Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 2378
Docket No. 2413

Referee John H. Dorsey

PARTIES TO DISPUTE: Railroad Yardmasters of America

Norfolk and Western Railway Company (Lake Region)

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

The ten (10) day deferred suspension of Yardmaster H. O. Duncan be removed and his personal record be cleared in connection with derailment and damage to three cars and an engine at the West End of Calumet Yard on September 11, 1967.

OPINION OF BOARD: Under date of September 12, 1967, Carrier served Claimant and four other employes with notice:

"Arrange to report to Trainmaster's Office Calumet Yard on Friday, September 15, 1967 at 3:15 p.m. for formal hearing to determine your responsibility, if any, in connection with side collision at West End Calumet Yard at No. 15 switch, between cars being shoved Westward on 15 track by the 7:00 a.m. East lead switch crew and the CNW transfer run moving eastward on switching lead into No. 20 track at about 10:50 a.m. Monday September 11, 1967, resulting in derailment and damage to NW 56441, Cn 472735, and GTW 441686 and damage to diesel unit 554. (Emphasis supplied)

You may bring Witness and/or representative if you so desire."

Pursuant to the notice hearing was held on the dates appointed with S. D. Chandler, Trainmaster, presiding as hearing officer. Claimant and one of the other employes, Conductor Hudson, were subjected to examination. The other three employes were not called. The hearing officer entered the following stipulation in the record:

"It was agreeable with all those in attendance to just take statements from the Conductor and Yardmaster in regards to the accident."

Then on the same date, September 15, 1967, Carrier wrote to Claimant:

"Referring to hearing which was held in the Trainmaster's Office, Calumet Yard at 3:15 p.m. this date to determine your responsibility, if any, in connection with side collision at West End of Calumet Yard at No. 15 switch, between cars being shoved Westward on 15 track by the 7:00 a.m. East lead switch crew and the CNW transfer run moving eastward on switching lead into No. 20 track at about 10:50 a.m. Monday September 11, 1967, resulting in derailment and damage to NW 56441, CN 472735, and GTW 441688 and damage to diesel unit 554:

For your responsibility as developed in the above-mentioned hearing you are hereby assessed ten (10) days deferred suspension and same will be made a part of your personal record."

The finding of responsibility and the assessment of the 10 days deferred suspension gave rise to a Claim by Organization, dated September 21, 1967, that Carrier had made a finding of guilt and disciplined Claimant in violation of the following pertinent provisions of the working agreement:

"RULE 13 - DISCIPLINE

(a) - Discipline. Yardmasters will not be disciplined, demoted, or dismissed without proper hearing as provided for in the following sections. They will not be suspended pending investigation for minor offenses.

(b)- Hearing. A yardmaster against whom charges are preferred or who may consider himself unjustly treated shall be granted a fair hearing before the superintendent or his authorized representative within ten days after notice by either party. Such notice shall be in writing and clearly specify the precise charge or nature of the complaint. The yardmaster shall have the right to be represented by representative of his choice and be given reasonable opportunity to secure the presence of necessary witnesses, and the decision shall be rendered within 30 days from date of hearing." (Emphasis supplied.)

In essence it is Organization's position that: (1) Claimant had not been served with a clear "precise charge" as required by Rule 13 (b), supra; (2) the Rule requires strict compliance with its provisions; and (3) the hearing held on September 15, 1967, was an investigation which cannot be held to satisfy the contractual requirements of due process prescribed in Rule 13.

Carrier's position is that: (1) the Organization has not challenged the fact that "the investigation" established Claimant's responsibility, without question; (2) Organization is asking this Board to remove the discipline from Claimant's record purely on the basis of what it considers procedural errors; (3) the notice of the hearing was entirely adequate as to the reasons for the hearing and afforded Claimant opportunity to prepare his defense; (4) "the Claimant was made fully aware that if his responsibility were developed he might be subject to disciplinary action" (Emphasis supplied.); and (5) it was the practice on the property established by history, custom and tradition for Carrier to assess discipline on the basis of the record made in an investigatory proceeding.

The sole issue in this case is whether Carrier disciplined Claimant in violation of Rule 13.

The holding of an investigation is an inherent right of management except to the extent it is circumscribed by the provisions of a collective bargaining agreement. We find no such circumscription in the agreement before us.

The procedures for conducting an investigation are unilalterally dictated by management.

Provisions of a collective bargaining agreement may not be evaded by management by its unilateral action.

Past practice on a property cannot be construed to vitiate express unambiguous provisions of a collective bargaining agreement. Either party has a right to demand compliance with the terms of an existing agreement at anytime, absent waiver. History, tradition and custom on the property is material and relevant to determine the intent of the parties only when there is an ambiguity in the wording of a provision. Otherwise, words in an agreement have to be given their common meaning or their peculiar meaning in the industry. Rule 13 (a) and (b) are not ambiguous.

A major objective of the good faith collective bargaining process is to alter by agreement past practices established on the property by history, tradition and custom and to qualify inherent rights of management.

A "precise charge" must satisfy--Who?-- What?--Where?--When?--Why?

With the foregoing established principles of contract construction, application and interpretation as premise we proceed to resolve the issue.

First, we look to the September 12, 1967, notice to the five employes including Claimant. It contains no charge against Claimant or any other of the addressed employes. Patently at the time of its issue Carrier was without knowledge as to who or anyone was responsible for the accident. Had Carrier at the time been possessed of such knowledge it would have been unnecessary to call into hearing five employes for a fact finding hearing -- a discovery proceeding. It would be antithetical and paradoxical to hold that the words "your responsibility, if any" do "clearly specify (a) precise charge" which is indispensable in a discipline case by contractual mandate of Rule 13 (b).

Rule 13 is a particular rule. It prevails over any general rule. Carrier is contractually restrained from disciplining "Yardmasters... without proper hearing as provided for in" paragraph (b). The Rule must be strictly construed. Failure of Carrier to give an employe a written notice that clearly specifies the precise charge against him makes a discipline proceeding against him void ab inito; ergo, Carrier, not having complied with an indispensable requirement of the Rule, was contractually enjoined from disciplining Claimant.

Carrier has cited the following Awards as supporting its position: First Division Award Nos. 19699, 20081, 18803, 17609, 12157, 18878, 19119, 20052; and, Fourth Division Award Nos. 2112, 1140 and 1880. Insofar as those Awards expressly hold or imply that under a factual situation, such as we are confronted with in the instant case, that a carrier can administer discipline predicated upon a hearing not held in compliance with a specific discipline provision, as herein, they are-- using an idiomatic expression of the industry-- "palpably wrong". It can be said in the instant case, by anology, that the Carrier had no jurisdiction to administer discipline in this case because it failed to comply with the plenary discipline procedure prescribed in the agreement.

We find and hold: (1) the notice of September 12 and the hearing held on September 15, 1967, were not in compliance with Rule 13-DISCIPLINE; (2) absent compliance with Rule 13 Carrier was contractually enjoined from disciplining Claimant; (3) the agreement compels us to sustain the Claim.

FINDINGS:

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

The carriers and the employe 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.

The Carrier violated the agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Muriel L. Humfreville
Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1969.