proper hearing. Such hearing will be held at the earliest possible time and yardmasters will be notified in writing of any charge or charges and will be afforded the opportunity to have any witnesses present and the right to have representation of their choice.

(b) A copy of any statement made by yardmaster in connection with a charge or charges, if reduced in writing and signed by him, will be furnished to him and a copy to any witness signing, as well as to representatives if there are any.

(c) If after proper hearing yardmaster is found not guilty of the charge of charges, if suspended or discharged he will be reinstated and paid for the wages lost, if any, suffered by him. Such compensation shall be the amount of wages he would have earned, less compensation received in other employment.

(d) The right of appeal to any superior officer is conceded."

Notice of the investigation served upon Claimant Fagan reads as follows:

"In accordance with rule 12(a), page 11 of the Agreement between Erie Railroad Company and Railroad Yardmasters of America, effective March 16th, 1953, you are hereby notified to present yourself for investigation to determine responsibility in connection with damage to automobiles on cars MDAX 244, 236, and 2144 which occurred at about 3:15 P. M., E. S. T., Friday, September 10, 1965, account insufficient clearance of Erie-Lackawanna Black Rock Branch Bridge in New York Central Railroad's Frontier Yard.

This investigation will be held at 9:00 A. M., E. S. T., Tuesday, September 14th, 1965, in Office of Terminal Trainmaster, second floor, Bison Yard Office, East Buffalo, New York.

At this investigation you may have present representation of your choice and any witnesses you may desire without expense to the Company.

You are being held out of service pending outcome of this investigation.

If you are unable to attend the investigation you should contact the undersigned at once giving reasons, as failure to report at the time and place stipulated will be considered an admission of guilt and grounds for discipline.

Yours truly,

/s/ E. J. Robisch
Superintendent"

The notice sent to Claimant Aquino reads:

"In accordance with Rule 11, Page 12, of the Agreement between The Delaware, Lackawanna, and Western Railroad Company and Railroad Yardmasters of America, effective October 1st, 1957, you are hereby notified to present yourself for investigation to determine responsibility in connection with damage to automobiles on cars MDAX 244, 236 and 2144 which occurred at about 3:15 P. M., E. S. T., Friday, September 10th, 1965, account insufficient clearance of Erie-Lackawanna Black Rock Branch Bridge in New York Central Railroad's Frontier Yard.

This investigation will be held at 9:00 A. M., E. S. T., Tuesday, September 14th, 1965, in Office of Terminal Trainmaster, second floor, Bison Yard Office, East Buffalo, N. Y.

At this investigation you may have present representation of your choice and any witnesses you may desire without expense to the Company.

You are being held out of service pending the outcome of this investigation.

If you are unable to attend the investigation you should contact the undersigned at once giving reasons, as failure to report at the

time and place stipulated will be considered as an admission of guilt and grounds for discipline.

Yours truly,

/s/ E. J. Robisch
Superintendent"

Timely objection to the form and content of these notices was raised by representative of the Claimants at the hearing on grounds that no specific charge or charges against Claimants were contained therein and that, therefore, the disciplinary rules (supra) of the agreements in evidence were violated. The objection was not sustained by the officer conducting the investigation. The petitioner entered the same objection during the progress of the claim on the property and upon appeal to this Board.

As a general rule a notice to an employe requiring his presence at an investigation held under the discipline rules of the basic agreement is deemed to be adequate if it is timely served and is so worded as fully to inform the recipient of the nature of the matter under investigation. The test of the adequacy of such notice is whether or not, in terms of time and wording, it affords the recipient full opportunity to prepare his defenses.

That general rule does not, however, prevail where, as here, the disciplinary rules of the agreement **require** the specification of the charge or charges against a yardmaster called into an investigation. This requirement is a contractual right and, therefore, must be strictly construed in order to prevent the gradual erosion and, indeed, eventual emasculation of an employe's right due process under the disciplinary rules.

In view of the foregoing, the Board finds that Carrier's failure to specify a charge or charges against Claimants in its notices of September 11, 1965, is a violation of the agreements in evidence. Accordingly, the claim will be sustained.

FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carriers and the employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Muriel L. Humfreville
Secretary

Witnessed at Chicago, Illinois, this 13th day of July, 1967.

W. H. H. Printing Co., Chicago, Ill.

Printed in U.S.A.